

No. 35296

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

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

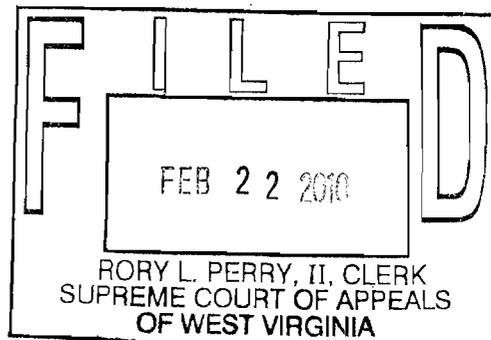
Plaintiffs - Respondents,

v.

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

Defendants - Petitioners.

QUESTION CERTIFIED BY THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA
HONORABLE O. C. SPAULDING, CIRCUIT JUDGE



RESPONSE BRIEF OF RESPONDENTS SHIRLEY WHITE, ET AL.

SHIRLEY WHITE, et al., Respondents,
BY COUNSEL

A handwritten signature in cursive script that reads "Thomas W. Rodd".

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INTRODUCTION, KIND OF PROCEEDING, RULING IN THE CIRCUIT COURT, AND
STANDARD OF REVIEW

The Circuit Court of Putnam County has certified the following question to the West Virginia Supreme Court of Appeals:

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?¹

By an Amended Order dated July 14, 2009² (R. 1166-1211, hereinafter "Amended Order" or "the circuit court's Order"), the circuit court answered this Certified Question "No."

The circuit court's answer was correct. The "as a result of" language in Section 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act requires, and the circuit court recognized, that a plaintiff in a private cause of action under the Act alleging deceptive conduct must in all cases allege and prove that he or she suffered an ascertainable loss because of a defendant's unlawful deceptive conduct. However, the circuit court also correctly recognized and held that the "as a result of" language in *W.Va. Code*, 46A-6-106(a) [1974] does *not* require

¹ *W.Va. Code*, 46A-6-106 [1974], the portion of the West Virginia Consumer Credit and Protection Act ("WVCCPA") that creates a private right of action for consumers who have been injured by conduct that is "unlawful" under the WVCCPA, states, in pertinent part, as follows:

(a) 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.

² On July 14, 2009, the circuit court entered its "Amended Order Denying Defendants' Motion to Dismiss and, Alternatively, for Summary Judgment, but Certifying a Legal Question to the West Virginia Supreme Court of Appeals." The Amended Order slightly modified the circuit court's original Order, which was entered on June 9, 2009. See note 3 *infra*.

that a plaintiff must in all such cases allege and prove that he or she purchased goods or services in reliance upon a defendant's unlawful deceptive conduct.

The putative Plaintiff class in the instant case ("the Plaintiffs" or "the Plaintiff class") are West Virginia women who purchased and received hormone drugs ("HRT drugs") that were developed, manufactured, and sold by the Defendant Wyeth (f/k/a American Home Products, d/b/a Wyeth-Ayerst Laboratories), with the assistance of Wyeth's co-Defendants, Dannemiller Memorial Educational Foundation, & Ketchum, Inc. (collectively, "Wyeth").

On April 4, 2004, the Plaintiffs filed a lawsuit pursuant to the citizen suit provisions of *W.Va. Code*, 46A-6-106(a) [1974], alleging that the women in the Plaintiff class had suffered ascertainable losses as a result of conduct by Wyeth that was unlawful under the West Virginia Consumer Credit and Protection Act, *W.Va. Code*, 46A-1-1 *et seq.* See Amended Complaint, R. 19-45, Pars. 7, 47, 53, 81.)

On October 27, 2008, Wyeth made a "*Motion to Dismiss or in the Alternative for Summary Judgment Due to Lack of Standing*," (R. 86-139). Wyeth asserted as its grounds for these motions that the Plaintiff class representatives had not alleged or pointed to evidence showing that each class representative or her doctor had personally "relied upon" a deceptive misrepresentation made by Wyeth when she "decided to purchase" Wyeth's hormone replacement therapy ("HRT") drugs. *Id.* Wyeth argued that only a woman who alleged and proved her or her doctor's "individual purchase decision reliance" upon Wyeth's deceptive conduct had standing to assert a claim under *W.Va. Code*, 46A-6-106(a) [1974]. *Id.* Wyeth's motions did not put at issue the evidentiary basis for the Plaintiffs' allegations of Wyeth's unlawful deceptive conduct, nor the Plaintiffs' allegations of having suffered ascertainable losses. Wyeth's motions were addressed solely to the claim that the plaintiffs had not shown a legally

sufficient *causal link* between Wyeth's alleged deceptive conduct and the Plaintiffs' having suffered a loss. *Id.* Wyeth contended that such a link could only be shown by showing that each class representative (and each woman in the putative Plaintiff class) or her doctor had relied upon Wyeth's deceptive conduct when she decided to purchase Wyeth's drugs. *Id.*

After briefing and argument, by Amended Order dated July 14, 2009, the Circuit Court of Putnam County denied Wyeth's motions and certified the foregoing Question to this Court. (Amended Order, R. 1166-1211.) The circuit court held that "proof of purchase decision reliance" was not necessary to establish a causal link between Wyeth's alleged unlawful deceptive conduct and the plaintiffs' suffering of ascertainable losses. The circuit court also held that the Plaintiffs had alleged such a causal link by asserting that due to Wyeth's deceptive conduct, the Plaintiffs had received drugs that were substantially and materially different from and inferior to what they were entitled to receive. *Id.*

In its Brief before this Court, Wyeth discusses what Wyeth thinks the circuit court "seemed to" do in its Order (Wyeth *Brief*, p. 7); what the court's holding "appears to be" (*id.*, p. 16); and how the circuit court "sometimes viewed" the issue as one thing, and "sometimes" as another (*id.*, p.15). These speculations and surmises about the Order's rationale and holding are attempts by Wyeth to erect a distorted a "straw man" version of the Order. This Court should read the Order itself, and in particular the "Analysis" section that begins at page 30.

Specifically, Wyeth contends that the circuit court's Order permits the Plaintiffs to maintain their cause of action without alleging or offering to prove any causal link between Wyeth's unlawful deceptive conduct and the Plaintiffs' ascertainable losses: "The Circuit Court's opinion can only be viewed [as ruling that the Plaintiffs] . . . need not allege or prove any causal

connection between Plaintiffs' injuries and Wyeth's allegedly deceptive acts . . ." (Wyeth Brief, p. 16.)

This contention is false. The circuit court's Order clearly recognizes and states that the Plaintiffs have alleged and intend to prove a causal link between Wyeth's unlawful deceptive conduct and the Plaintiffs' ascertainable losses:

According to the Plaintiffs, the issue is not whether the Plaintiffs relied upon Wyeth's deceptive practices, but *whether the Plaintiffs suffered any ascertainable loss as a result of the deceptive practices*. [Amended Order, p. 10, emphasis added.]

The Plaintiffs allege that they are only required to show *a link between* Wyeth's deceptive conduct and the purchaser's ascertainable loss, and not that the purchaser, or her doctor, made the purchase in reliance on Wyeth's misrepresentations. The Plaintiffs note that on a motion to dismiss, *the inferior drugs the Plaintiffs received, as compared to what the Plaintiffs were entitled to receive is assumed and the allegations made in the Plaintiffs' complaint are sufficient to withstand the motion*. *** This statement clearly conveys the Plaintiffs' issue – *that Wyeth engaged in deceptive practices which caused a loss to the Plaintiffs*. In viewing the facts in the light most favorable to the Plaintiffs, it appears that the Plaintiffs did not receive the benefit of their bargain and thus, are entitled to relief under the WVCCPA.

[Amended Order, pp. 41-42, R. 1206-1207, emphasis added].

The circuit court thus directly acknowledged in its Order that the Plaintiffs intend to prove in the instant case that they suffered "ascertainable losses" when they received HRT drugs that were substantially and materially different from and inferior to what the women in the Plaintiff class were entitled to receive – and that they received such different and inferior drugs "as a result of" (that is, their losses were "caused by") Wyeth's allegedly unlawful deceptive conduct.

Wyeth's "proving purchase decision reliance is also required" reading of *W.Va. Code*, 46A-6-106(a) [1974] was rejected by the circuit court -- because such a reading contravenes the clear language of the WVCCPA and relevant West Virginia authority, because it is contrary to the weight of the law from other jurisdictions, and because it would discriminate against the most vulnerable consumers. Wyeth's (and its *amicus*'s) cited legal authority, in furtherance of Wyeth's effort to reverse the circuit court's decision, is both factually distinguishable and legally unpersuasive. Wyeth's arguments invoking the constitutional doctrine of "standing" are similarly without merit. This Court should rule that the circuit court correctly denied Wyeth's motions for dismissal and summary judgment; and that the circuit court correctly answered the Certified Question.

On all of these issues, this standard for Court's review is *de novo*, because they are all matters of law.

DISCUSSION, POINTS AND AUTHORITIES, AND ARGUMENT

A. The Plaintiffs' Allegations That Are Assumed To Be True For Purposes Of The Instant Case, Without Reference to Any Allegation or Proof Of Reliance, Establish A *Prima Facie* Case That The Plaintiffs Have Suffered Ascertainable Losses "As A Result Of" And Caused By Wyeth's Unlawful Deceptive Conduct.

The Plaintiffs have alleged that they purchased and received HRT drugs whose benefits and risks -- including their very serious dangers -- had not been properly and accurately investigated and assessed; and that Wyeth deliberately ignored, dismissed, and misrepresented evidence regarding the true risks and benefits (or lack thereof) of these drugs -- with the intent to deceive and mislead consumers, doctors, and the general public. In *Plaintiffs' Response to*

Wyeth's Supplemental Memorandum in Support of Motion to Dismiss and Motion for Summary

Judgment (R. 904-930, pp. 4-5), the Plaintiffs stated:

[T]he Plaintiffs have alleged that the Plaintiffs purchased and spent money for the Defendant Wyeth's hormone drugs, and in return received drugs that had not been properly investigated and assessed for their safety, risks, and benefits; and that the Plaintiffs received drugs that were not effective and/or safe for conditions and circumstances for which the drugs were promoted in the marketplace; and that the Plaintiffs received drugs whose risks and benefits had not been fairly, properly, and adequately disclosed to physicians and consumers. These differences and inferiorities in the drugs that Plaintiffs received, as compared to what the Plaintiffs were entitled to receive and reasonably expected to receive, were ascertainable losses . . . [*Id.*, emphasis added.]

The Plaintiffs have additionally alleged that they received HRT drugs that in this fashion were different from and inferior to what the Plaintiffs were entitled to receive -- not because of any accident or mistake on Wyeth's part, but as a direct result of Wyeth's unlawful deceptive conduct.

Specifically, the Plaintiffs have *inter alia* alleged that "Wyeth suppressed and understated serious long-term risks" (Amended Complaint, R. 19-45, Par. 36); "Wyeth misrepresented the fundamental weakness of the evidence for the claims it made on behalf of hormone and estrogen replacement therapy, and glossed over and misrepresented the evidence that opposed those claims" (Amended Complaint, R. 19-45, Par. 37); "Wyeth unfairly and deceptively misrepresented that hormone and estrogen replacement therapies reduced the risks of Alzheimer's Disease; [when] in fact, the evidence suggested that the thrombo-embolic effects of these therapies actually increased the risks of Alzheimer's Disease and, especially, other forms of vascular dementia" (Amended Complaint, R. 19-45, Par. 43); and Wyeth "unfairly and deceptively represented that [HRT drugs] had long-term prophylactic benefits, especially for the

prevention of coronary heart disease, that they did not have." (Amended Complaint, R. 19-45, Par.34). The Plaintiffs have alleged that Wyeth and its co-defendants Dannemiller Memorial Educational Foundation, & Ketchum, Inc., conspired to present a "biased, manipulative, selective, and distorted view of the evidence for the risks and benefits of hormone and estrogen replacement therapy." (Amended Complaint, R. 19-45, Par. 68.) For purposes of the instant case, these allegations are assumed to be true.

The nature, seriousness, and plausibility of the Plaintiffs' allegations regarding Wyeth's HRT drugs, and in particular regarding Wyeth's culpability in failing to see that those drugs' risks and benefits were properly assessed and disclosed, are illustrated in a recent opinion by the United States Court of Appeals for the Eighth Circuit, *Scroggin v. Wyeth, et al.*, 586 F.3d 547 (8th Cir. 2009). *Scroggin* was a product liability personal injury case, brought under a "duty to warn" theory. Following are excerpts of the Eighth Circuit's discussion of Wyeth's conduct in developing and marketing its HRT drugs:

Hormone replacement therapy, consisting of estrogen plus progestin, is prescribed to combat the symptoms of menopause. Women's ovaries typically stop producing estrogen between the ages of forty-five and fifty-five, commencing the onset of menopause. Some women develop moderate to severe symptoms, including intense episodes of heat and sweating, known as hot flashes, as well as vaginal atrophy.

In 1942, Wyeth introduced Premarin, a conjugated equine estrogen intended to replace the estrogen naturally decreasing in women during menopause and reduce the associated symptoms. In 1959, Upjohn launched Provera, a progestin product approved for treatment of abnormal uterine bleeding. By the 1970s, studies showed a link between estrogen replacement drugs such as Premarin and endometrial cancer. It was later determined that prescribing progestin along with estrogen reduced this risk. Although the Food and Drug Administration (FDA) had not approved the combination of estrogen and progestin for treating menopausal symptoms, such combination hormone therapy

became the standard of care. Provera was often lawfully prescribed for this off-label use in conjunction with Premarin. In 1994, Wyeth became the first pharmaceutical company to combine estrogen and progestin into one package with the launch of Prempro. In 1995, Prempro became the first pharmaceutical that combined the two hormones into a single tablet. As of 2008, Premarin and Provera were the most common forms of estrogen and progestin replacement drugs.

B. Wyeth

Premarin is among Wyeth's most profitable products. The company has described Premarin as "our most important asset and our most important priority" and has equated the Premarin marketing efforts with a "Holy War, a Crusade." At trial, Scroggin argued that this devotion led Wyeth to implement a policy of "dismiss and distract" when it came to the risks associated with the drug. Scroggin asserted that Wyeth intentionally ignored the breast cancer risk and avoided its study at the same time as it vigorously promoted Premarin and Prempro. **According to Scroggin, Wyeth's "dismiss and distract" policy began in 1975.** [586 F.3d at 554-555, emphasis added.]

The FDA's Director of Bureau of Drugs stated that he expected Wyeth to provide a sound medical and scientific response to the new information, but instead Wyeth misrepresented scientific findings. Wyeth failed to propose studies to confront the questions that the new data raised and failed to refute or confirm the studies that were then available. [*Id.* at 555, emphasis added].

Throughout the 1990s, Wyeth remained vigilant in disassociating its product from cancer. In accordance with company policy, Wyeth denied the Eastern Cooperative Oncology Group's 1993 request for a supply of Premarin to conduct a study of hormone replacement therapy in women who have breast cancer. Presumably, the request was denied because estrogen is contraindicated for breast cancer, but a later memo referred to a custom at Wyeth of denying requests for Premarin for studies involving breast cancer. **In 1994, a Wyeth executive responded to the suggestion that a respected oncologist chair an upcoming meeting of Wyeth consultants with "[n]o way having an oncologist chair this. NO NO NO NO & NO."** [*Id.* at 556-557, emphasis added.]

In 1996, an NIH-sponsored study, authored by Dr. Steven Cummings, concluded that "the risk of breast cancer associated

with hormone replacement therapy may have been substantially underestimated.” Wyeth received an advanced abstract of the study and established a breast cancer task force in response. Wyeth's response plan involved the following strategy: **“shift attention to other cancers;” characterize the study as “just one more paper;” and highlight flaws in the study's methodology.** The task force's stated goal for an upcoming meeting of the American Society of Clinical Oncology was to **“[o]vershadow [the] Cummings data” by directing media attention elsewhere. Handwritten notes regarding the study state “keep U.S. press busy” and “dismiss/distract.”**[*Id.* at 557, emphasis added].

After a nearly three-week-long trial, the jury found that Wyeth and Upjohn had inadequately warned about a known or knowable risk of breast cancer from ingestion of Premarin, Provera, and Prempro and that this failure to warn was the proximate cause of Scroggin's breast cancer. The jury awarded Scroggin compensatory damages in the amount of \$2.7 million. [*Id.* at 563].

Scroggin presented sufficient evidence for the jury to find that the warnings were inadequate, contradictory, and confusing. [*Id.* at 564, emphasis added].

Although Wyeth's failure to organize one study to allow for adequate evaluation of the breast cancer risk, or its attempts to undermine the results of one adverse publication, may not reflect reckless disregard, a consistent pattern of such conduct might do so. A jury could find that although each study added to the evidence suggesting a risk of breast cancer, Wyeth nevertheless continued to engage in a practice of both inaction and mitigation. . . . **Viewed as a whole, then, the evidence presented could allow a jury to find or infer that Wyeth was guilty of malicious conduct within the meaning of Arkansas law.** [*Id.* at 572, emphasis added].

[W]e conclude that there was sufficient evidence upon which a jury could conclude that Wyeth acted *with reckless disregard to the risk of injury* [*Id.* at 573, emphasis added].

Scroggin v. Wyeth, et al., 586 F.3d 547 (8th Cir. 2009).³ The *Scroggin* court thus found sufficient evidence to establish that consumers like the plaintiff in that case received HRT drugs whose risks of causing breast cancer (*inter alia*) were not fairly, properly, and adequately represented and disclosed. Moreover, there was, according to the *Scroggin* court, sufficient evidence for a jury to find that "Wyeth acted with reckless disregard to the risk of injury." *Id.* at 573. The *Scroggin* opinion strongly corroborates the facial validity of the Plaintiffs' allegations of their ascertainable loss and Wyeth's unlawful conduct in the instant case.

In *Cross v. Trapp*, 170 W. Va. 459, 465, 204 S.E. 2d 446, 452 (1982), this Court recognized a patient's "right of self-decision" and held that this right cannot be effectively exercised where a patient is not provided with adequate and accurate information about the risks and benefits of medical treatment. Unless a drug used in medical treatment is adequately tested to ascertain its true safety, risks, and benefits, and those true risks and benefits are accurately provided to consumers who purchase the drugs, the drug's value is seriously compromised and diminished -- if not destroyed altogether. As one commentator has stated,

It is after all, only within a particular information context that a drug really exists. Without all of the information on the indications, dosage, and proper use contained in the labeling, coupled with the information and knowledge physicians possess about the use of drugs from their training and experience, a drug is

³ The circuit court's Amended Order added a statement that was requested by Wyeth, by Motion dated July 7, 2009 (the circuit court acted prior to a response being filed by the Plaintiffs), stating that "[a]t this time, the Plaintiffs have not presented evidence to show that Wyeth concealed any such studies [showing that HRT drugs resulted in an increased risk of breast cancer.]" (Order, R. 1166-1211, p.43.) Wyeth may suggest that this minor alteration in the circuit court's Order has significance in the instant case -- but it does not. The Plaintiffs were under no duty to provide evidence of Wyeth's deceptive conduct in the posture of the instant case. The Plaintiffs anticipate no difficulty in proving to a jury -- which, as the circuit court's Order specifically notes, is to make the determinations in this regard, *see id.*, -- that Wyeth in fact and very effectively "concealed" the real risks and benefits of Wyeth's HRT drugs by means of an extended course of deceptive conduct. Wyeth deliberately and recklessly exaggerated the drugs' benefits and minimized their possible risks, while opposing and "dismissing and denying" well-founded suggestions that those risks and claimed benefits needed to be better examined, to protect the public.

not, in any practical sense, a drug. It is just a useless and probably dangerous chemical. But with the right information, a drug can be a therapeutic tool of enormous and often lifesaving value to patients.

Chen, P., "Education Or Promotion?: Industry-Sponsored Continuing Medical Education (CME) as a Center For the Core/Commercial Speech Debate," 58 *Food & Drug L.J.* 473 (2003).⁴

In *State ex rel. Johnson and Johnson v. Karl*, 220 W.Va. 463, 477-478, 647 S.E.2d 899, 913-914 (2007) this Court stated:

[I]t is the prescription drug manufacturers who benefit from the sales of prescription drugs and possess the knowledge regarding potential harms, and the ultimate consumers who bear the significant health risks of using those drugs . . . Courts are increasingly motivated to protect the consumer . . . [quoting language from various state courts:] [drug manufacturers have a duty to provide] “warnings of dangerous side effects”; [information about] “dangers involved with the product”; “dangerous side effects and risks”; “possible side effects”; “dangers inherent in a prescription drug”; “information about the drug’s dangerous propensities” “caution against a drug’s side effects;” “[information] about the drug’s...potential dangers.”

Syllabus Point 3 of *State ex rel. Johnson and Johnson* states, in part:

Under West Virginia product liability law, manufacturers of prescription drugs are subject to the same *duty* to warn consumers about the risks of their products as other manufacturers. [emphasis added].

This rule's recognition of a high duty of care on the part of drug manufacturers is nothing new. More than one hundred years ago this Court set forth the same standard in Syllabus Point 5, *Peters v. Johnson*, 50 W. Va. 644, ___, 41 S.E. 190, 191, 193 (1902):

⁴Quoting Michael R. Taylor, "Drug Regulation, Off-Label Uses, and CME -- Reconciling Competing Values," Speech to the Food and Drug Law Institute (Feb. 26, 1992), *quoted* in Richard T. Kaplar, "The FDA and the First Amendment," in "Bad Prescription for the First Amendment" 50 (Richard T. Kaplar ed., 1993).

All persons engaged in manufacturing . . . drugs . . . or medicines, are required . . . to use the highest degree of care known to practical men to prevent injury. *** The greatest care is demanded of one who sells dangerous drugs. [citations omitted].

In the instant case, then, there can be no question that the women in the Plaintiff class were legally entitled to receive properly investigated, tested, and assessed hormone drugs – and that Wyeth had a legal duty to see that they received such drugs. The women in the Plaintiff class were entitled to purchase and receive drugs that were effective and safe for the conditions for which the drugs were being promoted by Wyeth in the marketplace, and to receive drugs whose risks and benefits had been fairly, properly, and adequately represented and disclosed to prescribing doctors and the public – and Wyeth had a duty to see that they received such drugs. *State ex rel. Johnson and Johnson, supra.*⁵ But in every respect, Wyeth did not live up to its duty.

As previously noted, *W.Va. Code*, 46A-6-106(a) [1974] requires that a consumer purchaser suffer an "ascertainable loss of money or property, real or personal" as a result of a defendant's unlawful conduct. Wyeth's *Brief* in the instant case (at page 21) uses ellipsis to omit the words "or property, real or personal" after "money," suggesting that the Plaintiff's alleged "ascertainable loss" can only be the money they spent in a purchase transaction. But Wyeth is incorrect in this suggestion. As this Court stated in Syllabus Point 16, in part, *In re West Virginia Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003):

For a consumer to make out a *prima facie* case to recover damages for "any ascertainable loss" under *W.Va. Code*, 46A-6-106 [1974], the consumer is not required to allege a specific amount of actual damages. If the consumer proves that he or she has purchased an

⁵"[P]roof that a party justifiably relied on a representation is not necessary when the representation involves a matter about which the party is legally required to inform the other." *Tri-West Construction Company v. Hernandez*, 43 Or. App. 961, 971-972, 607 P.2d 1375, 1382 (1979).

item that is different from or inferior to that for which he bargained, the "ascertainable loss" requirement is satisfied.

When the women in the Plaintiff purchased HRT drugs that were not properly investigated and tested, that were not effective and safe for the conditions for which they were promoted, and whose significant and material risks and benefits had not been properly and adequately represented and disclosed to prescribing doctors and the public -- they received drugs that were substantially and materially different from and inferior to what these women were entitled to receive in the transaction. This difference and inferiority in what these women received constituted an "ascertainable loss" under *W.Va. Code*, 46A-6-106(a) [1974]. This was directly recognized in the Circuit Court's Amended Order (R. 1166-1211, p. 41-42): "the inferior drugs the Plaintiffs received, as compared to what the Plaintiffs were entitled to receive is assumed . . . it appears that the Plaintiffs did not receive the benefit of their bargain."

Wyeth argued to the circuit court that the women in the Plaintiff class could not allege such an ascertainable loss because each woman did not personally "bargain" with someone (with whom? a pharmacist? a doctor?) about the accuracy and adequacy of the investigation and disclosure of the benefits and risks of the drugs that she received. *See* Amended Order, R. 1166-1211, p. 17: "Wyeth maintains that the Plaintiff cannot bargain for a benefit he or she does not know about."

But this argument places a ludicrous construction on the term "bargain." This Court recognized in *Arnold v. United Companies Lending Corp.* 204 W.Va. 229, 236, 511 S.E.2d 854, 861 (1998) that in the consumer protection context, a consumer's "bargain" is not what the consumer has consciously negotiated, but what the consumer is entitled to receive:

In real life we can envisage arbitration provisions being imposed upon consumers in contract situations *where consumers are totally*

ignorant of the implications of what they are signing, and where consumers bargain away many of the protections which have been secured for them with such difficulty at common law.

204 W.Va. at 236, 511 S.E.2d at 861. A consumer who is "totally ignorant" about the terms of what she or he is agreeing to cannot be said to have consciously "bargained" about those terms. Nevertheless, this Court stated in *Arnold* that a consumer could inadvertently "bargain away" such unknown protections. *Arnold* therefore shows that what a consumer has "bargained for" -- or the "benefit of the consumer's bargain" -- means what the consumer is legally entitled to receive in the transaction.

This principle was also recognized in *Joslin v. Mitchell*, 213 W.Va. 771, 584 S.E.2d 913 (2003), where this Court held that a statutory requirement that an insurance coverage adjustment and concurrent premium discount be "bargained for" did not mean that an insurer had actually negotiated with the consumer, or even that the consumer was actually aware of the adjustment. 213 W.Va. at 778, 584 S.E.2d at 920. Thus, the Plaintiffs in the instant case do not need to have "negotiated" about the adequacy of Wyeth's safety testing of its HRT drugs, or the accuracy of Wyeth's disclosures, etc., in order to have been entitled to receive drugs that were properly investigated and assessed, effective and safe for the conditions for which they were promoted, and whose risks and benefits had been properly disclosed. The law of West Virginia imposes such an entitlement and requirement in every consumer's transaction; and such an entitlement is and was a benefit, term, and part of every Plaintiff's "bargain." *See, e.g., State ex rel. Johnson and Johnson v. Karl*, 220 W.Va. 463, 647 S.E.2d 899 (2007).

Consistent with this principle, the Circuit Court of Putnam County properly ruled that "[i]n viewing the facts in the light most favorable to the Plaintiffs, it appears that the

Plaintiffs did not receive the benefit of their bargain and thus, are entitled to relief under the WVCCPA." (Amended Order, R. 1166-1211, p. 41-42.)

It may be succinctly shown at this point that Wyeth's alleged conduct – the conduct that the Plaintiffs say caused them to suffer these ascertainable losses -- meets the standard of "unlawful conduct" under *W.Va. Code*, 46A-6-106(a) [1974]. *W. Va. Code*, 46A-6-104 [1974] says that "unfair or deceptive acts or practices" are "unlawful conduct." *W.Va. Code*, 46A-6-102(7) [2005] describes certain specific types of unfair or deceptive acts and practices that fall within the term "unfair or deceptive acts or practices" (but does not limit the term's meaning to such defined conduct.)⁶ Looking to the specific definitions in *W.Va. Code*, 46A-6-

⁶ *W.Va. Code*, 46A-6-102(7) [2005] states, in part:

(7) "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:

(A) Passing off goods or services as those of another;

(B) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(C) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with or certification by another;

(D) Using deceptive representations or designations of geographic origin in connection with goods or services;

(E) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(F) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(G) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model if they are of another;

(H) Disparaging the goods, services or business of another by false or misleading representation of fact;

(I) Advertising goods or services with intent not to sell them as advertised;

(J) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(K) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;(L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(M) 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,

102(7) [2005], the Plaintiffs have alleged conduct that *inter alia* falls within the descriptions in *W.Va. Code*, 46A-6-102(7) (E), (G), (L), and (M) [2005]:

"Representing that goods . . . have characteristics [and] benefits that they do not have [or] . . . are of a particular quality . . . if they are of another [or] . . . any other conduct which similarly creates a likelihood of confusion or of misunderstanding . . . [or] any deception [or] . . . misrepresentation, or the concealment, suppression or omission of any material fact with intent that, others rely upon such concealment, suppression, or in connection with the sale or advertisement of any goods or services . . . [Id.]

Thus, the allegations in the Amended Complaint, some of which are quoted at pp. 10-11 *supra*, allege deceptive conduct by Wyeth that meets the "unlawful conduct" standard of the WVCCPA.

In summary of the foregoing -- the Plaintiffs' allegations of injury, assumed to be true for purposes of the instant case, establish a *prima facie* case that the women in the Plaintiff class suffered ascertainable losses when they purchased and received HRT drugs that were substantially and materially different from and inferior to what the Plaintiffs were entitled to receive. Moreover, the Plaintiffs' allegations of conduct that was designed and executed by Wyeth and its co-Defendants in order to suppress the development and disclosure of accurate and adequate information about the drugs' benefits and risks -- also assumed to be true for purposes of the instant case -- establish a *prima facie* case that the women's ascertainable losses were caused by and "as a result of" Wyeth's unlawful conduct.

The circuit court therefore correctly determined that the Plaintiffs had established a *prima facie* case, without reference to any allegation or proof of purchase decision reliance,

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;

that the women in the Plaintiff class had suffered ascertainable losses as a result of and caused by Wyeth's unlawful conduct.

B. The Circuit Court of Putnam County Correctly Ruled That Under *W.Va. Code*, 46A-6-106(a) [1974], In Order For A Consumer To Prove That She Suffered an Ascertainable Loss "As A Result Of" A Defendant's Unlawful Deceptive Conduct, It Is Not Mandatory That The Consumer Prove That She Purchased Goods Or Services in Reliance Upon That Conduct.

Wyeth argues, however, that under *W.Va. Code*, 46A-6-106(a) [1974] the *only* way that the women in the Plaintiff class can prove that they suffered ascertainable losses as a result of Wyeth's unlawful deceptive conduct is *for each woman to prove that her individual HRT drug purchase decision was made in reliance on Wyeth's deceptive conduct*. Wyeth says that such a "purchase decision reliance" requirement is mandated by the "as a result of" language of *W.Va. Code*, 46A-6-106(a) [1974].

Before discussing why Wyeth's argument is not supported in the language of the statute or the relevant case law, it should be noted that Wyeth's interpretation of *W.Va. Code*, 46A-6-106(a) [1974] would deny the protections and benefits of the statute to an illiterate West Virginian who purchases a bottle of aspirin that is mislabeled as containing 100 pills – if the bottle actually contains 75 pills, and if the mislabeling is a result of the aspirin manufacturer's deliberate and deceptive misconduct. (Misrepresentations as to quantities are specifically defined as unlawful deceptive conduct at *W.Va. Code*, 46A-6-102(7)(E) [2005].)

Because such an illiterate consumer could not have read the statement about the number of pills on the aspirin bottle label, Wyeth says that she could not have "decided to purchase" the deliberately "short-count" bottle of aspirin pills in reliance upon the erroneous information about the number of pills that the manufacturer deliberately placed on the label.

Wyeth's reading of *W.Va. Code*, 46A-6-106(a) [1974] would prohibit this illiterate consumer, who clearly has been cheated, from invoking the private right of action against deceptive conduct that is afforded in the statute.

The foregoing statement of Wyeth's position about who can and cannot bring a case under *W.Va. Code*, 46A-6-106(a) [1974] is not based on surmise. Wyeth specifically argued to the Circuit Court of Putnam County that consumers who don't or can't read labels *don't really care* about how many pills are in the bottle – so, says Wyeth, it is all right to deny them standing under the WVCCPA. See *Wyeth's Supplemental Reply in Support of Motion to Dismiss, or in the Alternative, for Summary Judgment Due to Lack of Standing*, (R. 653-898), p.5, n. 10: "If the purchaser of a bottle of aspirin is illiterate, and cannot read on [sic] the label's representation that the bottle contains 100 pills, then he is likely indifferent to how many pills the bottle contains."

However, as the circuit court correctly ruled, Wyeth's callous interpretation of *W.Va. Code*, 46A-6-106(a) [1974] is wrong. An illiterate consumer who purchases a "short-count" bottle of pills, where the manufacturer has deliberately misstated the actual quantity of pills on the label, has in fact been injured "as a result of" the manufacturer's deceptive conduct -- whether or not she read the label. Likewise, a woman drug purchaser who received Wyeth's HRT drugs -- that had not been properly tested, and whose true benefits and risks and safety were neither properly ascertained or disclosed, not because of an accident or mistake, but because Wyeth deliberately and deceptively dismissed and suppress those risks and exaggerated and distorted those benefits -- has been injured and suffered an ascertainable loss "as a result of" Wyeth's deceptive conduct.

The West Virginia Consumer Credit and Protection Act, and specifically *W.Va. Code*, 46A-6-106(a) [1974], extend their protection and benefit to *all* consumers who are cheated and injured by unlawful and deceptive conduct -- not just to consumers who can or do read labels, and not just to consumers whose claims meet the technical requirements of a common-law fraud action (which ordinarily include reliance in some form, *see* discussion *infra* at C.) *See Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 399, 582 S.E.2d 841, 846 (2003) (the WVCCPA must be "constru[ed] . . . liberally to protect *all* consumers from unfair, illegal, or deceptive action[.]"). *See also W.Va. Code*, 46A-6-101 [1974] (the WVCCPA's purpose is "to protect the public and foster fair and honest competition. . . . [and the Act] shall be liberally construed so that its beneficial purposes may be served.")

C. The Language Of *W.Va. Code*, 46A-6-106(a) [1974] And The West Virginia Cases Interpreting And Applying That Language Do Not Support Requiring Proof Of Reliance Upon Unlawful Deceptive Conduct In All Cases Brought Under The Statute.

As previously quoted, *W.Va. Code*, 46A-6-106(a) [1974], the section of the WVCCPA that creates a private right of action for injured consumers against parties who violate the WVCCPA, states in pertinent part as follows:

(a) 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.[emphasis added].

W.Va. Code, 46A-6-106(a) [1974], in part.

Wyeth's contention that specific proof of "individual purchase decision reliance" is required in all *W.Va. Code*, 46A-6-106(a) [1974] cases that allege unlawful deceptive conduct finds no support in the language of the statute itself.

The words "rely" or "reliance" are not found in *W.Va. Code*, 46A-6-106(a) [1974]. The operative words are "as a result of." The ordinary and plain meaning of the phrase "as a result of" is "caused by." In *Whitney v. Ralph Myers Contracting Corp.*, 146 W.Va. 130, 133-134, 118 S.E.2d 622, 624 (1961), the West Virginia Supreme Court stated that the phrase "as a result of" is simply another way of saying "caused by":

A plaintiff, of course, must establish by satisfactory proof that the injury of which he complains *was caused by, or was the result of*, action on the part of the defendant, before recovery is permitted. [emphasis added].

The requirement of causation is satisfied by showing a 'logical sequence of cause and effect' between the actions of the defendant and the plaintiff's injury, *Long v. City of Weirton*, 158 W.Va. 741, 762, 214 S.E.2d 832, 848 (1975). (Moreover, "[q]uestions of . . . proximate cause . . . present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." Syllabus Point 5, *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964).)

In *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995), this Court stated that:

The purpose of the 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*. As suggested by the court in *State v. Custom Pools*, 150 Vt. 533, 536, 556 A.2d 72, 74 (1988), "[i]t must be our primary objective to give meaning

and effect to this legislative purpose.” *Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.* [citations omitted, emphasis added.]

194 W.Va. at 777, 461 S.E.2d at 523.

Thus, *W.Va. Code*, 46A-6-106 [1974] was enacted to “provid[e] an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action . . . [and this Court] must construe the statute liberally [to accomplish that purpose].” *Id.*

The proof of "reliance" for which Wyeth argues, of course, is ordinarily required (in some fashion) in the "traditional" cause of action of common-law fraud. *See* Syllabus Point 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981):

The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged *because he relied upon it.* [emphasis added].

Thus, to the extent that the women in the Plaintiff class would "otherwise have difficulty" in proving their case under the traditional action of common-law fraud due to the reliance requirement that is associated with that traditional action, *State ex rel. McGraw v. Scott Runyan, supra*, requires that *W.Va. Code*, 46A-6-106 [1974] be interpreted to exclude a reliance requirement.

Moreover, the clear and unambiguous language of *W.Va. Code*, 46A-6-106 [1974] itself supports the reading given by the Circuit Court of Putnam County. *See Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002):

“ [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992)). See also Syl. pt. 4, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999) (““A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).’ Syllabus point 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997).”

213 W.Va. at 97, n.28, 576 S.E.2d at 824, n.28.

A recent case from Missouri, *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707 (Mo. Ct. App. 2009), discussed language in the Missouri consumer protection act's private right of action section that is is very similar to the language of *W.Va. Code*, 46A-6-106(a) [1974]. The *Plubell* opinion provides a good explanation of why the statutory language "as a result of" does not impose a "purchase decision reliance" requirement, in addition to a causation requirement.

In *Plubell*, purchasers of the drug Vioxx filed suit against the pharmaceutical company Merck under Missouri's Merchandising Practices Act ("MMPA"). The trial court certified a class consisting of all Missouri residents who had purchased Vioxx for personal or family use, but excluding those who claimed personal injury as a result of taking Vioxx. 289 S.W.3d at 711. According to the *Plubell* court,

The MMPA prohibits “deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce” by defining such activity as an unlawful practice. Civil actions may be brought under the MMPA to recover actual damages by “[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice.]

289 S.W.3d at 711-712 (citations omitted).

A comparison of the pertinent language governing private rights of action under the West Virginia and Missouri statutes shows that the two statutes are very similar, and essentially identical for purposes of comparison in the instant case.

<p>MMPA: Civil actions may be brought under the MMPA by “[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, <i>as a result of</i> [an unlawful practice.] [emphasis added]. § 407.025.1.</p>	<p>WVCCPA: Civil actions may be brought under the WVCCPA by “[a]ny person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, <i>as a result of</i> [an unlawful practice.] [emphasis added]. <i>W.Va. Code</i>, 46A-6-106 [1974].</p>
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The *Plubell* court specifically discussed whether the plaintiffs in that case were required to allege and prove individualized reliance by each class member upon the defendant's unlawful deceptive conduct:

[I]n its attempt to show that common issues do not predominate in the class, Merck mischaracterizes the showing required under the MMPA. . . . It argues Plaintiffs will have to prove Merck's knowledge of Vioxx's risks and its representations about Vioxx at the time of each class member's purchase, each prescribing physician's knowledge of the risks, whether a different representation would have affected the class member's taking of Vioxx

[A] civil action under the MMPA requires that the litigant “suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice].” Merck argues that in order to prove “loss,” each plaintiff will have to show causation—that they would not have used Vioxx had the risks been known—as well as demonstrate the amount the plaintiff would have paid for alternative therapy. However, Plaintiffs' claim does not require these subjective, individualized inquiries.

289 S.W.3d at 713-714 (citations omitted). The *Plubell* opinion carefully examined the applicable statutory language:

The MMPA does not require that an unlawful practice cause a “purchase.” A civil suit may be brought by “[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice].” “[A]s a result of” modifies “ascertainable loss”; it does not modify “purchases or leases.” Thus, a plaintiff’s loss should be a result of the defendant’s unlawful practice, *but the statute does not require that the purchase be caused by the unlawful practice*. Therefore, the class members are not individually required to show what they would or would not have done had the product not been misrepresented and the risks known. [emphasis added.]

289 S.W.3d at 714 (emphasis added). *Accord, Carr-Davis v. Bristol-Myers Squibb Co.*, 2009 WL 5206122 (D.N.J. 2009).

The *Plubell* opinion’s statutory analysis is logical and sound. This Court should follow the same analysis, and rule that under *W.Va. Code*, 46A-6-106 [1974], “a plaintiff’s loss should be a result of the defendant’s unlawful practice, but the statute does not require that the purchase be caused by the unlawful practice.” 289 S.W.3d at 714.

Wyeth’s argument that the case of *Orlando v. Finance One of West Virginia, Inc.*, 179 W.Va. 447, 369 S.E.2d 882 (1988) supports the existence of a reliance requirement under *W.Va. Code*, 46A-6-106 [1974] is without merit. *Orlando* involved the inclusion of an illegal and unenforceable clause that waived a debtor’s homestead and personal property exemptions in a loan agreement. This Court held that even though the inclusion of the clause was “unlawful conduct,” it was not actionable under *W.Va. Code*, 46A-6-106 [1974]

. . . because Finance One made no attempt to enforce Clause # 14, [and therefore] the appellants have suffered no “ascertainable loss

of money or property” as a result of the inclusion of Clause # 14 in the loan contract.

179 W.Va. at 453, 369 S.E.2d at 888.

This Court's holding in *Orlando* simply supports the unremarkable principle that a plaintiff must allege and prove that in order to sustain an action under *W.Va. Code*, 46A-6-106 [1974], a defendant's unlawful conduct has caused the plaintiff to suffer a legally cognizable injury. The factual situation in *Orlando* is unlike the instant case, in which the Plaintiffs clearly allege having suffered ascertainable losses as a result of Wyeth's deceptive conduct.

It is also notable that in *Orlando*, the waiver clause was not alleged to have caused the plaintiffs to sign the loan agreement. Yet this Court's opinion in *Orlando* suggests that had the loan company attempted enforcement of the unlawful clause, the plaintiffs would have had a right to proceed with an action under *W.Va. Code*, 46A-6-106(a) [1974] – despite the lack of any "reliance" on the clause by the plaintiffs. The *Orlando* opinion thus supports the Plaintiffs' contention that whether proof of reliance may be necessary to prove loss causation in a case brought under *W.Va. Code*, 46A-6-106(a) [1974], and if so the type of proof that is required, depends on the facts of the individual case; including the alleged losses and conduct that are at issue in the case.⁷ In the instant case, as the circuit court properly ruled, proof of "purchase decision reliance" was and is not necessary for the Plaintiffs to establish that they suffered ascertainable losses as the result of Wyeth's unlawful deceptive conduct.

⁷ Cf. *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.* 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998) (Workman, J., concurring) (even in common-law fraud cases, the degree and nature of any required proof of reliance will vary according to the fraudulent conduct at issue:

Obviously, one who is defrauded in this manner cannot possibly take any affirmative action to indicate reliance, since he knows nothing of the deception. Yet, it would be ludicrous to reward a fraudulent actor for his skill in perpetrating such a deception. That is not what the law on fraud, and specifically on the element of detrimental reliance, envisions.

Wyeth's citations to other West Virginia cases discussing *W.Va. Code*, 46A-6-106(a) [1974] provide no greater support for Wyeth's arguments. *Harless v. First National Bank of Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978) states that consumers can bring an action under *W.Va. Code*, 46A-6-106(a) [1974] if they are "subjected to" unlawful conduct under the WVCCPA. In the *Harless* case, the "unlawful conduct" in question was when the bank "intentionally and illegally overcharged . . . on prepayment of their installment loans and [to whom the bank] intentionally did not make proper rebates." 162 W.Va. at 118, 246 S.E.2d at 272. Again, in *Harless*, as in *Orlando*, no consumer is alleged to have "relied on" on the bank's unlawful conduct; nevertheless, the opinion recognizes that consumers have standing to bring an action under *W.Va. Code*, 46A-6-106(a) [1974] if they suffered ascertainable losses as a result of unlawful conduct -- with no mention of reliance.

Wyeth's additional discussion of two unpublished opinions -- *State ex rel. Miller v. Secretary of Education*, 1993 WL 545730 (S.D.W.Va. 1993), and *Bertovich v. Advanced Brands and Importing Co.*, 2006 WL 2382273 (N.D.W.Va. 2006) is similarly unpersuasive. The cases are discussed in a footnote.⁸

⁸Regarding this Court's disfavoring of the citation of unpublished opinions except for limited purposes, see Justice McHugh's statements in *Pugh v. Workers' Compensation Com'r*, 188 W.Va. 414, 417, 424 S.E.2d 759, 762 (1992). Neither of the two unpublished opinions supports Wyeth's arguments. In *Bertovich*, two parents sued beer and liquor companies, claiming that alcohol advertising was causing children to buy alcohol. There was no claim that anyone had bought a product that was different from what the person was entitled to receive. Any possible causal chain between the advertising and any injury was broken as a matter of law by illegal underage consumption. The alcohol companies were not charged with failing to provide products that had been fairly tested for their safety, etc. Because the plaintiffs undertook to prove in *Bertovich* that children had seen the advertising and that their "reliance" on this advertising caused them to drink alcohol, the court also noted that there was no evidence of such reliance. The *Bertovich* opinion does not discuss the difference between causation and reliance -- much less what is required to state a cause of action under *W.Va. Code*, 46A-6-106 [1974]. In *State of West Virginia ex rel. Miller v. Secretary of Educ. of U.S.*, 1993 WL 545730 (S.D.W.Va. 1993), the plaintiffs denied that they had to show that anyone had suffered any sort of "ascertainable loss." The trial court properly disagreed, and denied their claims. The plaintiffs' additional argument -- that they also did not have to

Finally, Wyeth's Brief mischaracterizes the Plaintiffs' view of the significance of the provisions of *W.Va. Code*, 46A-6-102(7)(M) [2005], previously quoted in context at note 5 *supra*. This definitional language says that unlawful "unfair or deceptive acts and practices" includes "any deception, [etc.] . . . 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*." (*Id.* emphasis added). The Plaintiffs do not contend that this language trumps the "as a result of" injury/causation requirement in *W.Va. Code*, 46A-6-106(a) [1974] -- the Plaintiffs are not relieved by this definitional language from showing that they have been "damaged" by and as a result of Wyeth's unlawful deceptive conduct. However, the Plaintiffs do contend that this statutory language clearly negates Wyeth's claim that each woman in the Plaintiff class must prove that her personal purchase decision was made in reliance on Wyeth's misleading and deceptive conduct.

D. An Extensive Body Of Well-Reasoned Case Law From Other States Supports the Circuit Court's Conclusion That The Plaintiffs In the Instant Case Are Not Required to Prove That They Purchased Drugs In Reliance On Wyeth's Unlawful Deceptive Conduct In Order To Maintain Their Case Under *W.Va. Code*, 46A-6-106(a) [1974].

In the following discussion, it will be seen that a substantial number of state courts (in addition to *Plubell, supra*) have held that proof of "purchase decision reliance" on deceptive conduct is not required under the private rights of action that are available to consumers in those states' consumer protection acts. Regarding these cases, the Circuit Court of Putnam County stated in its Amended Order, at p. 39:

show "reliance" -- was immaterial to the trial court's ruling, and the holding in the *Miller* case does not support Wyeth's position.

the cases from the jurisdictions which hold that proof of reliance is not required under their consumer protection statutes are more in line with the policies pertaining to liberal construction of remedial statutes that have been articulated by the West Virginia Supreme Court of Appeals.

In *Sanders v. Francis*, 277 Oregon 593, 599-600, 561 P.2d 1003, 1006 (1977) (*en banc*), the court held that whether proof of reliance in a consumer protection act case is required depends on the facts of the case; *accord*, *Tri-West Construction Company v. Hernandez*, 43 Or. App. 961, 971-972, 607 P.2d 1375, 1382 (1979).

In *Smoot v. Physicians Life Insurance Co.*, 135 N.M. 265, 270-271, 87 P.3d 545, 550-551 (2003), the court stated:

Defendant reads the [consumer protection statute] . . . to require Plaintiff to allege and prove detrimental reliance. . . . Defendant's argument is that proof of actual damages or proximate causation necessarily requires proof of reliance. . . . Defendant mistakenly contends 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. However, causation and reliance are distinct concepts. "Causation requires a nexus between a defendant's conduct and a plaintiff's loss; reliance concerns the nexus between a defendant's conduct and a plaintiff's purchase or sale." . . . Moreover, there appears to be a national trend to interpret consumer protection statutes . . . such that plaintiffs need not prove reliance. [emphasis added].

In *Varacallo v. Mass. Mut. Life Ins. Co.*, 332 N. J. Super. 31, 43, 752 A. 2d 807, 814 (2000), the court stated:

[A consumer protection act claim and a claim for common law fraud claim] "differ . . . in that common law fraud requires proof of reliance while consumer fraud requires only proof of a causal nexus between the concealment of the material fact and the loss . . .

In *Anunziato v. eMachines, Inc.*, 402 F.Supp.2d 1133, 1136-1138 (C.D. Cal.

2005), the court held that the words “as a result of” did not impose a mandatory reliance requirement, and explained its reasoning as follows:

eMachines asserts that Annunziato has failed to allege that he was harmed “as a result of” these violations. *** The goal of both the UCL and the FAL is the protection of consumers. However, the Court can envision numerous situations in which the addition of a reliance requirement would foreclose the opportunity of many consumers to sue under the UCL and the FAL. One common form of UCL or FAL claim is a “short weight” or “short count” claim. For example, a box of cookies may indicate that it weighs sixteen ounces and contains twenty-four cookies, but actually be short. Even in this day of increased consumer awareness, not every consumer reads every label. If actual reliance were required, a consumer who did not read the label and rely on the count and weight representations would be barred from proceeding under the UCL or the FAL because he or she could not claim reliance on the representation in making his or her purchase. Yet the consumer would be harmed as a result of the falsity of the representation. Some consumers are likely never to read the representations. Suppose a father sends his young son on an adventure to the supermarket to purchase the same box of cookies. He would be cheated on the purchase but be without relief if he failed to read and rely on the label. *** The goal of consumer protection is not advanced by eliminating large segments of the public from coverage under the UCL... .

In *Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F. 3d 508, 511 n.4 (2d. Cir.

2005), the court stated:

Originally . . . the statute, which applies to a broad range of deceptive practices regardless of the perpetrator's intent, was only enforceable by the Attorney General. In 1980, however, § 349 was amended to provide a private right of action for “any person who has been injured by reason of any violation of this section.” . . . [T]he New York courts, in keeping with the prophylactic purposes of § 349, . . . required that a plaintiff seeking to recover under § 349 show only that the practice complained of was objectively misleading or deceptive and that he had suffered injury “as a result” of the practice. [internal citations omitted].

In International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 850, 443 N.E.2d

1308, 1314 (1983), the court stated:

{The defendants} . . . appear to argue that a cause of action under G.L. c. 93A is restricted by the traditional limitations of the common law actions for fraud and deceit; the argument focuses on the adequacy of IFIC's proof of actual reliance. This focus is inappropriate. This court has rejected the proposition that a plaintiff must show proof of actual reliance on a misrepresentation under c. 93A, . . . What the plaintiff must show is a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception.

And in *In re Lupron Marketing and Sales Practices Litigation*, 295 F. Supp.2d

148, 181 n.37 (D. Mass. 2003), the court stated, in a multi-jurisdictional case:

In contrast to plaintiffs' common-law fraud claims, none of the specified state consumer protection acts (as best I can determine) requires proof of actual reliance on the deceptive act. They require proof only of a causal connection between the deceptive act and a plaintiff's loss.

See also K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc., 301 Wis. 2d 109, 129, 732

N.W. 2d 792, 803 (2007) (consumer protection act claim requires proof of causation, not

reliance). Each of the above-cited cases provides persuasive authority that supports the position

of the Plaintiffs in the instant case. The Circuit Court of Putnam County was correct in

concluding that:

the cases from the jurisdictions which hold that proof of reliance is not required under their consumer protection statutes are more in line with the policies pertaining to liberal construction of remedial statutes that have been articulated by the West Virginia Supreme Court of Appeals. [Amended Order, p. 39].

E. The Cases And Other Authority Cited By Wyeth And Its *Amicus Curiae*, The Product Liability Council, Are Unpersuasive And Do Not Demonstrate That The Circuit Court Erred In Its Ruling.

Initially, it should be noted that in an article cited by Wyeth's *amicus curiae*, the Product Liability Council, the author complains that "*only a few state courts* have [adopted Wyeth's and the PLC's position that] in a misrepresentation case, causation and reliance are essentially the same thing." Scheuerman, S., "The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiff(s) to Allege Reliance as an Essential Element," 43 *Harvard Journal of Legislation* 1, 22 (2006) (emphasis added). There is no reason for this Court to join those "few state courts."

Wyeth begins its discussion of cases from other states with *Weinberg v. Sun Company, Inc.*, 565 Pa. 612, 777 A.2d 442 (P. 2001). *Weinberg* was a case where the issue to be decided was whether a false advertisement had in fact caused the plaintiff class members to purchase a particular type of gasoline. The class was defined as "*consumers who believed the false message* that Ultra® would enhance engine performance and purchased Ultra® for that reason." 565 Pa. at 614, 777 A.2d at 444 (emphasis added). Under these facts -- where the subjective belief of the class members and their resultant purchases were their alleged common characteristic -- it is hardly surprising that the court concluded that proof of causation in that case required showing that the consumers purchased gasoline in reliance upon a "false message." This factual situation is different than the instant case, where the alleged deficiencies and differences in what the women in the Plaintiff class received are not a function of their subjective beliefs when they purchased the drugs.

Beyond the specific facts of the *Weinberg* case, and more importantly for the issues before this Court, the *Weinberg* court took a view of Pennsylvania's consumer protection act that is at odds with the view that this Court has taken of the WVCCPA. The *Weinberg* court stated that: "[t]he UTPCPL's 'underlying foundation is fraud prevention.' Nothing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation." 565 Pa. at 619, 777 A.2d at 616 [emphasis added].

This holding by the *Weinberg* court -- that the right of private action under Pennsylvania's consumer protection law is essentially a codification of the elements of common-law fraud -- is directly contrary to this court's holding in *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995), that:

The purpose of the 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.*

194 W.Va. at 777, 461 S.E.2d at 523. And of course, it is the "reliance" element of the "traditional cause of action" of common-law fraud that the *Weinberg* court read into Pennsylvania's consumer protection statute.⁹ For these reasons, Wyeth's citation to *Weinberg* is unpersuasive.

⁹ It should be also noted that the restrictive approach taken by some Pennsylvania courts to their consumer protection statute has been strongly criticized by commentators. See Buckingham, S., "Distinguishing Deception and Fraud: Expanding the Scope of Statutory Remedies Available in Pennsylvania for Violations of State Consumer Protection Law," 78 *Temple Law Review* 1025, 1046 (Winter 2005) ("[t]he Pennsylvania Supreme Court should abrogate the requirement that the plaintiff prove the elements of common law fraud . . ."). See also Davis, A., "Commonwealth v. Manson: Dueling Opinions from the Appellate Courts of Pennsylvania Over Consumer Protection," 17 *Widener Law Journal* 431, 447 (Winter 2008) ([T]he superior court holds fast to its dated rule requiring the elements of fraud . . .").

Wyeth's citation to *DeBouse v. Bayer*, 235 Ill.2d 544, ___ N.E.2d ___, 2009 WL 4843362 (Ill. 2009) is similarly unpersuasive. The *DeBouse* court stated that its ruling was based upon the "basic principle . . . that to maintain an action under the [Illinois Consumer Protection] Act, the plaintiff *must actually be deceived by a statement or omission that is made by the defendant.*" 235 Ill.2d at ___, ___ N.E.2d at ___, Slip. op. at 5. This "principle," of course, is the view taken by the Pennsylvania court in *Weinberg* – that the state's consumer protection act is simply a codification of common-law fraud, including its reliance requirement -- a view that as noted is contrary to the view adopted by this Court in *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995), that the WVCCPA is intended to expand a consumer's remedies beyond traditional common-law remedies.

Additionally, the *DeBouse* opinion also takes a view of the duties of a drug manufacturer that is markedly different from the holdings of this Court. The Illinois court states that "offering prescription drugs for sale in Illinois is [not] a representation that the drug is safe for its intended use;[]" and holds that a consumer cannot "rely on" any "implied statement" by the manufacturer to the effect that the drugs that they received were in fact safe, etc. 235 Ill.2d at ___, ___ N.E.2d at ___, Slip. op. at 6. This view of a drug manufacturer's duty is distinctly at variance with this Court's holding in *State ex rel. Johnson and Johnson v. Karl*, 220 W.Va. 463, 477-478, 647 S.E.2d 899, 913-914 (2007), stating that:

[drug manufacturers have a duty to provide] "warnings of dangerous side effects"; [information about] "dangers involved with the product"; "dangerous side effects and risks"; "possible side effects"; "dangers inherent in a prescription drug"; "information about the drug's dangerous propensities" "caution against a drug's side effects;" "[information] about the drug's...potential dangers.

For these reasons, the *DeBouse* opinion is no more persuasive on Wyeth's behalf than is *Weinberg*.

A third state consumer protection act case discussed by Wyeth, *Lloyd v. General Motors Corp.*, 397 Md. 108, 916 A.2d 257 (2007) is also unhelpful to Wyeth's cause. In *Lloyd*, a class of consumers who purchased certain automobiles brought an action against the automobiles' manufacturers, claiming that the automobiles had an unsafe defect that caused seats to collapse rearward in moderate and severe rear-impact collisions. None of the consumers had suffered a physical injury, but they all claimed to have received a product that was substantially and materially different from and inferior to what they were entitled to receive. The *Lloyd* court held that the lower court had improperly dismissed the consumers' claims under the Maryland consumer protection statute, because the difference between what the consumers received and what they were entitled to receive constituted an ascertainable loss. 397 Md. at 150, n.17, 916 A.2d at 281, n.17. While the *Lloyd* opinion notes that reliance has been required in some other Maryland cases – assumedly where the facts of the case dictated such a requirement, nowhere in the opinion is there reference to individualized purchase decision reliance by the members of the Plaintiff class.

The *Lloyd* opinion also states that the defendants' wrongful failure to disclose the true risks of the defective seat backs constituted not only the basis for a private right of action under Maryland's consumer protection act, but also for a common-law action for fraudulent concealment, which, the court states "includes the situation where the defendant actively undertakes conduct or utters statements designed to, or that would, *divert attention away from the defect.*" (397 Md. at 138, n. 11, 916 A.2d at 274, n.11, citations omitted, emphasis added).

Wyeth's conduct in "diverting attention away from the defect" is precisely the kind of concealment that the Plaintiffs have alleged in the instant case. See *Scroggin, supra*:

Wyeth's response plan involved the following strategy: "shift attention to other cancers;" characterize the study as "just one more paper;" and highlight flaws in the study's methodology. The task force's stated goal for an upcoming meeting of the American Society of Clinical Oncology was to "[o]vershadow [the] Cummings data" by *directing media attention elsewhere*. *** Handwritten notes regarding the study state "keep U.S. press busy" and "*dismiss/distract*." [emphasis added].

Thus, the *Lloyd* opinion shows that consumers like the Plaintiffs in the instant case, who "could not have discovered the cause of action [Wyeth's deceptive and misleading unlawful conduct and their resultant loss] despite the exercise of reasonable diligence," 397 Md. at 139, 916 A.2d at 275 (citations omitted), had standing to assert both common-law and consumer protection act claims, despite the lack of evidence of "any affirmative action to indicate reliance[.]" *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, -202 W.Va. at 175, 503 S.E.2d at 264 (1998).

In summary, the state-law cases from other jurisdictions that are discussed by Wyeth do not demonstrate any reason why this court should abandon its traditional remedial reading of the WVCCPA and adopt Wyeth's suggestion that *W.Va. Code*, 46A-6-106(a) [1974] is a codification of common-law fraud in which individual purchase decision reliance on deceptive misconduct must always be pled and proved.

The cases discussed by the *amicus curiae* Product Liability Council ("PLC") fare no better in bolstering Wyeth's arguments. The PLC initially discusses *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001). In that case, and unlike the instant case, the plaintiffs were not purchasers of the tobacco products in question; rather, they were

HMOs [that] brought these actions against the tobacco companies seeking to recover costs of increased health-care services incurred as a result of their members' tobacco-related illnesses.

In *Group Health Plan*, the court stated that the HMOs "appear to concede that, as part of their necessary proof of a causal nexus between their damages and the defendants' wrongful conduct, they must demonstrate that defendants' conduct had some impact on their members' use of tobacco products that caused their damages." 621 N.W.2d at 13-14. Given this concession, the Minnesota court unsurprisingly stated that some sort of proof of reliance by the HMO members would be required under the facts of the case to establish that the defendants' conduct "caused" members to use the tobacco products, and that thereby the HMOs spent money for the members' care, etc. *Id.* This situation is factually distinguishable from the instant case, where the Plaintiffs' claimed ascertainable loss of receiving different and inferior drugs is not tied to the Defendants' causing the women in the Plaintiff class to purchase Wyeth's drugs.

More importantly, while the court in *Group Health Plan* recognized that proving causation under the facts of that particular case could require some sort of proof of reliance, the court went on to soundly reject the argument that is made by the PLC and Wyeth in the instant case -- that proof of individualized "purchase decision reliance" by each woman in the Plaintiff class was required. In this regard, the *Group Health Plan* court stated:

The language of the statutes therefore establishes that, to state a claim that any of the substantive statutes has been violated, the plaintiff need only plead that the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby. Allegations that the plaintiff relied on the defendant's conduct are not required to plead a violation. [621 N.W.2d at 12.]

While we conclude that causation is a necessary element in a damages claim under the misrepresentation in sales statutes, in light of the reality that the root cause of the HMOs' claimed damages is their members' smoking-related injuries allegedly

caused by the misconduct of the tobacco companies and the statutory authorization to “any person injured by a violation” to bring an action, we do not interpret the language of subdivision 3a to require a strict showing of direct causation, as would be required at common law. Rather, as the court of appeals has expressed it, the statute requires that there must be some “legal nexus” between the injury and the defendants' wrongful conduct. . . . This reading is consistent with the intent of the legislature to provide relaxed requirements for pleading and proof in such actions. [621 N.W.2d at 14.]

[W]e reject the view expressed in two federal court decisions that our misrepresentation in sales laws require proof of individual reliance in all actions seeking damages. . . . **To impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions.** Moreover, we are confident that the legislature would not have authorized private damages actions such as this, where the alleged misrepresentations are claimed to have affected a large number of consumers, while retaining a strict burden of proof that depends on evidence of individual consumer reliance. [621 N.W.2d at 15, internal citations omitted, emphasis added.]

Given the procedural posture of this case, we decline to explicate further what method or manner of proof is necessary to satisfy the causal nexus requirement in general or, in this case, in particular. We necessarily must leave resolution of this issue to the federal district court where it can be considered in the concrete context of the evidence actually offered by the parties.

The *Group Health Plan* opinion therefore is decidedly unhelpful to Wyeth's argument that the Plaintiffs in the instant case must prove individual purchase decision reliance.¹⁰

¹⁰ The PLC also cites to *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, (D.Md. 2001). *Shreve* was a personal injury case where the plaintiff suffered severed fingers using an allegedly defective snow blower. The court held that the Maryland consumer protection act did not provide a legal basis for the personal injury claim because "there is no indication whatsoever that defendants knew of any defect and covered up its existence through sales practices or materials." 166 F.Supp.2d at 418. These facts are different than the allegations in the instant case, where (1) the Plaintiffs are not claiming any personal injuries, but rather that as consumers and purchasers they received something other than what they were

The PLC also cites to *Williams v. Purdue Pharma Co.*, 297 F.Supp.2d 171 (D.D.C. 2003). In *Williams*, the court stated that the plaintiffs "do not allege that OxyContin failed to provide them effective pain relief or that they suffered any adverse consequences from their use of OxyContin. Defendants argue that, absent such allegations, 'it must be assumed that OxyContin worked for plaintiffs and that consequently *they got what they paid for.*' . . . *The Court agrees.*" 297 F.Supp2d at 176 (emphasis added).¹¹ Based on *Williams*, the PLC argues that a West Virginia consumer who purchases and receives powerful drugs whose actual benefits and risks and dangers and safety have not been properly ascertained or disclosed, as a direct result of the drug manufacturer's deliberately deceptive conduct – that such a consumer "got what she paid for."

But the PLC is wrong. When West Virginia consumers buy prescription drugs, they do not pay for improperly tested, dangerous substances -- especially when it turns out that the drugs have been marketed with "reckless disregard to the risk of injury." *Scroggin, supra*. See Syllabus Point 3, *State ex rel. Johnson and Johnson v. Karl*, 220 W.Va. 463,477-478, 647 S.E.2d 899, 913-914 (2007); see also *Peters v. Johnson*, 50 W. Va. 644, ___, 41 S.E. 190 (1902) and discussion *supra*.¹² To suggest that this Court adopt the *Williams'* court's position – that

entitled to receive; and (2) where the Plaintiffs contend that their ascertainable loss occurred precisely because Wyeth, having good reason to know of dangers and risks in its HRT drugs, "covered up" those risks through a course of "dismiss/deny" conduct (*Scroggin, supra*).

¹¹ The primary theory asserted by the plaintiffs in *Williams* was "fraud on the market," based on alleged overcharging for Oxycontin -- a claim that is not made by the Plaintiffs in the instant case.

¹²In the circuit court's Order at page 37, the court discussed an unpublished opinion by a court in Missouri that rejected imposing an actual reliance requirement under that state's consumer protection act. The Order noted that in *Collora v. R.J. Reynolds Tobacco Co.*, 2003 WL 23139377 (Mo. Cir. 2003), whether or not the plaintiff purchased the product based on the alleged deceptive conduct was "irrelevant," because under Missouri law it is "presumed that the customer has relied upon the obligation of fair dealing in making his or her purchase." The *Collora* case illustrates how some courts have taken the approach of simply presuming reliance when a defendant has failed to provide accurate information about its products that a consumer is legally entitled to receive.

such a consumer simply "got what she paid for" -- is contrary to established West Virginia jurisprudence. To adopt the position advocated by Wyeth and the PLC would immunize egregious misconduct from accountability, and would lead to consumers paying for and receiving dangerous, negligently tested drugs -- without any recourse under consumer protection laws specifically designed to protect the public from deceptive commercial conduct. This Court should give the PLC's "she got what she paid for" argument no weight.

F. The Constitutional Doctrine Of Standing Does Not Bar the Plaintiffs From Maintaining Their Suit Under *W.Va. Code*, 46A-6-106(a) [1974] Because They Have Plausibly Alleged That They Have Suffered A Legal Injury That Was Caused By Wyeth.

In its Brief in the instant case, Wyeth repeatedly attempts to conflate and replace the requirement that a defendant's unlawful deceptive conduct *cause* an injury or ascertainable loss to a plaintiff -- with Wyeth's wished-for requirement that the Plaintiffs must prove they actually *relied on* Wyeth's deceptive conduct in making a purchase decision. This effort can be clearly seen in Wyeth's contention that the women in the Plaintiff class lack constitutional "standing" to assert a claim under the WVCCPA. The circuit court indicated in its Order that there might to be some of tension between the constitutional doctrine of standing and the sensible interpretation of *W.Va. Code*, 46A-6-106(a) [1974] that the circuit court adopted. *See* Amended Order, p. 40. However, giving all due respect to the circuit court's expression of concern, it can be readily demonstrated that there is no tension whatsoever between the proper application of the language of *W.Va. Code*, 46A-6-106(a) [1974] and constitutional standing principles.

Standing is not an abstract matter, and is always viewed in light of the particular claims being made in a case. *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 95, 576

S.E.2d 807, 822 (2002) states that “standing is gauged by the specific common-law, statutory or constitutional claims that a party presents.” The general law of West Virginia regarding standing was articulated by Justice Davis in *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W.Va. 99, 111-112, 602 S.E.2d 542, 554-555 (2004) (Davis, J., concurring):

This Court has indicated that “[g]enerally, standing is defined as ‘[a] party’s right to make a legal or seek judicial enforcement of a duty or right.’” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black’s Law Dictionary 1413 (7th ed.1999)). Ultimately, “the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed. 343 (1975). See also *Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968) (“In other words, when standing is placed in issue in a case, the question is *whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue[.]*”).[emphasis added].

Applying the analysis set forth by Justice Davis: if the women in the instant case are not the "proper parties" to request adjudication of the issue of whether they have suffered ascertainable losses as a result of Wyeth's unlawful conduct -- then who is?

In *Bennett v. Spear*, 520 U.S. 154, 162, 168-171, 117 S.Ct. 1154, 1161, 1164-65, 137 L.Ed.2d 281 (1997) (citations omitted), the United States Supreme Court discussed the issue of causation and injury in connection with challenges to a plaintiff's standing:

To satisfy the ‘case’ or ‘controversy’ requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant and that the injury will likely be redressed by a favorable decision. [Justice Scalia wrote that the defendant’s argument that plaintiffs had not sufficiently alleged causation] wrongly equates injury “fairly traceable” to the defendant with injury as to which the defendant’s actions are the very last step in the chain of causation. ***[The] petitioners have met their burden - which is extremely modest at this stage of the litigation - of

alleging that their injury is ‘fairly traceable’ to the [defendant’s conduct]. [emphasis added].

This admonition by Justice Scalia -- that the plaintiff’s burden of alleging “causation” in establishing constitutional “case or controversy” standing is “extremely modest” – was recently reinforced in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161-162 (4th Cir. 2000) (*en banc*):

The “fairly traceable” requirement ensures that there is a genuine nexus between a plaintiff’s injury and a defendant’s alleged illegal conduct. See *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130. But . . . the “fairly traceable” standard is “not equivalent to a requirement of tort causation.” *Id.* (quoting *Powell Duffryn Terminals*, 913 F.2d at 72). Other circuits have refused to interpret it as such. See *Cedar Point Oil Co.*, 73 F.3d at 557-58; *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 505 (3d Cir.1993); *Powell Duffryn Terminals*, 913 F.2d at 72-73.

See also *In re Mutual Funds Inv. Litigation*, 519 F.Supp.2d 580, 586 (D. Md. 2007) (plaintiff class representative in securities litigation had Article III standing where “she plausibly alleges that (1) she has suffered an injury in part traceable to a defendant..., and (2) her claimed injury is shared in common with others who have been similarly harmed by the same defendant’s actions.”)

If the Plaintiffs in the instant case had not alleged and pointed to evidence from which a rational jury could find that the Plaintiffs had suffered ascertainable losses as a result of Wyeth’s unlawful conduct, the Plaintiffs would lack both statutory and constitutional standing. But they have done so; and there is no tension between the circuit court’s correct statutory interpretation and constitutional standing requirements.

G. The Powers Granted By The Legislature To The West Virginia Attorney General To Enforce The West Virginia Consumer Credit and Protection Act Do Not Affect The Remedies Available To Consumers Under the Act.

Wyeth (and its *amicus curiae* PLC) argue that the women in the Plaintiff class are improperly seeking to usurp the role of the Attorney General of West Virginia ("WVAG") -- who is authorized to take action to prevent unlawful conduct under the WVCCPA without necessarily alleging or proving that a consumer has suffered an ascertainable loss as a result of that unlawful conduct. *See, e.g., W.Va. Code, 46A-7-111 [1974]*, authorizing the WVAG to bring an action restraining creditors and their agents if their conduct is "likely to" cause injury to consumers. However, the Plaintiffs do not allege that their injuries are inchoate, threatened, or "likely." The women in the Plaintiff class have all suffered real, ascertainable losses.

Wyeth and the PLC also argue that the Legislative grant of such authority to the WVAG means that a narrow construction must be given to the statute giving private rights of action to consumers, *W.Va. Code, 46A-6-106(a) [1974]*. However, this argument directly contradicts the mandate of *W.Va. Code, 46A-7-113 [1974]*, which states:

The grant of powers to the attorney general in this chapter *does not affect remedies available to consumers under this chapter or under other principles of law or equity.* [emphasis added].

Applying this statutory language to the instant case, the Legislative grant of powers to the WVAG to bring consumer protection cases without proof of actual injury to a consumer "does not affect" the remedies that are available to the women in the Plaintiff class under *W.Va. Code, 46A-6-106(a) [1974]*. *Id.* Wyeth's and the PLC's contentions to the contrary are foreclosed by the language of *W.Va. Code, 46A-7-113 [1974]*.¹³

¹³ The PLC's discussion regarding the similar powers of the Federal Trade Commission ("FTC") (PLC *Brief* pp. 8-9) is unhelpful to Wyeth's arguments. The PLC argues that because the government can on its

CONCLUSION

Every West Virginia consumer/drug purchaser is entitled to receive prescription drugs whose substantial and material risks and benefits have been fairly, properly, and adequately investigated and disclosed by their manufacturer. When a consumer does not receive such drugs – not because of an accident or mistake, but because of a manufacturer's extensive course of unlawful deceptive conduct – such a consumer, whether or not she "relied on" a particular misrepresentation by the manufacturer when she decided to purchase the drugs, has standing to assert a private right of action under *W.Va. Code*, 46A-6-106(a) [1974], based on her ascertainable loss of receiving drugs that were substantially and materially different from and inferior to what she was entitled to receive, "as a result of" the manufacturer's unlawful deceptive conduct.

own enforce consumer protection laws, any grant of the right to consumers to recover for injuries caused by violations of those laws should be narrowly construed. The PLC brings to this Court's attention to certain "problems" that some United States Senators foresaw -- in 1914! -- if private rights of action were allowed under state consumer protection acts. *Id.* **The PLC even points out the specific danger that was to be avoided: "a certain class of lawyers, especially in large communities, will arise to ply the vocation of hunting up and working with such suits[.]"** (*id.*, p.9). (The Plaintiffs regret that the PLC has not brought its powers to bear on further delineating the characteristics, ethnicities, etc. that were thought to be associated with this "certain class of lawyers.") The PLC, consistent with its institutional purpose, advocates returning to a "traditional" era, when commerce was unfettered by direct accountability to ordinary citizens. However, the West Virginia Legislature and this Court have rejected this approach:

The purpose of the 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. As suggested by the court in *State v. Custom Pools*, 150 Vt. 533, 536, 556 A.2d 72, 74 (1988), "[i]t must be our primary objective to give meaning and effect to this legislative purpose." Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995).

Based on all of the foregoing, the West Virginia Supreme Court of Appeals should rule that the women in the Plaintiff class who purchased Wyeth's HRT drugs have alleged and pointed to evidence showing that they suffered ascertainable losses as a result of Wyeth's unlawful deceptive conduct, and that these women are not additionally required to prove that they or their doctors relied on specific deceptive misrepresentations made by Wyeth when they decided to purchase the HRT drugs. This Court should also rule, therefore, that the Circuit Court of Putnam County, did not err in denying Wyeth's Motions to Dismiss and for Summary Judgment. Finally, this Court should rule that the Circuit Court of Putnam County correctly answered the Certified Question, and that in an action brought under *W.Va. Code*, 46A-6-106(a) [1974], proof of individual reliance on deceptive conduct in making a purchase decision is not a mandatory requirement to show that a defendant's unlawful deceptive conduct caused a consumer to suffer an ascertainable loss.

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CERTIFICATE OF SERVICE

I, Thomas Rodd, counsel for the Respondents Shirley White, et al., hereby certify that I have this 22nd day of February served a copy of the foregoing "RESPONSE BRIEF OF RESPONDENTS SHIRLEY WHITE, ET AL." upon the following counsel for the parties of record and *amici curiae* by First Class, U.S. Mail, postage pre-paid.

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