

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35296

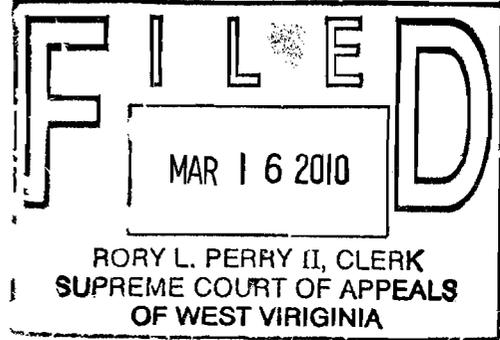
**SHIRLEY WHITE, CATHY DENNISON,
and JENNY L. TYLER, on behalf of themselves
and a class of others similarly situated,**

Plaintiffs-Respondents,

v.

**WYETH, f/k/a AMERICAN HOME PRODUCTS,
d/b/a WYETH-AYERST LABORATORIES,
KETCHUM, INC., and DANNEMILLER
MEMORIAL EDUCATION FOUNDATION,**

Defendants-Petitioners.



**QUESTION CERTIFIED BY THE CIRCUIT COURT OF PUTNAM COUNTY
PUTNAM COUNTY, WEST VIRGINIA**

HONORABLE O.C. SPAULDING, CHIEF JUDGE

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REPLY BRIEF FOR PETITIONERS

=====

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PRELIMINARY STATEMENT

The only issue on this appeal is whether, if a manufacturer makes an affirmative misrepresentation about a product, a plaintiff can maintain a claim under the West Virginia Consumer Credit and Protection Act (“CCPA” or “Act”) without proof of reliance. Plaintiffs say they can, and, in effect, ask this Court to hold Wyeth liable to *them* for allegedly making an affirmative misrepresentation to *someone else* regarding the risks and benefits of Wyeth’s hormone therapy prescription medications.

This unprecedented theory of *per se* liability explains the glaring omissions in both the Plaintiffs’ (“Pl. Br.”) and the Attorney General’s (“AG Br.”) briefs. Not once in their combined 70 pages do the briefs refer to or even acknowledge the undisputed facts that:

- by their own admission, the three plaintiffs *never* saw or heard *any* of the alleged misrepresentations;
 - there is *no* evidence that any of the three plaintiffs’ doctors saw or heard *any* of the alleged misrepresentations;
 - each of the three plaintiffs’ doctors made his prescribing decisions based on information from sources other than Wyeth, such as his medical education and his own clinical experience;
 - each of the three plaintiffs took the Wyeth medications solely for relief of menopausal symptoms, and not for any benefit that was allegedly misrepresented;
 - the Wyeth medications relieved each plaintiff’s menopausal symptoms, and fulfilled each plaintiff’s expectations about the medication’s performance; and
 - none of the three plaintiffs experienced an allegedly misrepresented side effect.
- (See Wyeth Br. 8-13).

Plaintiffs conceded below that they had produced no evidence of reliance. (Apr. 3, 2009 Tr. 36-38). And the Circuit Court found that “Plaintiffs have not provided the Court with specific evidence of concealment by Wyeth.” (Order Striking Certain Statements (July 14, 2009) at 3; *see* Am. Order 43). Given the undisputed factual record, which this Court’s precedents require it to consider in deciding the certified question,¹ the only issue before the Court involves alleged affirmative misrepresentations – not omissions, not unconscionable contract terms, not unfair trade practices. Whether, hypothetically, reliance might be required in those other circumstances is not before the Court. The sole issue this certified appeal presents is whether *these plaintiffs* can prove a private claim under the Act without any proof of reliance under the circumstances of *this* case.²

Plaintiffs now admit that the “as a result” of requirement in the Act means “because of.” (Pl. Br. 5). Where, as here, the case concerns an affirmative misrepresentation, “because of” and “reliance” mean the same thing. As the *Restatement of Tort* states in explaining the “causation in fact” requirement for a claim based on a misrepresentation:

If the misrepresentation has not in fact been *relied* upon by the recipient in entering into a transaction in which he suffers pecuniary loss, the misrepresentation is not in fact a *cause* of the loss If the misrepresentation has in fact *induced*

¹ This Court will answer a certified question based on the “factual pattern” of the case and will decline to “expand the certified question to facts that are not before” it, addressing only those questions that are “pertinent” and “necessary in the decision of the case.” *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 174, 475 S.E.2d 172, 174 (1996); *King v. Lens Creek Ltd. P’ship*, 199 W. Va. 136, 143, 483 S.E.2d 265, 272 (1996); *West Va. Water Serv. Co. v. Cunningham*, 143 W. Va. 1, 10, 98 S.E.2d 891, 896 (1957).

² Plaintiffs studiously avoid the undisputed facts in *this* record – which demonstrate the absence of reliance and causation – and, instead, refer to a different record in *another* litigation. Aside from the irrelevance of *In re Prempro Prods. Liab. Litig. (Scroggin v. Wyeth)*, 586 F.3d 547 (8th Cir. 2009), Plaintiffs ignore that in that case, unlike here, both the plaintiff and her physicians did, in fact, read, rely on and discuss Wyeth’s statements, and that this reliance was necessary for affirmance of the judgment. *Id.* at 564.

the recipient to enter into the transaction, there is *causation* in fact of the loss suffered in the transaction.

Restatement of Torts (Second) § 546 cmt. a (1977) (emphasis added). *See also, e.g., In re Tobacco II Cases*, 207 P.3d 20, 40 (Cal. 2009) (“there is no doubt that reliance is the causal mechanism of fraud”); *Gordon & Co. v. Ross*, 84 F.3d 542, 545 (2d Cir. 1996) (citing and quoting the *Restatement*). On the undisputed facts here, such reliance and, therefore, causation, cannot be shown.

As the Circuit Court correctly recognized (Am. Order 40), to rule that the Act does not require reliance on an affirmative misrepresentation would “go[] against” the West Virginia constitutional requirement that to have standing a plaintiff must prove a “causal connection” between her “injury and the conduct forming the basis of the lawsuit.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002). Because Courts “must interpret the law to avoid constitutional conflicts, if the language of the law will reasonably permit such an avoidance,” *W. Va. Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 124, 468 S.E.2d 733, 739 (1996), this Court should hold that a private plaintiff cannot assert a CCPA claim based on a representation of fact when neither she nor anyone acting on her behalf saw or heard or acted upon the representation.

ARGUMENT

I. BECAUSE PLAINTIFFS AND THEIR DOCTORS WERE UNAWARE OF THE ALLEGED MISREPRESENTATION, THE ACT'S REQUIREMENT THAT THE PLAINTIFF'S LOSS BE SUFFERED “AS A RESULT” OF THE MISREPRESENTATION CANNOT BE SATISFIED.

Whether viewed as an issue of reliance, or of causation, Plaintiffs' arguments nullify the CCPA's requirement that a plaintiff bringing a private action must prove that she suffered a loss “as a result” of the misrepresentation. Plaintiffs argue for *per se* liability, where any purchaser

could recover under the Act even when the defendant made the misrepresentation only to some other purchaser, and the plaintiff had no knowledge that the defendant did so.

Plaintiffs' *per se* theory produces absurd results. Consider, for example, where a rogue sales representative made misrepresentations to one doctor who prescribed a drug to 20 West Virginians on the strength of those misrepresentations, but where other doctors, who had no contact with the sales representative and no knowledge of the misrepresentations, prescribed the drug to 50,000 West Virginians. It does not make any sense to say that the Act gives a private right of action to those 50,000, as well as to the 20. There can be no loss "as a result" of a false statement if neither the plaintiff nor her doctor had any exposure to the statement before or at the time of the purchase. By contrast, a patient who saw (or whose doctor saw) the alleged misrepresentations and acted on those misrepresentations could sue for a loss suffered as a result of the purchase of the medication, for in that case, unlike here, the loss would have arisen "as a result" of the misrepresentation.

Plaintiffs' hypothetical (Pl. Br. 21) of an illiterate consumer who purchases a bottle labeled for 100 pills that contains only 75 pills confirms this analysis. There, the pharmacist who sold the mislabeled bottle to the patient charged him for 100 pills *in reliance on* the manufacturer's misrepresentation that the bottle, in fact, contained 100 pills. That is, Plaintiffs' scenario involves both exposure to the false statement and reliance on that false statement. For purposes of establishing that the false statement *caused* the consumer's loss, it makes no difference that the pharmacist and not the illiterate patient relied on the misrepresentation. The patient relied directly on the pharmacist, who, in turn, relied on the manufacturer, who dispensed the bottle of pills. Just so here, were it the case that Plaintiffs' doctors relied on Wyeth's alleged misrepresentations about hormone therapy, it would satisfy the Act's "as a result of" requirement. But

the undisputed record distinguishes this case from Plaintiffs' hypothetical situation, for neither Plaintiffs nor their doctors were aware of the allegedly false statements.

Plaintiffs' *per se* theory would allow every purchaser to recover under the Act so long as she purchased a product about which the manufacturer had made a misrepresentation to anyone, even if the misrepresentation never reached the plaintiff or someone acting on her behalf, and even if that misrepresentation did not affect the plaintiff's purchasing decision. The Legislature surely did not intend that result.

II. THE TEXT OF THE ACT REQUIRES A SHOWING OF RELIANCE WHERE PLAINTIFFS SUE BASED ON AN AFFIRMATIVE MISREPRESENTATION.

This Court has long emphasized that “every word used [in a statute] is presumed to have meaning and purpose.” *Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 133, 464 S.E.2d 771, 775 (1995). Thus, “[t]his Court’s responsibility is to give effect, whenever possible, to every word in a statute and not distort the plain language contained therein.” *Cottrill v. Ranson*, 200 W. Va. 691, 697, 490 S.E.2d 778, 784 (1997). To circumvent this basic tenet, Plaintiffs and the Attorney General misdirect the Court’s attention to § 102(7)(M)’s language that a “deceptive act[] or practice” violates the CCPA “whether or not any person has in fact been misled, deceived or damaged thereby.” (Pl. Br. 31; AG Br. 14-15). This provision, however, merely defines a violation of the Act. It falls under the section of the Act labeled “Definitions,” and it describes what conduct constitutes a deceptive act. It does not address the separate issue of which private parties have standing to bring a damages action for that violation.

Section 106(a) governs that issue. It requires that a private party – but not the Attorney General – establish both that she suffered “an ascertainable loss” and that she did so “as a result of” the allegedly deceptive act. Plaintiffs' *per se* theory of liability disregards the Legislature’s design by granting consumers the same authority to proceed as the Attorney General. If that had

been the intent of the Legislature, it would have used the same language to define both causes of action. But it did not. It authorized the Attorney General to proceed in the absence of any evidence that consumers had yet been influenced by the deceptive conduct or yet suffered loss. By contrast, it required a private plaintiff to establish (i) loss (ii) caused by the deceptive conduct.

So understood, the Legislature's design does not leave manufacturers free to make misrepresentations without consequence. The Act authorizes the Attorney General to enjoin deceptive conduct even before it causes harm. The Attorney General need prove only that the conduct is, in fact, deceptive. (W. Va. Code § 46A-7-110). And the Act confers a private right of action on those consumers who, unlike Plaintiffs, did see or hear the misrepresentations and purchased the product in reliance on them. The Act plainly limits a private action for damages to those who suffered a loss "as a result of" the false statement; and it just as plainly does not extend that right to everyone who purchased the product, even if they did not know of the statement.

The Attorney General's rejoinder that "cause" may be broader than "reliance" in some contexts may well be true in some other circumstances – for example, when the allegedly deceptive act is an omission, an unconscionable contract term, or an unfair trade practice. But this record raises only the issue of whether cause and reliance are different in the case of an affirmative misrepresentation of fact. Neither the Attorney General nor the Plaintiffs have explained how they could possibly differ in the case of an affirmative misrepresentation – certainly not on

the undisputed facts here, where neither the Plaintiffs nor their doctors saw or heard of the alleged misrepresentations.³

Plaintiffs further assert that there is always a loss “as a result of” a false statement if the quality of the product that was provided is “inferior.” (Pl. Br. 17). But “inferior” is a relative concept; something can be termed inferior only in comparison to something else. To take the hypothetical illiterate purchaser again, the bottle of 75 pills is not inherently inferior; it is inferior only if the consumer expected to receive a bottle of 100 pills. If the doctor prescribed 75 pills and the pharmacist charged the patient only for 75 pills because he knew the bottle was incorrectly labeled and contained 75 pills rather than 100 (*i.e.*, the pharmacist did not rely on any misrepresentation about the number of pills in the bottle), then the patient got and paid for the 75 pills the doctor prescribed, not an “inferior” number. As this Court put it in *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 75, 585 S.E.2d 52, 75 (2003), where a buyer “*expect[s]* to receive a particular item or service” and receives it, he has not “lost the benefits of the product which he was *led to believe* he had purchased.” (Emphasis added). One cannot be “led” to believe a representation if one has neither seen nor heard it and, as a result (*i.e.*, in reliance thereon), “believe[d]” the representation to be true.

Nowhere in the opinion below nor in their briefs do the Circuit Court, the Attorney General or the Plaintiffs explain *how* a patient could suffer loss “as a result of” an affirmative

³ The Attorney General’s reference to the Federal Trade Commission Act (AG Br. 16-17) is misplaced, for the Commission can obtain consumer redress only if there is reliance, albeit reliance that, in the first instance, may be presumed. The very cases cited by the Attorney General hold that the “presumption of actual reliance” under the FTC Act may be rebutted. If the defendant can “prove the absence of reliance” by particular consumers, those consumers *cannot* be awarded monetary redress. *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993); see *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000).

misrepresentation about the benefits or risks of a drug without she or her doctor being aware of the misrepresentation, let alone relying upon it. Notwithstanding their protestation to the contrary (Pl. Br. 42 n.11), Plaintiffs are, at bottom, requesting that this Court adopt a version of a “fraud on the market” theory – *i.e.*, that if some purchasers of a product were deceived, then *every* purchaser in the market is entitled to a monetary recovery without proof that he or she was aware of (or misled) by the misrepresentation. Plaintiffs understandably resist this label, for “[n]o court has accepted the use of [the] theory outside the context of securities fraud.” *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000), *overruled on other grounds by St. Jermain v. Howard*, 556 F.3d 262 (5th Cir. 2009). As one of the decisions cited by the Attorney General recognizes, “a fraud on the market theory . . . cannot apply outside the strict parameters of securities fraud litigation.” *Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1085, 1088 (N.J. 2007). *Accord, Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 155 n.1, 163-64 (Ill. 2002) (rejecting fraud-on-the-market theory for consumer fraud claim); *Weinberg v. Sun Co.*, 777 A.2d 442, 445-46 (Pa. 2001) (same); *Ex parte Exxon Corp.*, 725 So. 2d 930, 933 n.3 (Ala. 1998) (same); *Kwaak v. Pfizer Inc.*, 881 N.E.2d 812, 819 (Mass. Ct. App. 2008) (same).

Absent reliance on a “fraud on the market” theory, Plaintiffs’ argument boils down to the contention that the Act does not require a showing of reliance because the Legislature intended to provide a cause of action to consumers who could not maintain a traditional fraud cause of action and because, in any event, the Act should be interpreted liberally to effectuate the Act’s remedial purpose. (Pl. Br. 24-25). Neither assertion withstands analysis. First, giving effect to the “as a result of” language in section 106(a) does not impose the same requirements of proof as a common law fraud claim. The CCPA is a strict liability statute; it does not require a showing

of knowledge or intent by the defendant other than an “intent that others rely” on the misrepresentation. (W. Va. Code § 46A-6-102(f)(13). A common law fraud claim, on the other hand, requires actual or constructive knowledge. *See, e.g., Croston v. Emax Oil Co.*, 195 W. Va. 86, 90, 464 S.E.2d 728, 732 (1995); *Ashworth v. Albers Med., Inc.*, 410 F. Supp. 2d 471, 477 (S.D. W. Va. 2005). Second, as for the Act’s remedial purpose, the Legislature expressed a concern to protect consumers “who would otherwise have difficulty proving their case under a more traditional cause of action,” not consumers who had no cause of action in the first place.⁴ As the Supreme Court of the United States recently reminded, “textual limitations upon a law’s scope are no less a part of its ‘purpose’ than its substantive authorizations.” *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010) (Ginsburg, J.) (citation omitted).

III. THE CASE LAW DOES NOT SUPPORT PLAINTIFFS’ THEORY OF *PER SE* LIABILITY.

A. Plaintiffs Cannot Distinguish the West Virginia Cases Cited by Wyeth Supporting the Conclusion that the Act Requires Reliance to Establish a CCPA Private Cause of Action.

Plaintiffs’ and the Attorney General’s attempts to distinguish the West Virginia cases cited at pages 25-28 of our opening brief do not withstand scrutiny.

In *Orlando v Finance One of W. Va. Inc.*, 179 W. Va. 447, 451-53, 369 S.E.2d 886-87 (1988), this Court held that the plaintiffs could not recover damages based on an unlawful provision in a loan agreement because the defendant “made no attempt to enforce” the provision and, therefore, the plaintiffs could not establish that they suffered a loss “as a result of the inclusion” of the provision. Plaintiffs are correct that the decision “supports the unremarkable principle” that to prove a CCPA claim the plaintiff must establish that “a defendant’s unlawful conduct has

⁴ *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 61 S.E.2d 516, 523 (1995).

caused the plaintiff to suffer a legally cognizable injury.” (Pl. Br. 29) (emphasis added).

Plaintiffs try to distinguish *Orlando*’s facts on the ground that they have “suffered ascertainable losses as a result of Wyeth’s deceptive conduct.” (*Id.*). But just as an unenforced contract provision causes no harm, neither does an unseen, unheard, and unheeded misrepresentation. As the *Restatement of Torts* explains, “reliance” is the “causation in fact” requirement for an affirmative misrepresentation. *Restatement of Torts (Second)* § 546 cmt. a (1977).

In *Harless v. First Nat’l Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978), this Court stated that the Legislature created a private right of action under the CCPA “on behalf of persons who have been *subjected to* practices that violate” the Act. *Id.* at 125, 246 S.E.2d at 275-76 (emphasis added). Plaintiffs point to the fact that the unlawful conduct in *Harless* was an illegal overcharge and that there was no mention of reliance. (Pl. Br. 30). But reliance has no relevance because the case did not involve an affirmative misrepresentation. The general principle of law that the Court stated – that to have a private right of action under the CCPA the plaintiff must be “subjected to” the unlawful conduct – applies regardless of the particular facts of the case. Nowhere do Plaintiffs even attempt to explain how a consumer who never saw or heard (or whose doctors never saw or heard) a deceptive statement was “subjected to” it.

In *re W. Va. Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003), also supports Wyeth’s position that reliance is required. *Rezulin* involved a prescription medication that had lost its FDA approval and was no longer being sold. The Court held that to satisfy the “ascertainable loss” requirement under § 46A-6-106(a), a plaintiff is “not required to prove actual damages of a specific dollar amount.” *Id.* at 74, 585 S.E.2d at 74. While the Court did not address the separate requirement that the loss must be suffered “as a result of” the deceptive conduct, its language strongly suggests that the Act requires proof of reliance. This Court stated that a buyer

who “receive[s] something other than *what he bargained for* . . . has suffered a loss . . . because he parted with his money reasonably *expecting to receive* a particular item or service [H]e has lost the benefits of the product which he was *led to believe* he had purchased.” *Id.* at 75, 585 S.E.2d at 75 (emphasis added). The words “what he bargained for,” what he “expected to receive,” and what he was “led to believe,” all include an element of reliance. The Court recognized that the plaintiff must show some difference between what the plaintiff was “led to believe” he would get and what he got. Plaintiffs failed to make any such showing here.

Ignoring all of this, Plaintiffs cling to the Court’s statement that “[i]f the consumer proves that he or she has purchased an item that is different from or inferior to that for which he bargained, the ‘ascertainable loss’ requirement is satisfied.” (Pl. Br. 16-17) (quoting Syl. pt. 16, 214 W. Va. 52, 585 S.E.2d at 52). The key words in the sentence Plaintiffs quoted are “that for which he bargained.” An allegedly untrue representation is not something the plaintiff has bargained for if he knew nothing about it and did not rely on it.⁵

⁵ Plaintiffs also fail to distinguish the decisions of two West Virginia federal district courts that held that the Act requires reliance. (Pl. Br. 30 n.8). *Bertovich v. Advanced Brands & Importing, Co.*, 2006 WL 2382273 (N.D. W. Va. Aug. 17, 2006), dismissed the complaint on the ground that the plaintiffs failed to allege the requisite “causal connection” with the defendants’ alleged deceptive advertising because the plaintiffs failed to identify anyone who was “exposed” to the defendant’s allegedly deceptive ads and failed to allege that any product purchase was “attributed” to the allegedly deceptive ads. *Id.* at *9. In other words, the plaintiffs failed to allege reliance. Likewise, in *State ex rel. Miller v. Sec. of Educ.*, 1993 WL 545730 (S.D. W. Va. Sept. 30, 1993), the court held that because there was “no evidence” that either plaintiff “was misled by the [defendant’s] catalog representations,” “neither named plaintiff is typical of those, if any there be, who may have relied on such a representation.” *Id.* at *10. The court, applying the decision in *Orlando*, rejected as “ignor[ing] the plain language of § 106(1)” the plaintiffs’ argument “that they are not required to demonstrate their reliance upon the alleged catalog misrepresentation or even prove damages as a result.” *Id.* at *12-13.

B. The West Virginia Cases Plaintiffs Cite Support Wyeth's Argument that the Act Requires Proof of Reliance.

Unable to cite a single decision by this Court that supports their theory of *per se* liability, Plaintiffs cite decisions that do *not* address the meaning of the phrase “as a result of” in § 46A-6-106(a) and that, on their face, do not support their theory.

In *State ex rel. Johnson & Johnson v. Karl*, 220 W. Va. 463, 647 S.E.2d 899 (2007), this Court declined to adopt the learned intermediary rule in prescription drug product liability cases. The premise of the decision was that pharmaceutical manufacturers had a duty to provide warnings directly to the ultimate users of their products. *Id.* at 471-78, 647 S.E.2d at 907-14. The reason that warnings must be provided directly to consumers, the Court found, is that consumers may *rely* on them in deciding whether to take the drug. *Id.* So in contrast to those States that have adopted the learned intermediary rule, where the physician's lack of reliance is fatal to the plaintiff's claim, in West Virginia a plaintiff may prove reliance *either* through the patient or the doctor. Nothing in *Johnson & Johnson* suggests that there could be a valid claim when *neither* the patient *nor* the doctor relies on the manufacturer's alleged misrepresentations.

Cross v. Trapp, 170 W. Va. 459, 465, 204 S.E.2d 446, 452 (1982), involved the patient's “right of self-decision.” By definition, a “self-decision” requires a *decision* based on the information provided to the patient. Here, the patients (and their doctors) made no “self-decision” based on information provided to them by Wyeth because they did not see, hear or rely on any information from Wyeth.

Similarly, in *Peters v. Johnson*, the Court stated that the plaintiff took the wrong drug “believing it to be” the correct drug and became sick. 50 W. Va. 644, 645, 41 S.E. 190, 190 (1902). To “believ[e] it to be” the right drug is to *rely* on a representation to that effect. Here, by contrast, Plaintiffs did not form any belief about hormone therapy based on anything Wyeth

said. They relied on their doctors. And their doctors did not form any belief about the drugs based on Wyeth's statements other than that the drugs are effective in treating menopausal symptoms – precisely the benefit Plaintiffs admittedly received.

Equally unavailing is the decision in *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (1998). *Arnold* did not involve an alleged affirmative misrepresentation, but, rather, the enforceability of a compulsory arbitration clause in a form credit agreement – a clause “imposed upon consumers in contract situations where consumers are totally ignorant of the implications of what they are signing,” where “there is no evidence that the loan broker made any other loan option available,” and where the consumer “had no meaningful alternative to obtaining the loan from” the lending company. *Id.* at 236, 511 S.E.2d at 861. “Given the nature of this arbitration agreement, combined with the great disparity in bargaining power,” this Court held that “one can safely infer that the terms were not bargained for and that allowing such a one-sided agreement to stand would unfairly defeat the [consumer’s] legitimate expectations.” *Id.* *Arnold* differs from this case in two ways. First, it involved an unconscionable contract term, not a misrepresentation of fact. Second, whereas the *Arnold* plaintiffs were “ignorant” about the bargain, none of the three plaintiffs here testified she bargained for benefits she did not receive. To the contrary, each received effective relief from her menopausal symptoms, without any allegedly misrepresented side effects. Nor were their doctors “ignorant.” Rather, their doctors testified that the alleged misrepresentations did *not* affect their prescribing decision and, thus, were *not* part of the “bargain.”

Nor does *Whitney v. Ralph Myers Contracting Corp.*, 146 W. Va. 130, 118 S.E.2d 622 (1961), *overruled on other grounds by Peneschi v. Nat’l Steel Corp.*, 170 W. Va. 511, 519, 295 S.E.2d 1, 9 (1982), help Plaintiffs. As that decision explains, “[p]roximate cause’ is most often

defined as any cause which in natural and continuous sequence . . . produces the result complained of *and without which the result would not have occurred.*” *Id.* at 134, 118 S.E.2d at 624 (emphasis added). Where, as here, the plaintiffs’ claim is based on an alleged affirmative misrepresentation, there is no “but for” causation if the purchasers and their doctors never saw or heard the alleged misrepresentation, and the physicians testified that their decisions to prescribe the medication had nothing to do with the alleged misrepresentation. The existence of a misrepresentation in the air does not change anything as to individuals who are unaware of, or do not act upon, the factual representation.⁶

C. Decisions Interpreting the Consumer Protection Statutes of Other States Do Not Support Plaintiffs’ *Per Se* Theory of Liability.

Plaintiffs ignore the decisions petitioners cited interpreting the comparable consumer fraud and deceptive trade practices statutes of California, Colorado, Georgia, Virginia and

⁶ The other decisions of this Court involving the CCPA that Plaintiffs and the Attorney General cite did not involve the “as a result of” requirement; nor do they otherwise support Plaintiffs’ *per se* theory of liability. *See State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 450, 582 S.E.2d 885, 897 (2003) (addressing “the statutory standard for issuing a preliminary injunction” in a suit brought by the Attorney General); *State ex rel. McGraw v. Imperial Marketing*, 203 W. Va. 203, 506 S.E.2d 799, (1998) (addressing in a suit brought by the Attorney General whether the defendant violated the Prizes and Gifts Act); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995) (holding “that the Attorney General has authority under the CCPA to proceed against holders of [promissory] notes obtained by their assignor”); *Clendenin Lumber & Supply Co. v. Carpenter*, 172 W. Va. 375, 305 S.E.2d 332 (1983) (addressing whether there was “an assignment of earnings” in violation of the CCPA). Even farther afield is *Joslin v. Mitchell*, 213 W. Va. 771, 584 S.E.2d 913 (2003), where the Court held “that the phrase ‘bargained for discount’ in W. Va. Code, 33-6-31(b) allows an insurance company to unilaterally give an insured a multi-car discount as consideration for the enforcement of anti-stacking language in an automobile insurance policy.” *Id.* at 778, 584 S.E.2d at 920.

Oregon and holding that the phrase “as a result of” in those statutes requires a showing of reliance. As for the three cases Plaintiffs strive to distinguish, their efforts fail.⁷

Plaintiffs attempt to distinguish the Pennsylvania Supreme Court’s decision in *Weinberg v. Sun Co.*, 777 A.2d 442 (Pa. 2001), on the ground that the class there was defined as “consumers who *believed* the false message” at issue. (Pl. Br. 35) (emphasis added). But that is also the law in West Virginia. As the *Rezulin* Court held, a consumer must establish what “he was led to *believe*.” 214 W. Va. at 75, 585 S.E.2d at 75 (emphasis added). Moreover, *Weinberg* turned on the absence of any “ authority which would permit a private plaintiff to pursue an advertiser because an advertisement might deceive members of the audience and might influence a purchasing decision when the plaintiff himself was neither deceived nor influenced.” 777 A.2d at 446. Plaintiffs also ignore the Pennsylvania Court’s fundamental holding that, as a matter of statutory construction (and consistent with the *Restatement of Torts*, see pp. 2-3, *supra*), the “as a result of” provision “requires, in a private action, that . . . a plaintiff must allege reliance, that he purchased [the product] because he heard and believe[d]” the alleged affirmative misrepresentation. *Id.* See *Schwartz v. Rockey*, 932 A.2d 885, 897 n.16 (Pa. 2007) (“the justifiable reliance criterion derives from the causation requirement which is express on the face of” the statute).⁸

Plaintiffs argue that the holding in *De Bouse v. Bayer, AG*, 2009 WL 4843362 (Ill. Dec. 17, 2009) – that the plaintiff “must actually be deceived by a statement or omission that is made

⁷ The Attorney General ignores all of the cited decisions.

⁸ Plaintiffs additionally attempt to distinguish *Weinberg* on the ground that it quoted from an earlier opinion that the “underlying foundation” of the Pennsylvania statute is “fraud prevention.” (Pl. Br. 36) (quoting 777 A.2d at 616). But that opinion also stated that the purpose of the Pennsylvania statute was “to benefit the public at large by eradicating, among other things, ‘unfair or deceptive’ business practices” and that the statute “must be liberally construed.” *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 815-16 (Pa. 1974). That, of course, is also the law under the CCPA.

by the defendant” – is contrary to *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). But *Scott Runyan Pontiac-Buick* concerned the authority of the Attorney General “to proceed against holders of [promissory] notes obtained by their assignor.” *Id.* at 777, 461 S.E.2d at 523. The Court did not address whether a *private* plaintiff in a CCPA suit had to “actually be deceived” by the affirmative misrepresentation. Moreover, as noted above, this Court in *Rezulin* stated the opposite – that a consumer must establish what “he was led to believe.” 214 W. Va. at 75, 585 S.E.2d at 75. As for *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 277 (Md. 2007), the decision expressly states that a plaintiff under the Maryland consumer fraud statute must prove that he or she suffered a loss “as a result of his or her *reliance* on the sellers’ misrepresentation.”⁹ (Emphasis added).

What is more, the Supreme Court of Washington, agreeing with the Supreme Court of Minnesota, recently held that reliance and causation are one and the same in the case of affirmative misrepresentations:

“[W]here, as here, the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct . . . , ***as a practical matter it is not possible that the damages could be caused by a violation [of the Minnesota Consumer Protection Act] without reliance on the statements or conduct alleged to violate the statutes.***”

Schnall v. AT&T Wireless Servs., Inc., 2010 Wash. LEXIS 61, *26-28 (Wash. Jan. 21, 2010), quoting *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 13 (Minn. 2001) (emphasis added).¹⁰ *Accord, Peery v. Hansen*, 585 P.2d 574, 577 (Ariz. Ct. App. 1978)

⁹ *Accord, Citaramanis v. Hollowell*, 613 A.2d 964, 969 (Md. 1992) (the statute “creates a bright line distinction between the public enforcement remedies available under the [statute] and the private remedy available” under the statute).

¹⁰ Plaintiffs’ attempt (Pl. Br. 39-41) to distinguish *Group Health Plan* fails because it ignores that ***this*** appeal concerns an alleged affirmative misrepresentation. Also wide of the mark is the Attorney General’s citation to *Kinetic Co. v. Medtronic, Inc.*, 2009 WL (continued...)

“reliance on the unlawful acts” is a “prerequisite” to relief); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009) (where a defendant has made an “affirmative misrepresentation,” a plaintiff can prove that she sustained injury “only by demonstrating that she relied upon” the misrepresentation).

In the teeth of this case law, Plaintiffs and the Attorney General cite a handful of decisions purportedly holding that reliance is not a requirement under some other states’ consumer fraud and deceptive trade practices statutes. Even those states, however, require that the deceptive conduct cause the plaintiff’s purchase of the product. In that regard, it is telling that Plaintiffs and the Attorney General do not cite any case permitting a plaintiff to sue who herself was unaware of the misrepresentation. This failure is not surprising because, “[r]egardless of whether reliance is a required element under the [consumer protection statute], plaintiffs must at least allege that they were exposed” to the alleged misrepresentation. *Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 276 (Ct. App. Tenn. 1999). Many other cases hold that there can be no recovery under a state consumer fraud statute without proof that the plaintiff or someone acting on her behalf saw or heard the misrepresentation.¹¹

4547624 (D. Minn. Dec. 4, 2009), which merely held that to survive a motion to dismiss a claim under the Minnesota statute, “it is not necessary to *plead* individual consumer reliance on defendant’s wrongful conduct.” *Id.* at *8 (emphasis added) (citing *Group Health Plan*). *Accord, In re St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig.*, 522 F.3d 836, 840 (8th Cir. 2008) (when “direct evidence that an individual plaintiff (or his or her physician) did not rely on representations” from the defendant “is available, then it is highly relevant and probative on the question of whether there is a causal nexus between alleged misrepresentations and any injury”); Am. Order 38-39.

¹¹ *See, e.g., Barbara’s Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 927 (Ill. 2007) (statements “are not actionable because no plaintiff was aware of the[m]”); *Oliveira*, 776 N.E.2d at 163-64 (Ill.) (“Because plaintiff does not allege that he saw, heard or read any of defendant’s ads, plaintiff cannot” maintain claim based on the ads); *Pfizer v. Superior Ct.*, 2010 Cal. App. LEXIS 281, *16-20 (Cal. Ct. App. Feb. 25, 2010) (“one who was not exposed to the alleged misrepresentations and therefore could not possibly have lost money or
(continued...)

Plaintiffs and the Attorney General place much emphasis on the Missouri Court of Appeals' decision in *Plubell v. Merck & Co.*, 289 S.W.3d 707 (Mo. Ct. App. 2009). (See Pl. Br. 26-28; AG Br. 12). But *Plubell* did not involve an affirmative misrepresentation; it involved an alleged "fail[ure] to disclose and active[] conceal[ment]," 289 S.W.3d at 711, issues that this appeal does not involve. Decisions interpreting the Florida¹² and New Mexico¹³ statutes have no relevance here for the same reason – they involved alleged omissions and not affirmative misrepresentations.

property as a result of" the misrepresentations" cannot recover); *Cohen v. DIRECTV, Inc.*, 101 Cal. Rptr. 3d 37, 48-49 (Cal. Ct. App. 2009) (statute does not provide a cause of action to "a consumer who was never exposed in any way to an allegedly wrongful business practice"); *Kwaak*, 881 N.E.2d at 818-19 (Ct. App. Mass.) (consumers not "exposed to the [advertising] campaign," or "those exposed to the deceptive aspects of the advertising campaign" but whose purchasing decisions were "for reasons unrelated to the advertising," cannot maintain claim based on ads); *Lilly v. Hewlett-Packard Co.*, 2006 U.S. Dist. LEXIS 22114, *15 (S.D. Oh. April 21, 2006) (complaint does not "allege that Plaintiff saw or was even aware of the alleged misrepresentations at any time before or during the purchase" of the product means that they "cannot reasonably be considered to have caused Plaintiff any harm"); *Gale v. IBM Corp.*, 781 N.Y.S.2d 45, 47 (N.Y. App. Div. 2004) ("[i]f the plaintiff did not see any of these statements, they could not have been the cause of his injury, there being no connection between the deceptive act and the plaintiff's injury"); *Solomon v. Bell Atlantic Corp.*, 777 N.Y.S.2d 50, 53 (N.Y. App. Div. 2004) (reversing class certification because class included members who "did not all see the same advertisements" and "some saw no advertisements at all" and therefore had no cause of action).

¹² *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. Dist. Ct. App. 2001) ("failure to disclose" modifications to telephones). See *Black Diamond Prop., Inc. v. Haines*, 940 So. 2d 1176, 1179 (Dist. Ct. App. Fla. 2006) ("*Powertel* involved a factually distinguishable situation wherein the alleged fraud was based on nondisclosure, rather than affirmative misrepresentation. Under those circumstances, it was not necessary to call each plaintiff to establish that a misrepresentation had occurred. Moreover, all of the plaintiffs were similarly induced resulting in damages.").

¹³ *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545 (N.M. 2003). In *Smoot*, the plaintiff suffered injury because she had to pay an "additional cost" for her life insurance that the defendant failed to disclose. *Id.* at 546-47.

In sum, as explained above – and in the Appendix hereto discussing the other out-of-state cases they cite – Plaintiffs and the Attorney General fail to cite a single case from any state in which a plaintiff is awarded a refund because the seller made a representation to *someone else*. Simply put, Mrs. Smith should not get a refund because the seller (allegedly) misled Mrs. Brown.

IV. PLAINTIFFS LACK CONSTITUTIONAL STANDING.

Plaintiffs concede (Pl. Br. 43-44), as they must, that to satisfy the “constitutional requiremen[t]” for standing under Article VIII, § 3 of this State’s Constitution, they must prove, *inter alia*, that they suffered a “concrete and particularized” “injury-in-fact” and that there is a “causal connection” between that “injury and the conduct forming the basis of the lawsuit.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002). As explained above, the undisputed factual record demonstrates that Plaintiffs (and their doctors) did not rely on any alleged misrepresentations by Wyeth and, therefore, Plaintiffs did not suffer any injury *caused* by the alleged misrepresentations.

Plaintiffs try an end-run around the constitutional requirement of causation by arguing that the real issue is whether they are the “proper parties” to assert the CCPA claim here, asking if they are not, “then who is?” (Pl. Br. 44). The fact that these plaintiffs do not have constitutional standing does not preclude a CCPA action by other West Virginia purchasers who can show that, unlike Plaintiffs, Wyeth’s alleged misrepresentations did cause them injury. For example, a patient who saw and was misled by the alleged misrepresentation could sue where she suffered the side effect that allegedly was misrepresented; where she purchased the product to obtain a misrepresented nonexistent benefit; or where the product worked less effectively in treating her menopausal symptoms than she or her doctor was led to believe by a false statement. Each of these situations would require proof that the patient (or someone acting on her behalf)

saw or heard the misrepresentation and acted upon it. If, as Plaintiffs allege, Wyeth's alleged misrepresentations were pervasive, there should be no shortage of patients who would have standing to sue. The problem is, these plaintiffs are not among them.

Given that Courts "must interpret the law to avoid constitutional conflicts, if the language of the law will reasonably permit such an avoidance,"¹⁴ this Court should hold that a private plaintiff cannot assert a CCPA claim based on an affirmative representation of fact when neither she nor anyone acting on her behalf saw or heard or acted upon the representation. In all events, any "tension" (Pl. Br. 43) between the CCPA and the constitutional standing requirement must be resolved in favor of the Constitution. A statute cannot trump a constitutional command.

RELIEF FOR WHICH PETITIONERS PRAY

For the reasons described above and in our opening brief, this Court should answer the Certified Question: "Yes." It should then remand this action with instructions to the Circuit Court to dismiss Plaintiffs' Amended Complaint and enter judgment for Petitioners Wyeth and Ketchum.

In the alternative, if this Court answers the Certified Question in the negative, it should declare the private damage remedy of § 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act unconstitutional under the facts of this case pursuant to Art. VIII, § 3 of the West

¹⁴ *W. Va. Human Rights Comm'n*, 196 W. Va. at 124, 468 S.E.2d at 739.

Virginia Constitution and remand with instructions to the Circuit Court to dismiss Plaintiffs' Amended Complaint and enter judgment for Petitioners Wyeth and Ketchum.

Dated: March 16, 2010

Respectfully submitted,

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APPENDIX

As with the decisions Plaintiffs and the Attorney General cite that we discuss above (at pp. 17-19), none of the remaining decisions they cite hold that a consumer can obtain a refund because the seller made a representation to *someone else*:

- **Alaska.** The Attorney General refers to an opinion where the plaintiff physician alleged that health care providers committed anticompetitive and unfair acts in denying him staff privileges. *Odom v. Fairbanks Memorial Hosp.*, 999 P.2d 123, 127-28, 131-32 (Alaska 2000). The decision has nothing to do with affirmative misrepresentations, reliance or causation.

- **California.** Plaintiffs cite a federal district court decision,¹⁵ ignoring the California Supreme Court's later decision – cited in our brief (at p. 32) – that expressly held that the “as a result of” provision “imposes an *actual reliance* requirement on plaintiffs prosecuting a private enforcement action under the [California Unfair Competition Law's] fraud prong,” thus effectively overruling the contrary holding of the federal district court. *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009) (emphasis added). Just last month, the California Court of Appeal, in interpreting this statute, held that “one who was not exposed to the alleged misrepresentations . . . could not possibly have lost money or property as a result of” the misrepresentations. *Pfizer*, 2010 Cal. App. LEXIS 281, at *16. *Accord, Cohen*, 101 Cal. Rptr. 3d at 47-49 (affirming denial of class certification for lack of predominance of common issues where some class members “never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services”).

¹⁵ *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133 (C.D. Cal. 2005).

- **Connecticut.** The cases Plaintiffs and the Attorney General cite either did not involve affirmative misrepresentations,¹⁶ or concerned whether private plaintiffs are “required to prove actual damages of a specific dollar amount” to establish an “ascertainable loss,”¹⁷ not whether reliance was required.

- **Massachusetts.** The cases Plaintiffs and the Attorney General cite are not just distinguishable,¹⁸ but make clear that where, as here, the consumer was not “exposed to the deceptive aspects of the advertising campaign,” or was exposed but “purchased [the product] for reasons unrelated to the advertising,” then under Massachusetts law the plaintiff cannot establish “the required causal connection between the deception and the loss” and, therefore, has no claim. *Kwaak*, 881 N.E.2d at 818-19.

- **Michigan.** In the context of a claim by school employees who purchased tax-shelter annuity policies and alleged “a common scheme of misrepresentation involving a single

¹⁶ *Neighborhood Builders, Inc. v. Town of Madison*, 986 A.2d 278 (Conn. 2010) (allegation that town’s increase in building permit fees was unfair practice); *Artie’s Auto Body, Inc. v. Hartford Fire Ins. Co.*, 947 A.2d 320, 326 (Conn. 2007) (allegations by auto repair body repair shops that defendant insurance company (i) “improperly steered insureds to a closed network of preferred auto body repair shops that charged labor rates well below reasonable market value”; (ii) “improperly established an artificially low standard or prevailing hourly rate for reimbursement to shops that were not in the network of preferred shops”; and (iii) “provided positive and negative incentives to purportedly independent insurance appraisers to encourage or pressure them into accepting monetary and other limits proposed by” the defendant.

¹⁷ *Hinchliffe v. Am. Motors Corp.*, 440 A.2d 810, 814 (Conn. 1981).

¹⁸ *Int’l Fidelity Ins. Co. v. Wilson*, 443 N.E.2d 1308, 1314 (Mass. 1983) (plaintiff surety established “causal connection between the deception and the loss” where its injury was as a result of forged signatures on indemnity agreements); *In re Lupron Marketing & Sales Practices Litig.*, 295 F. Supp.2d 148, 181 (D. Mass. 2003) (plaintiffs stated claim for relief where claim of causation was based on alleged RICO violations); *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 885-89 (Mass. 2008) (risk of injury from continuing use of non-compliant product satisfies requirement for causal connection).

type of policy,” the Court stated that members of a class “need not individually prove reliance.” *Dix v. Am. Bankers Life Assur. Co.*, 415 N.W.2d 206, 209-10 (Mich. 1987). Nothing in the court’s decision suggests that where, as here, the plaintiff or her doctor did not even see or hear the alleged misrepresentation, the plaintiff could recover.

- **New Jersey.** The intermediate appellate court decision¹⁹ Plaintiffs cite is contrary to later rulings of the New Jersey Supreme Court, one of which the Attorney General himself cited. In that later ruling, the Supreme Court denied class certification of a claim under New Jersey’s Consumer Fraud Act on the ground that common issues of injury and causation did not predominate because “plaintiff does not suggest that each of these proposed class members *receiv[ed]* the same information from defendant [and] *reacted* in a uniform or even similar manner” and, instead, “made individualized decisions.” *Int’l Union of Operating Eng’rs*, 929 A.2d at 1085, 1087-88 (emphasis added) (*citing Kaufman v. I-Stat Corp.*, 754 A.2d 1188, 1195-1200 (N.J. 2000)).²⁰ In making this ruling, the New Jersey Supreme Court held that “[i]n place of the traditional reliance element of fraud and misrepresentation,” the plaintiff must prove a “causal nexus” between the deceptive act and the plaintiff’s loss. *Id.* at 1087-88. Although the Court did not use the word reliance, in requiring that the plaintiff prove that it (i) “received” the alleged misrepresentation from defendant and (ii) “reacted” to that misrepresentation, the Court required a showing of the functional equivalent of reliance. Neither is present here.

- **New York.** Plaintiffs and the Attorney General attempt to make much of the Second Circuit’s opinion in *Pelman v. McDonald’s Corp.*, 396 F.3d 508, 509-11 (2d Cir. 2005),

¹⁹ *Varacallo v. Mass. Mut. Life Ins. Co.*, 752 A.2d 807 (N.J. Super. Ct. App. Div. 2000).

²⁰ *See also Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 520 n.14 (D.N.J. 2002) (reliance on *Varacallo* was “ill-founded” given the ruling in *Kaufman*).

which merely held that *at the pleadings stage* the plaintiff does not have to make “a particularized allegation of reliance” based on “any particular . . . advertisement or promotional material.” Plaintiffs, however, ignore New York state court appellate decisions which make clear that if, as here, there is undisputed *proof* that “the plaintiff did not see” the alleged deceptive statement, it “could not have been the cause of his injury, there being no connection between the deceptive act and the plaintiff’s injury.” *Gale*, 781 N.Y.S.2d at 47 (affirming dismissal of claim). *Accord*, *Solomon*, 777 N.Y.S.2d at 55 (decertifying class because “some [plaintiffs] saw no advertisements at all before deciding to become subscribers”). Moreover, to the extent *Pelman*, a federal case, could be read as inconsistent with *Gale* and *Solomon*, the state court appellate decisions obviously control.

- **North Carolina.** The Attorney General, but not the Plaintiffs, refers to a decision in a case brought by the North Carolina Attorney General, where causation and injury are *not* at issue,²¹ but ignores other decisions holding that, in a private litigation for damages, “[t]o prove actual causation, a plaintiff must prove that he or she detrimentally relied on the defendant’s deceptive statement or misrepresentation.” *Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F. Supp. 303, 308 (M.D.N.C. 1988) (citing *Pearce v. Am. Defender Life Ins. Co.*, 343 S.E.2d 174, 180-81 (N.C. 1986) (holding that what the plaintiff “believed about the extent of his life insurance coverage and why he believed it is directly pertinent to the question of his reliance upon the misrepresentation”)). *See also Tucker v. Blvd. at Piper Glen LLC*, 564 S.E.2d 248, 251 (N.C. Ct. App. 2002) (“Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show ‘actual reliance’ on the alleged

²¹ *State of N.C. ex rel. Cooper v. NCCS Loans, Inc.*, 624 S.E.2d 371 (N.C. Ct. App. 2005).

misrepresentation in order to establish that the alleged misrepresentation ‘proximately caused’ the injury of which plaintiff complains.”).

- **Oregon.** Plaintiffs cite an Oregon Supreme Court decision for the proposition “that whether proof of reliance in a consumer protection act case is required depends on the facts of the case” (Pl. Br. 32), but fail to quote the Court’s statement that “reliance may indeed be a requisite cause of any loss, i.e. when plaintiff claims to have acted upon a seller’s express representations.” *Sanders v. Francis*, 561 P.2d 1003, 1006 (Or. 1977). Plaintiffs also ignore the later Oregon Court of Appeals decision we cited in our opening brief that expressly held, citing *Sanders*, that where “the alleged violations are affirmative misrepresentations, the causal ‘as a result of’ element **requires proof of reliance-in-fact** by the consumer.” *Feitler v. Animation Celection, Inc.*, 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (emphasis added). *Accord, Picus*, 256 F.R.D. at 657 (“In Oregon, causation requires proof of the consumer’s reliance-in-fact when an alleged violation is an affirmative misrepresentation, as opposed to a failure to disclose.”).²²

- **Wisconsin.** While the case Plaintiffs cite suggests that reliance is not required under the Wisconsin statute, it held that the plaintiff must show “a causal connection between the untrue, deceptive, or misleading representation and the pecuniary loss” and that this “requires a showing of material **inducement.**” *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 732 N.W.2d 792, 802 (Wis. 2007) (emphasis added). Hence, though not denominated reliance, the Court required that the plaintiff have seen and relied on the misleading representation.

²² Also misplaced is Plaintiffs’ reference to *Tri-West Constr. Co. v. Hernandez*, 607 P.2d 1375 (Or. Ct. App. 1979). There, the Court held that plaintiffs had a consumer fraud claim where a construction company falsely told them that they did not have authority to rescind an unwanted home-improvements contract, thereby leading plaintiffs to believe that they “had no right at all to cancel” the contract. In other words, the plaintiffs **did** rely on the alleged misrepresentation. *Id.* at 1378, 1382.

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

WYETH and KETCHUM, INC.

Petitioners,

v.

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

CIVIL ACTION NO. 04-C-127

Respondents.

CERTIFICATE OF SERVICE

I, Pamela Dawn Tarr, counsel for Defendants Wyeth and Ketchum, Inc., hereby certify that I have served the foregoing "Reply Brief for Petitioner" upon all counsel of record by placing a copy thereof in the regular course of the United States mail, postage prepaid, this 16th day of March, 2010, addressed as follows:

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A handwritten signature in black ink, appearing to read "Pamela Dawn Tarr". The signature is written in a cursive style with a large initial "P" and "D".

PAMELA DAWN TARR (WVSB #3694)