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No. 69600-9-1

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**COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON**

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WANDA BUNCH, on behalf of herself and others similarly situated,

Respondent/Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY and DEPOSITORS  
INSURANCE COMPANY,

Petitioners/Defendants.

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STATE OF WASHINGTON  
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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

### A. Plaintiff's Lawsuit

Wanda Bunch (Bunch) filed a lawsuit in King County Superior Court against her insurance company, Nationwide Mutual Insurance Company and Depositors Insurance (collectively Nationwide). The lawsuit arose out of the discovery of water damage to a home Bunch owns. Nationwide refused to pay anything for the damage, asserting that its policy excluded water damage. Bunch asserts that she is entitled to coverage under a broader reading of her insurance policy stemming from a policy ambiguity. As alleged in her complaint, Bunch's policy excludes damage caused by, among other things, "wear and tear; marring; deterioration; inherent vice; latent defect; mechanical breakdown." CP 29. But her policy goes on to say that "[i]f any of these cause water to escape ..., " then the policy covers "loss caused by the water" along with "the cost of tearing out and replacing any part of a building" necessary to make certain repairs. *Id.* Another court found a similar Nationwide policy to be ambiguous in *Liebel v. Nationwide Ins. Co. of Florida*, 22 So.3d 111, 117 (Fla. Dist. Ct. App. 2009). Bunch asserted several claims common to insurance actions, including claims for damages and for an injunction under the Consumer Protection Act, chapter 19.86 RCW (CPA). Bunch asserted that, if she is correct about the policy ambiguity, all Nationwide

insureds in Washington should benefit from the broader coverage granted by the policy than Nationwide has credited.

**B. Procedural Posture**

Nationwide removed the action that Bunch filed to federal court. Nationwide's removal gave rise to a jurisdictional problem. After the water damage, Nationwide canceled Bunch's coverage so that she is no longer a Nationwide insured. This makes no substantive difference for Bunch's CPA injunction claim, because she brings this claim acting as a private attorney general. *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973) (holding that "public policy is best served by permitting an injured individual to enjoin future violations of RCW 19.86, even if such violations would not directly affect the individual's own private rights"). Bunch asserts that if Nationwide is misinterpreting its policy language in a way that gives its insureds less coverage than they are entitled to, then (1) Nationwide should *stop*; and (2) Nationwide should re-adjust claims arising within the CPA limitations period applying the correct coverage. This is Nationwide's responsibility to its policyholders. *Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269, 282, 961 P.2d 933 (1998) ("The insurer evaluates the claim, determines coverage, and assesses the monetary value of the coverage.").

But because of the peculiarities of federal Article III jurisdiction, the federal court cannot reach Bunch's CPA injunction claim because she is no longer a Nationwide policyholder. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021–22 (9th Cir. 2004).<sup>1</sup> As a result, the federal court dismissed the CPA injunction claim without prejudice. As Nationwide points out, this was over Bunch's objection that her properly and timely filed CPA injunction claim was entitled to be heard on the merits just as much as any other claim and should have been remanded for that purpose. After the federal court dismissed the claim, Bunch re-filed it in King County Superior Court.

### **C. The Issue**

The issue before this Court is: what should be done about Bunch's CPA injunction claim?

Bunch believes that she is entitled to pursue it along side her other claims, just as she would have been able to do if Nationwide had never removed the case. As discussed below, there is good reason why she would want to do so. And Nationwide admits that the CPA injunction claim *must* be heard in state court. But Nationwide claims that

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<sup>1</sup> There is no reason to think that this issue would arise in the more usual case where the plaintiff in an insurance case is still a policyholder of the defendant insurance company. The problem of this case appears to be confined to the relatively narrow class of cases in which the insured-insurer relationship is no longer continuing.

Washington's priority-of-action rule means that *Nationwide* gets to decide which claims Bunch pursues and when. Nationwide claims that Bunch must litigate her claims remaining in federal court first, and can resume her CPA injunction claim in state court only at some point in the future following months or years of litigation in federal court. Nationwide assumes throughout its brief that it will win on the CPA *damages* claim in federal court. But Nationwide leaves out an inconvenient fact: if Nationwide *loses* in federal court—if Bunch establishes that Nationwide *did* violate the CPA—then the federal litigation *cannot* determine the CPA injunction claim; it could serve only as a precursor to more litigation in state court to determine the parameters of injunctive relief. This simple reality precludes Nationwide from meeting the test for the priority-of-action rule, res judicata, or collateral estoppel. And it means that the trial court was right to deny Nationwide the stay it requested.

**D. Relief Requested**

As a practical matter, Bunch will be unlikely to benefit from a favorable decision from this Court. The appeal itself has given Nationwide the benefit of a stay and the parties have been required to proceed in federal court. Nonetheless, Bunch asks this Court to hold:

1. When a plaintiff's claims must be split up because a federal court has jurisdiction to reach some, but not all of them,

Washington courts will not automatically preclude the plaintiff from pursuing claims remaining in state court merely because of the procedural fortuity that some of the claims must proceed in federal court.

2. The trial court has discretion to determine those cases in which a plaintiff ought to be able to pursue claims remaining in state court, notwithstanding the removal of some to federal court.
3. The priority-of-action rule does not preclude the pendency of two actions when, as in this case, different relief is sought in the two actions.

Finally, nothing that the trial court did in this case deserves the pejorative accusation leveled by Nationwide that it “presumed to install itself as the arbiter between Bunch’s state court action and the federal action.” Appellant’s Opening Brief at 19. What the trial court ordered is that, as condition of allowing Bunch’s CPA injunction claim to proceed, it would take reasonable steps as necessary to ensure that the parties were not required to repeat the same work twice merely because two actions were pending. Far from arrogating control over the federal action, the trial court was recognizing the need to control the action before it to ensure that the parties would be protected from duplicative burdens. We would expect

the federal court to do no less. Both courts' rules require discovery to be done efficiently. If discovery were done in the federal court, we would expect the state court to protect either party if it were sought to be repeated in state court. And vice versa. Nationwide's accusations are unfair to the trial court. In arguing that the trial court was trying to arrogate power over a federal court, Nationwide is trying to construct a bogey man that is entirely fictitious.

## II. STATEMENT OF THE CASE

Bunch filed an action against Nationwide in King County Superior Court. CP 26–35. Bunch asserted claims arising out of a denial of insurance coverage for damages and for an injunction under the Consumer Protection Act, chapter 19.86 RCW (“CPA”), among others. *Id.* Bunch sought to maintain the action as a class action with respect to an ambiguity she alleges in her policy. *Id.* Bunch alleges that the policy purports to exclude coverage for water damage, yet affords coverage for the same damage if caused by a series of causes such as “wear and tear.” Bunch sought to represent a class consisting of “[a]ll insureds with respect to property located in the State of Washington who have submitted claims for water damage and whose claims were denied in whole or in part . . . based on the ambiguity in the policy . . .” CP 30–31.

Nationwide removed the action to federal court. Bunch sought remand of the CPA injunction claim because it was not within the federal court's subject matter jurisdiction. CP 98–106. The federal court agreed that it lacked subject matter jurisdiction to reach the CPA injunction claim, but instead of remanding dismissed it without prejudice. CP 51–59. Bunch therefore re-filed the claim in King County Superior Court where it was originally. CP 1–8.

Nationwide moved to stay the CPA injunction claim pending resolution of the federal action under the “priority-of-action” rule. CP 9–20. That rule explicitly requires that two actions seek “identical” relief in order to justify a stay. *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981). Consistent with this and other Supreme Court precedent, the superior court made a discretionary determination that Nationwide was not entitled to a stay. CP 223–24. In denying a stay, the superior court took the reasonable precaution of ordering the parties to avoid any unnecessary expense resulting from the pendency of two actions, ordering:

1. Nationwide's Motion to Stay is DENIED.
2. The parties and their counsel shall use reasonable efforts to minimize additional cost resulting from the pendency of two actions.
3. The parties and their counsel shall use reasonable efforts to ensure that discovery conducted in one action need not be duplicated in the other.

4. Any party may make an appropriate motion in the event it believes it is being exposed to duplicative costs unnecessarily.

CP 223–24. Nationwide appeals.

### III. ARGUMENT

#### A. The trial court’s order must be affirmed under controlling Supreme Court precedent.

##### 1. Identity of relief is lacking.

The Supreme Court has described the priority-of-action rule as follows: “the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved.” *Sherwin*, 96 Wn.2d at 80. The rule applies “only” when the cases involved are “identical as to subject matter, parties and relief.” *Id.*

Bunch’s state and federal court actions do not meet the priority-of-action test, because there is no identity of relief between the two actions. The priority-of-action rule “does *not* apply even though the first court could grant the relief sought in the second court, if such relief has not in fact been sought there.” *Id.* (emphasis added) (citing *Brandt v. Stowe*, 20 Misc.2d 856, 194 N.Y.S.2d 77 (1959)). “[O]verlap[.]” in the relief sought is insufficient to invoke the rule if “identity” of relief is lacking. *American Mobile Homes of Wash., Inc. v. Seattle-First National Bank*, 115 Wn.2d 307, 320, 796 P.2d 1276 (1990).

There is not even potential “overlap” here. The federal court has ruled it is *prohibited* from granting the relief that Bunch seeks in state court. The federal court determined that limitations on its jurisdiction flowing from Article III of the United States Constitution do not permit it to issue Bunch’s requested CPA injunctive relief—the only relief she seeks in the state court action. Because the two actions do *not* seek “identical” relief, the test for the priority-of-action rule is not met. It follows that the superior court did not err in denying Nationwide’s motion.

There is no general rule that two actions cannot proceed simultaneously merely because of an overlap, even a close one, in issues. Neither Washington courts, *Trust Fund Servs. v. Heyman*, 15 Wn. App. 452, 454–55, 550 P.2d 547 (1976) (trial court properly declined to continue action pending determination of federal labor law in parallel federal action), nor federal courts, *Travelers Indemnity Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990) (error for federal trial court to abstain from exercising jurisdiction because of parallel state-court action), stay or continue actions for the *mere* reason that another court is deciding other claims with overlap in issues.

**2. The state and federal court actions lack concurrent jurisdiction.**

The priority-of-action rule does not apply for another reason: there is no concurrent jurisdiction by the two courts over the two actions. “[T]he underlying purpose of the priority-of-action rule is to determine which trial court has jurisdiction to control the proceedings.” *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 917–18, 913 P.2d 375 (1996). The real issue here is whether Bunch can pursue her CPA injunction claim along with her other claims—as she would have been entitled to do if Nationwide had never removed the action. The priority-of-action rule has *never* been applied to hold that a validly asserted claim must be put on hold at the insistence of the very party against whom the claim has been asserted. The federal court is hearing certain claims that Nationwide has a right to have heard in federal court. The state court is hearing another claim that Nationwide does *not* have a right to have heard in federal court. Two courts are not exercising concurrent jurisdiction at all, so the purpose of the priority-of-action rule is not implicated.

When the first action is subject to jurisdictional limitations, such as when an agency is “incompetent” to hear a claim brought in a subsequent court action, the priority-of-action rule does not apply. *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass’n*, 111 Wn.

App. 586, 608, 49 P.3d 894 (2002). Here, because it lacks jurisdiction, the federal court is similarly “incompetent” to hear Bunch’s injunction claim. As a result, the priority-of-action rule does not require a stay of the state-court action.

It is undisputed that the Supreme Court’s test for priority-of-action requires identity of relief and that identity of relief is lacking. It also requires concurrent jurisdiction over the claims, and there is none here. The superior court’s determination that the priority-of-action rule does not apply was a correct application of the law. It must therefore be affirmed.

**B. Nationwide seeks to evade clear Supreme Court precedent based on a flawed analysis of res judicata.**

In the trial court, Nationwide argued the priority-of-action rule. On appeal, it has pivoted to arguing res judicata, and, for the first time in its opening brief, collateral estoppel. These shifting theories reflect the simple fact that the Supreme Court test requires identity of relief and such identity is lacking. So Nationwide argues that the Supreme Court meant something other than what it said, arguing that the priority-of-action rule is *really* nothing more than the res judicata test in disguise (and now, collateral estoppel). But Nationwide cannot demonstrate that the federal action would have res judicata effect on Bunch’s CPA injunction claim in state court. On the contrary, Nationwide recognizes that the federal action

would *not* have the res judicata effect of barring the injunction claim in state court. If res judicata applied, the federal action would bar the state court action in its entirety. But Nationwide has always conceded that Bunch is entitled to further litigation in the state court after the federal action to secure injunctive relief as appropriate.<sup>2</sup>

**1. Nationwide's pivot to res judicata**

Res judicata does not apply. Res judicata requires the following:

To make a judgment Res judicata in a subsequent action there must be a concurrence of identity in four respects: (1) Of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.

*Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396, 429 P.2d 207 (1967)

(quoting *Northern Pac. R. Co. v. Snohomish Cy.*, 101 Wash. 686, 172 P.

878 (1918)). Here, identity of cause of action is lacking. The effect of res

judicata is to bar a claim that has already been decided. *Hilltop Terrace*

*Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29

(1995) ("Resurrecting the same claim in a subsequent action is barred by

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<sup>2</sup> The Court should recognize that this is a concession Nationwide is forced to make. Bunch is entitled to a decision on her CPA injunction claim *on the merits*. Nationwide cannot reasonably take any other position. But this merits determination can occur *only* in state court. This highlights that the issue is not which court has jurisdiction, but what sequence the two courts' adjudications must take. Neither the priority-of-action rule nor any law Nationwide has cited has *ever* been invoked to give the defendant the right to insist on one sequence or another.

res judicata.”). But when a different action is based on a different claim that raises some of the same issues, the claim is not barred, even though issues that were previously litigated may not be re-litigated under the rules of collateral estoppel. *Id.* (“When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel.”).

Nationwide concedes that Bunch’s federal action cannot bar her CPA injunction claim as res judicata. Nationwide contemplates that at the conclusion of the federal action the state court would *still* have to decide the merits of Bunch’s CPA injunction claim. The most obvious reason why res judicata does not apply is that if Bunch were to prevail in federal court, even Nationwide agrees it would not bar her CPA injunction claim. Nationwide insists that it is not trying to prevent Bunch from asserting her CPA injunction claim. But a plaintiff who sues and prevails is just as much barred under res judicata from suing again. *Landry v. Luscher*, 95 Wn. App. 779, 781, 976 P.2d 1274 (1999) (plaintiffs’ second action for additional damages for personal injury was barred after plaintiffs sued and prevailed for damages for property damage). In contrast, Nationwide contemplates that after spending years litigating in federal court, Bunch can then resume her CPA injunction claim in state court and proceed to litigate such matters as the precise conduct subject to being enjoined, the

parameters of final injunctive relief, and any related issues such as recovery of attorney fees for securing injunctive relief—none of which the federal courts have jurisdiction to reach. The very notion of having to continue the CPA injunction claim after conclusion of the federal action shows that res judicata clearly does not apply.

Even if Bunch were to lose in federal court, it would be true to say only that her CPA injunction claim *might* be subject to a motion to dismiss. For example, the federal court could conclude that Bunch lacks coverage for a reason independent of the ambiguity in her insurance policy, or that Bunch did not suffer actual damages that would support an award. But the absence of coverage would not bar a CPA claim premised on an unfair or deceptive act by the insurer. *Coventry*, 136 Wn.2d at 279 (insured may maintain CPA action in the absence of coverage). And the absence of actual damages would not bar an injunction claim if Bunch could nevertheless demonstrate legal injury under the CPA. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 58, 204 P.3d 885 (2009) (“‘Injury’ is distinct from ‘damages.’”) (citation omitted). These issues would remain to be litigated in the state court, a fact that shows, again, that the federal action cannot act as a res judicata bar on the state court action. Because res judicata does not apply, the priority-of-action doctrine cannot apply either. *Civil Serv. Comm'n of City of Kelso v. City of Kelso*,

137 Wn.2d 166, 177, 969 P.2d 474 (1999) (“Because res judicata does not prevent Stair from arbitrating his grievance, the priority-of-action doctrine likewise will not bar the arbitration.”).

## **2. Nationwide’s pivot to collateral estoppel**

In the trial court, Nationwide argued the priority-of-action rule. But that argument fails because identity of relief is lacking. Then, in seeking discretionary review, Nationwide argued res judicata. But that argument fails because identity of cause of action is lacking, and Nationwide itself envisions further litigation in state court. So, without missing a beat, Nationwide has pivoted in its opening brief again, this time arguing that the priority-of-action rule is really concerned with collateral estoppel. That no Washington court has ever said so does not appear to concern Nationwide or its lawyers.

Res judicata and collateral estoppel are different doctrines. As the Supreme Court has explained:

The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted

*Seattle-First Nat. Bank v. Kawachi*, 91 Wn.2d 223, 225–26, 588 P.2d 725 (1978). “Where res judicata precludes relitigation of an entire cause because of an identity of parties and issues culminating in a judgment,

collateral estoppel is less inclusive, preventing retrial of but one or more of the crucial issues or determinative facts.” *Bordeaux*, 71 Wn.2d at 396. The Supreme Court again noted the distinction in *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 872, 93 P.3d 108 (2004): “Todd raised the defense of res judicata (claim preclusion), not the defense of collateral estoppel (issue preclusion). We must be vigilant in preserving the distinction between these two defenses.”

Bunch agrees that if either court determined an issue relevant in both actions (such as whether Nationwide engaged in an unfair or deceptive act or practice), the determination would have *collateral estoppel* effect in the other action. As shown above, it does not follow that either action would bar the other as *res judicata*. But no Washington court has ever held that the mere possibility that collateral estoppel could apply as to some issues means that a court must stay an action. This test would be inconsistent with the test for the priority-of-action rule on its face. The priority-of-action rule requires “identity” of relief. Collateral estoppel clearly does not.

But most important, Nationwide never answers the question of why it is entitled to force Bunch to litigate her claims in federal court first. In reality, Nationwide’s own arguments foreclose any risk of inconsistent decisions or the waste of judicial resources. If the state court decided that

Nationwide did or did not violate the CPA, that finding would have collateral estoppel effect in federal court as well. Neither court would ever have to revisit an issue litigated in the other. But neither the priority-of-action rule nor any legal authority holds that Nationwide has the right to insist on litigation of the claims in federal court first.

**C. This court should not disturb the trial court’s discretion.**

**1. The abuse-of-discretion standard.**

Nationwide concedes that this appeal is governed by the abuse of discretion standard. In applying the priority-of-action rule, courts do not “blindly” apply a “‘first filed, first prevails’ rule.” *Am. Mobile Homes*, 115 Wn.2d at 321. This case shows why. Bunch filed all her claims in a court that could hear them all. She asked the federal court to remand instead of dismiss with prejudice. This is the later filed action only because the federal court left Bunch no other way to pursue her CPA injunction claim. Instead of blindly following a first-filed rule, trial courts have discretion to consider appropriate equitable considerations. *Id*; *see also Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 161, 744 P.2d 1032 (1987) *amended*, 109 Wn.2d 107, 750 P.2d 254 (1988) (doctrine of comity to another tribunal discretionary); *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000) (decision on whether to stay civil action due to pending criminal action reviewed for abuse of discretion);

*Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982)  
(trial court decision applying “first to file” rule reviewed for abuse of discretion).

“An appellate court will find an abuse of discretion only on a clear showing that the court’s exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (quotations omitted).

**2. The trial court was entitled to find that Bunch’s rights would not be protected if the injunction claim were stayed.**

As noted above, to prevail on her damages claims in federal court, Bunch must prove actual damages, whereas she can establish her injunction claim in state court merely upon a showing of legal injury under the CPA. *Panag*, 166 Wn.2d at 58.

In addition, Bunch seeks to maintain this action as a class action with respect to the ambiguity she alleges in her insurance policy. Bunch’s CPA injunction claim in state court is subject to a different standard for class certification than Bunch’s damages claims in federal court. Under CR 23(b)(2), Bunch is entitled to maintain an action for injunctive relief on a class basis if Nationwide “has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

injunctive relief ... with respect to the class as a whole.” In contrast, to maintain her damages claims on a class basis in federal court, Bunch will be required to meet the different standard of Fed. R. Civ. P. 23(b)(3), which, like Washington’s CR 23(b)(3), requires Bunch to show that common questions “predominate” over individual ones and that a class action is “superior” to other available methods of resolution. Moreover, Fed. R. Civ. P. 23(f) allows interlocutory appeals of class certification orders in federal court, further drawing out federal proceedings.

The trial court was entitled to conclude that there is no good reason why Bunch should have to spend years trying to prove actual damages in the federal courts and meet a higher class certification standard, when she would be entitled to a quicker remedy, subject to a lesser burden of proof, and a lower class certification standard, in state court. The trial court was entitled to find that Bunch’s right to bring a claim for an injunction will *not* be protected in the federal action.

But when Washington courts have applied the priority-of-action rule to stay an action, they have uniformly found that the non-moving party’s rights would be completely protected in the other action. *E.g.* *Atlantic Cas. Ins. Co. v. Oregon Mut. Ins. Co.*, 137 Wn. App. 296, 304–05, 153 P.3d 211 (2007) (“[i]n the garnishment action, the garnishee insurance company, here, Atlantic, is entitled to raise any defense it had

against its policy holder against the garnishing creditor.”); *City of Yakima v. International Ass’n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 675–76, 818 P.2d 1076 (1991) (reactionary declaratory action filed by defendant in another forum sought “identical” relief to that already at issue in the first action). Here, Bunch is not “entitled to raise any [claim]” in the federal that she can in the state-court action. The trial court was within its discretion to conclude that because Bunch’s rights would not be protected in the federal action, the state-court action should not be stayed.

**3. Nationwide’s fears are nonexistent.**

Nationwide has utterly failed to show that it would be unfairly prejudiced if Bunch is permitted to pursue her CPA injunction claim at the same time as her other claims just as she would have been entitled to if Nationwide had never removed the action. The trial court’s order protects Nationwide from the incurring of unnecessary expense through the pendency of two actions by requiring the parties to use reasonable efforts to minimize the incurring of duplicative costs and discovery.

Indeed, the trial court was justified in finding that while some ministerial tasks such as witness disclosures would have to be served in both actions, which could easily be copied, the major expenses such as depositions and discovery would not have to be duplicated. The state and federal rules allow depositions taken in one action to be used in another.

*E.g.* ER 801(d)(1) (prior statement of a witness), ER 804(b)(1) (former testimony). Discovery responses by the parties are broadly admissible as party-statements under both state and federal rules. ER 801(d)(2).

Failing to establish any real prejudice, Nationwide falls back on arguing the potential for the “waste of judicial resources” or the “risk of inconsistent results.” Nationwide relies on an unpublished federal trial court order refusing to remand a claim for these asserted reasons. *See Hardie v. Countrywide Home Loans Servicing LP*, No. C08-1286RSL, 2009 WL 210860, at \*1 (W.D. Wash. Jan. 28, 2009).

But as Nationwide’s own reasoning shows, there is no risk of wasting judicial resources or arriving at inconsistent results. Nationwide concedes that an issue decided in either action will have preclusive effect in the other. Thus, one court will not be asked to revisit a finding made by another and for the same reason there is no risk that one court will rule differently than another.

Indeed, contrary to the unpublished trial court order on which Nationwide relies, the Ninth Circuit has explained that the federal courts recognize that parallel proceedings will be necessary when the federal courts have jurisdiction over some, but not all, parts of an action:

Our circuit’s interpretation of § 1441(a) and *Schacht’s* interpretation of § 1447(c) admittedly may result in largely duplicative state and federal court proceedings in this case

and others like it. A case that is properly removed in its entirety may nonetheless be effectively split up when it is subsequently determined that some claims cannot be adjudicated in federal court

*Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1007 (9th Cir. 2001). No party contends that parallel proceedings are ideal, but they are necessary to protect the parties' respective rights when the federal courts are compelled to break up actions based on the peculiar limitations of their jurisdiction. There is no reason for this Court to be more sensitive than the Ninth Circuit to the occasional need for parallel proceedings.

**D. The Court should not re-write the priority-of-action rule to cover a situation it was never intended to cover.**

The priority-of-action rule has never been applied in order to determine which of two courts, validly exercising jurisdiction over different claims, should proceed first. This case is unlike cases in which the Washington appellate courts have been called upon to determine which of two *counties* addressing the same claims should proceed. This is because the federal court has exclusive jurisdiction over the claims before it and the state court has exclusive jurisdiction over the claim before it.

The Court should not use the priority-of-action rule to try to determine whether Bunch's federal claims or state claim should proceed first. Presumably, a fair inquiry into whether the federal claims or the state claim should precede the other could reasonably lead to the conclusion

that the state claim should come first. But in that case, this Court certainly could not stay the federal action to give effect to its conclusion. The point is that Nationwide is advocating an inherently one-sided approach.

Nationwide decries the very parallel proceedings that the *Ninth Circuit* has held are sometimes required. But even if the Court accepted Nationwide's argument that, contrary to the Ninth Circuit's view, parallel proceedings are never allowed, it still would not follow that it is the federal action that should come first or that it is Nationwide that should get to decide.

Nationwide has never asked the federal court to stay its proceedings. The priority-of-action rule simply does not apply to this issue and does not entitle Nationwide to a stay.

The proper resolution is as the trial court ordered. Bunch should be allowed to pursue her validly asserted claim for injunctive relief just as she would have been allowed to do if Nationwide had never removed the action. Since another court is not adjudicating that claim, there is no justification for the trial court to stay proceedings. But since another court is adjudicating other claims with overlapping issues, the trial court should appropriately ensure that the parties are not forced to do the same tasks twice. This resolution is far more fair than giving one party, Nationwide, the right to dictate the sequence of the litigation for no real reason other

than to avoid ministerial functions such as filing the same witness list in two courts.

#### IV. CONCLUSION

This is not a case where Nationwide would be spared the bulk of the work through the issuance of a stay. Nationwide will still have to defend against Bunch's claims. The burden on Nationwide of defending the state-court action at the same time as the federal action will entail a few additional filings in the form of witness lists and the like. But it will not entail any duplicative discovery, as the trial court has already ordered. These minor burdens do not justify forcing Bunch to spend years litigating more challenging claims in federal court before she has the chance to pursue a quicker, more efficient remedy in state court. The trial court correctly perceived these considerations. Bunch respectfully asks that the Court affirm. But most importantly, she asks that this Court issue an opinion recognizing that trial courts have discretion to evaluate the very parade of horrors portrayed by Nationwide in the rhetorical flourishes populating its brief. For when these horrors ring hollow, as Nationwide's do, they should not be used to give the defendant the right to dictate to the plaintiff what claims will be pursued and when.

The sequence is all this appeal is really about. No one contends that just because Nationwide was able to remove the case, Bunch should

have to forfeit her CPA injunction claim on the merits. Such a contention would run counter to the very purposes of federal removal jurisdiction, which is not supposed to give defendants a more *advantageous* forum. As a result, Nationwide concedes that Bunch is entitled to a merits determination of her CPA injunction claim and it concedes that this determination must occur in state court. This distinguishes this case from every single Washington case applying the priority-of-action doctrine to stay an action. Nationwide has not cited a single case in which the doctrine has ever been applied to stay an action that was admittedly the only action in which a particular claim could be pursued.

Ultimately, there is no principled reason why the state court action should await the resolution of the federal action. Why, for example, is it not the reverse? Nationwide certainly does not want the federal action stayed pending resolution of the state court action, but it would accomplish the same thing. Why does Nationwide get to insist that one action be stayed versus the other, when it was Nationwide's removal that forced the break-up of the action? The law does not "blindly" apply a "'first filed, first prevails' rule." *Am. Mobile Homes*, 115 Wn.2d at 321.

Bunch is not asking to litigate anything twice. She is asking to litigate the claims she is entitled to bring, and to start with the one that she thinks is the best. The few copy-and-paste tasks that would be required to

maintain two actions instead of one, such as filing two sets of the same witness lists, do not justify giving Nationwide the procedural advantage of forcing Bunch to postpone until the end of the case a claim that is subject to a lower class certification standard and well positioned to provide effective relief. It is precisely such a claim that would be most efficient to address at the beginning of the case. The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of June, 2013.

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