

No. 80572-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

AMICUS CURIAE BRIEF ON BEHALF OF
CERTAIN WASHINGTON-BASED COMPANIES

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I. INTRODUCTION

Amici are five nationally-known companies headquartered in Washington (the “Washington Companies”) that develop innovative products and services, which they license and sell to consumers across the country.¹ They ask the Court to reverse the decision below because it imposes on Washington-based companies onerous legal rules that will govern their relationships with consumers across the nation – rules that do *not* burden their competitors in other states. Further, the decision of the Court of Appeals runs counter to the trend of case law across the country and to decisions of this Court. The Washington Companies urge the Court to reverse on two grounds:

First, in certifying a class that the trial court in its discretion declined to certify, the decision below contradicts *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 84 (2007). Under *Indoor Billboard*, a fact finder must consider “all relevant evidence” in deciding whether a plaintiff has established the causation element of a CPA damages claim. In a case involving allegedly deceptive advertising, such as this, “all relevant evidence” must include evidence whether the plaintiff saw, understood, and cared about the advertising, none of which can be shown on a class basis. Even for an “omissions” claim, the trier of fact at least must consider whether the plaintiff saw advertising from which the defendant omitted information; that evidence generally will be individual (not class) in nature.

¹ The five companies joining in this brief are Amazon.com, Clearwire Corporation, Holland America Line Inc., Microsoft Corporation, and T-Mobile USA, Inc.

Second, in holding that its ruling on causation would govern the claims of consumers living across the nation, the decision below departs from the Restatement (Second) of Conflict of Laws. The commentary to the Restatement makes clear that Washington law should not govern all claims of consumers across the country just because AT&T Wireless had its headquarters and made decisions in Washington. Dozens of courts reject this “headquarters state” theory, for sound reasons that go to the heart of federalism. A few weeks ago, this Court in *McKee v. AT&T Corp.*, No. 81006-1 (Wash. Aug. 28, 2008), rejected the “headquarters state” choice of law theory in a consumer case, holding that Washington law supplied the rule of decision for Washington consumers.

When the Washington Companies serve consumers in other states, they (like every business) must comply with local state laws, including laws against deceptive trade practices. But if the decision below stands, Washington businesses will face an additional burden: a Washington statute of national application that allows class certification and recovery of damages in deceptive advertising cases without regard to the need to prove causation – even if the consumer’s state law requires that proof. The Court should refuse to impose that burden on Washington businesses.

II. ARGUMENT

A. The Court Should Follow *Indoor Billboard* and Reverse the Court of Appeals’ Erroneous Ruling on CPA Causation.

Plaintiffs do *not* allege that AT&T engaged in intrinsically improper conduct. To the contrary, plaintiffs acknowledge that AT&T

Wireless had the right, established by federal law, to pass through “federal universal service contribution costs.” 47 C.F.R. § 54.712.² Plaintiffs thus “challenge[] only nondisclosure (and misleading disclosure) of the practice,” CP 1126, and say that their claim turns on the allegation “that [AT&T] billed more for service than the amount advertised.” Schnall Supp. Br. (May 29, 2008) at 8.

Causation presents a central issue in deceptive advertising claims. The decision below, however, adopts an approach to causation that makes *Indoor Billboard* irrelevant in class actions and puts Washington at odds with the consumer protection jurisprudence of almost every other state.

1. The Court of Appeals and Plaintiffs Advocate an Approach to Causation That This Court Rejected in *Indoor Billboard*.

The trial court made the discretionary determination that individual questions would predominate at trial because of the need for plaintiffs to show a “causal link” between the alleged deception and plaintiffs’ actual damages under RCW 19.86.090. In reversing, the Court of Appeals disposed of CPA causation through the terse assertion that “it is enough to establish causation that [plaintiffs] purchased the service and AT&T charged them a fee that was not a tax or government surcharge.” *Schnall v. AT&T Wireless*, 139 Wn. App. 280, 292 ¶ 17 (2007). Accordingly,

² “All major long distance carriers attempt to recover the costs of their contributions to the USF fund from their customers by way of line-item surcharges.” *In re Universal Serv. Fund Tel. Billing Prac. Litig.*, 300 F. Supp. 2d 1107, 1114 (D. Kan. 2003). *See also In re Incomnet, Inc.*, 463 F.3d 1064, 1066 (9th Cir. 2006) (“telecommunications companies pass this cost through to their subscribers” through a charge that “generally appears on phone bills as the ‘Universal Service Fund Fee’”).

plaintiffs claim they could “meet the proximate cause standard based on facts that are common to the class.” Schnall Supp. Br. 7-11.

But Washington law properly takes a more comprehensive view of the evidence admissible on the issue of causation. In *Indoor Billboard*, the Court emphasized that a plaintiff in a CPA case must prove causation using the same standard that governs any case involving proximate causation, *i.e.*, under the “but for” test set forth in the Washington Pattern Instructions. 162 Wn.2d at 82, ¶ 52. Thus, in deciding whether deceptive conduct caused “actual damage” under RCW 19.86.090, the finder of fact in a consumer case must consider “payment of the invoice,” as well as “*all other relevant evidence* on the issue of proximate cause.” 162 Wn.2d at 84, ¶ 56 (emphasis added). The Court discussed the “relevant evidence” at length. *Indoor Billboard* pointed to its president’s testimony that he read, relied on, and was confused by Integra’s marketing materials. 162 Wn.2d at 84, ¶ 58. Integra pointed to evidence of *Indoor Billboard*’s actual knowledge of the facts that Integra allegedly misrepresented and concealed. 162 Wn.2d at 84, ¶ 59. The Court found material issues of fact that precluded summary judgment. 162 Wn.2d at 85, ¶ 60.

As *Indoor Billboard* makes clear, to supply a causal link in a case involving claims of deceptive advertising, the finder of fact must consider the text of the advertising; whether the plaintiff saw the advertising; what other information or knowledge was available to the plaintiff, including other advertising; the plaintiff’s background and conduct in similar transactions; and previous dealings with the defendant. Put in terms of

this case, if AT&T Wireless showed that Mr. Schnall did *not* see the allegedly deceptive advertising and that he routinely paid an identical fee to previous carriers without complaint, a properly instructed jury would have the right (perhaps even the obligation) to find that the deceptive advertising did *not* cause him any actual damages, foreclosing recovery under RCW 19.86.090. But if the same jury heard that a different consumer saw the advertising and that it prompted her to buy AT&T Wireless service, it might reach a different conclusion. In each instance, the jury would be ruling based upon its consideration of “all relevant evidence” bearing on causation, just as *Indoor Billboard* requires.

But as this discussion shows, the jury’s decision in a deceptive advertising case necessarily turns on what a particular plaintiff saw and knew, and how much the facts at issue mattered to that plaintiff. Plaintiffs cannot provide that sort of proof on a common basis. Indeed, although plaintiffs promise to explain their “common evidence” of causation, they actually discuss *only* the allegedly deceptive practices, Schnall Supp. Br. at 8, and the supposed injury, Schnall Supp. Br. at 9-10. Plaintiffs do not identify *any* link between the deceptive practice and the injury – which is what “causation” means – and they ignore the individual evidence that defendants have the right to present in any case where the state of plaintiff’s knowledge may influence the trier of fact.

For similar reasons, courts across the country in dozens of cases have denied class certification of deceptive advertising claims. Many have held that the need to examine the mix of information available to

each consumer forecloses certification, for the obvious reason that a consumer who knows the truth cannot show that the alleged deception caused “actual damages.” *E.g., Wright v. Fred Hutchison Cancer Research Ctr.*, 2001 WL 1782714, at *3 (W.D. Wash. Nov. 19, 2001); *Poulos v. Caesar’s World, Inc.*, 379 F.3d 654, 665-66 (9th Cir. 2004); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (alleged deception regarding sweetener in fountain Diet Coke); *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1091-93 (Fla. Dist. Ct. App. 2003) (alleged deception concerning strength of calcium tablets). Other courts have declined to certify deceptive advertising claims because plaintiffs cannot show causation without at least presenting individual proof that they actually saw the advertising. *E.g., Solomon v. Bell Atl. Corp.*, 777 N.Y.S.2d 50, 55-56 (N.Y. App. Div. 2004) (“[p]laintiffs have not demonstrated that all members of the class saw the same advertisements” or any “advertisements at all”); *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 164 (Ill. 2002); *Gonzales v. Proctor & Gamble Co.*, 247 F.R.D. 616, 623-24 (S.D. Cal. 2007); *Fink v. Ricoh Corp.*, 839 A.2d 942, 959-60, 975-76 (N.J. Super. Ct. Law Div. 2003).³ Contrary to what the decision

³ Some of the many decisions refusing to certify deceptive advertising claims include *Caro v. Proctor & Gamble Co.*, 22 Cal. Rptr. 2d 419, 431-32 (Cal. App. 1993) (“fresh” orange juice); *Davies v. Philip Morris U.S.A., Inc.*, 2006 WL 1600067 at *3 (Wash. Super. Ct. 2006) (light cigarettes); *Green v. McNeil Nutritionals, LLC*, 2005 WL 3388158 at *7 (Fla. Cir. Ct. Nov. 16, 2005) (artificial sweetener); *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 504 (N.D. Ga. 2006) (credit improvement services); *Osborne v. Subaru of America, Inc.*, 243 Cal. Rptr. 815, 824 (Cal. App. 1988) (cars); *Philip Morris USA Inc. v. Hines*, 883 So.2d 292, 294-95 (Fla. Dist. Ct. App. 2003) (light cigarettes); *In re Sears, Roebuck & Co. Tools Marketing & Sales Practices Litig.*, 2007 WL 4287511 at *6 (N.D. Ill. Dec. 4, 2007) (tools “Made in USA”); *In re*

below and plaintiffs suggest, however, no case “would permit a private plaintiff to pursue an advertiser ... when the plaintiff ... was neither deceived nor influenced” by the allegedly deceptive advertisement. *Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001).

Indoor Billboard fits comfortably within this body of law: it requires the trier of fact to consider “all relevant evidence” bearing on causation; in a deceptive advertising case, the body of “relevant evidence” necessarily will vary from person to person. As a result, this Court should adhere to its decision in *Indoor Billboard*, reverse the Court of Appeals, and reinstate the trial court’s discretionary denial of class certification.

2. Plaintiffs Cannot Avoid the Need to Show Causation by Transforming Their Deception Case into a Case Involving “Omissions.”

Confronted with the difficulty of establishing causation, plaintiffs often argue that their claims involve omissions, not misstatements, and suggest that courts may presume causation in an omissions case. The Court of Appeals fell into this analytical trap, suggesting that stringent requirements for proving causation in an omissions case would place “class plaintiffs in the impossible position of proving a negative” and deter “meritorious private CPA claims.” *Schnall*, 139 Wn. App. at 291, ¶ 16.⁴

Worldcom, Inc., 343 B.R. 412, 422 (Bkrcty. S.D.N.Y. 2006) (long-distance plans); *Zapka v. Coca-Cola Co.*, 2000 WL 1644539 at *3 (N.D. Ill. 2000) (fountain Diet Coke).

⁴ The Court of Appeals said the trial court required proof of “reliance” and asserted that proof of “reliance” on an omission would be impossible. 139 Wn. App. at 291, ¶ 16. But the trial court actually discussed *causation*, not reliance, in terms that foreshadowed *Indoor Billboard*’s emphasis on the need to consider all “relevant evidence” of causation. CP 417-422. In any event, the common law long has recognized that “reliance” establishes the causal link between deception and damage. *See, e.g.*, Restatement (Second) of Torts § 546 cmt. a (absent reliance, “misrepresentation is not in fact a cause

But Division I's assertion (like the Washington Attorney General's brief from which it draws) does not even mention the rich precedent and commentary concerning proof of causation in cases involving omissions. Many courts have noted the artificiality of efforts to distinguish between misrepresentations and omissions. "All misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true." *Little v. First California Co.*, 532 F.2d 1302, 1304 n.4 (9th Cir. 1976). See also *Johnston v. HBO Film Management*, 265 F.3d 178, 192-93 (3d Cir. 2001). For example, plaintiffs here claim AT&T Wireless misrepresented its service plans because it advertised a fixed monthly price when, in fact, it allegedly intended to charge that price *plus* a standard, permissible pass-through of the universal service fund fee. Plaintiffs can characterize that allegation as a misrepresentation (*i.e.*, that AT&T said that it charged a fixed monthly fee when it really did not) or an omission (*i.e.*, that AT&T omitted to state its intention to pass through the universal service fund fee).

But no matter how one categorizes the alleged deception, plaintiff in a false advertising case *still* must at least have seen the advertising in question to recover "actual damages." Allegations of an omission may give rise to a rebuttable presumption of causation, but only if the plaintiff has seen or read the material from which the fact at issue has been

of the loss"). Although this Court has given plaintiffs flexibility to prove causation through other evidence, reliance always has been the principal means by which plaintiffs show a causal link between deception and damages – and it will always be part of the "relevant evidence" contemplated under *Indoor Billboard*.

omitted. See *Alter v. DBLKM, Inc.*, 840 F. Supp. 799, 807 (D. Colo. 1993); *Mirkin v. Wasserman*, 858 P.2d 568, 574-75 (Cal. 1993) (cases do not “support an argument for presuming reliance on the part of persons who never read or heard the alleged misrepresentations”). A court cannot indulge a presumption of causation if a defendant omits a material fact from an advertisement *that the plaintiff never saw*. Absent an affirmative duty to disclose (which plaintiffs do not allege), the creation of such a presumption would lack support in the case law or common sense.

Thus, in terms of the required evidence of causation under *Indoor Billboard*, characterization of plaintiffs’ claims as involving misstatements or omissions does not make any practical difference. Either way, *Indoor Billboard* requires that the jury be given the right to consider “*all ...* relevant evidence on the issue of proximate cause.” For any defendant in a deceptive advertising case, that evidence will include testimony not only as to the content of the allegedly deceptive advertising, but also as to whether the plaintiff saw the advertising, knew the truth anyway, and would have done anything different had she known the truth. If the plaintiff did not see the allegedly deceptive advertising, a jury surely would be free (at least) to find that the advertising did not *cause* the plaintiff’s injury – even if the advertising omitted information in a way that had the “capacity to deceive” those who *did* see it.⁵

⁵ The Court of Appeals suggested that a plaintiff may be able to recover damages under the CPA simply by establishing that conduct “had the capacity to deceive,” without regard to whether it deceived the plaintiff. 139 Wn. App. at 292, ¶ 17. This oft-repeated (but seldom understood) assertion derives from *State v. Ralph Williams Northwest Chrysler-Plymouth, Inc.*, 87 Wn.2d 298 (1976). But *Ralph Williams* involved an

In arguing that “omissions” deserve special treatment, the Court of Appeals relied on *Morris v. International Yogurt Co.*, 107 Wn.2d 314 (1986). *Morris* involved an individual suit (not a class action) in which International Yogurt prepared a detailed offering circular, which it gave to Morris before the parties entered into a franchise agreement. *Morris*, 107 Wn.2d at 316. The circular omitted important information. *Id.* Under Washington law, that circular formed the basis of the franchise offering under RCW 19.100.170(2). *Morris*, 107 Wn.2d at 321-22. The Court therefore held that Morris would be entitled to a rebuttable presumption that he relied on the omitted information, subject to International Yogurt’s right to present individual evidence that Morris did not rely. *Morris*, 107 Wn.2d at 328-29. In other words, the plaintiff in *Morris* could show that he *saw* and *read* the document the defendant prepared and from which the defendant omitted important information. Similar individual proof forms a crucial part of the “relevant evidence” on causation, even if plaintiffs characterize their case as involving omissions.

3. Adhering to *Indoor Billboard* Will Not Impede Consumer Protection.

Finally, plaintiffs resort to the thinly veiled suggestion that the Court should tinker with *Indoor Billboard* to make it easier to obtain certification of class actions in CPA claims. *See Schnall Supp. Br. 14-15.*

enforcement action, in which the Attorney General does not need to prove actual damages, which makes causation irrelevant. By contrast, a private plaintiff must establish causation to recover “actual damages.” Plaintiffs cannot seriously contend that they can prove that conduct inflicted “actual damages” simply by showing it had the “capacity” to deceive the public – even if it did not actually deceive the plaintiff.

But even plaintiffs must admit (because the principle is so well settled) that the Court may *not* recalibrate the substantive elements of claims to make class certification easier. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (pursuit of class claim cannot “abridge, enlarge or modify any substantive right”); *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (“enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited”). This Court must either apply *Indoor Billboard* without regard to the consequences for class certification or overrule a decision less than a year old.

The Court should resist the temptation to relax the substantive elements of a CPA claim to make class certification easier. Aside from the importance of *stare decisis* to the orderly administration of justice, plaintiffs’ arguments exaggerate the impact of reversing the Court of Appeals and adhering to *Indoor Billboard*.⁶ For one thing, the Court’s decision here will have no bearing on cases that do *not* depend on the state of the consumer’s knowledge but instead involve allegations of intrinsic deception or unfairness. And even where a plaintiff must establish state of mind to recover, individual consumers may sue to recover three times actual damages, obtain attorneys fees (including, where appropriate, a fee multiplier), and seek an injunction under RCW 19.86.090 “even when the

⁶As explained above, many states in which the Washington Companies and their competitors transact business have construed their consumer protection acts to require proof of actual deception in deceptive advertising cases, which forecloses class certification of those claims. See, e.g., *Oliveira*, 776 N.E.2d at 164 (Illinois); *Weinberg*, 777 A.2d at 446 (Pennsylvania). Plaintiffs have not given this Court any reason to suspect that consumers (or, frankly, the plaintiffs’ bar) in those states have suffered any ill effects from that approach to consumer litigation.

injunction would not directly affect their own private interests.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853 (2007). Further, the Attorney General has an arsenal of formal and informal enforcement tools available. See RCW 19.86.080 (authorizing suit by Attorney General); RCW 19.86.100 (authorizing assurances of discontinuance of violation).

B. This Court Should Reject the “Headquarters State” Approach to Choice of Law in Consumer Cases.

The Court of Appeals held that when non-Washington consumers sue Washington businesses, Washington law has nationwide reach. The combination of a relaxed causation standard for proposed CPA class actions and the nationalization of Washington law invites out-of-state consumers to bring grievances against Washington businesses to this state – rather than enlist the assistance of their local courts, applying their local law.⁷ For Washington businesses that transact business with consumers across the country, this development has breathtaking significance.

The decision below stands almost alone in its approach to choice of law in consumer class action cases, leaving the Washington Companies exposed both to suits in Washington under a nationwide application of the CPA and to litigation in other states under local law. As almost every court to consider the issue has held, a consumer’s home state (not the business’s headquarters state) supplies the law to protect against consumer deception and compensate state residents. This Court’s decision in *McKee* fits well within the judicial mainstream, unlike the decision below.

⁷ The named plaintiffs here include residents of California, New Jersey, and Florida, all of which have robust consumer protection statutes to protect their residents.

1. The Court of Appeals Did Not Properly Apply Choice of Law Factors under the Restatement.

In deciding whether Washington law governed the claims of AT&T Wireless's consumers across the country, the Court of Appeals invoked the Restatement (Second) of Conflict of Laws § 148(2), which sets forth six choice of law factors for deception-based claims:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations;
- (b) the place where the plaintiff received the representations;
- (c) the place where the defendant made the representations;
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties;
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time; and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Schnall, 139 Wn. App. at 293 ¶ 20. After identifying this test, however, the Court of Appeals did not analyze these factors, did not discuss the comments to the Restatement, and did not cite cases applying Section 148. Instead, the Court held that a company's headquarters state supplies the governing law for consumer claims – even for consumers who live far away and never left their home states to do business with the company:

[T]he most significant relationships were in Washington because all of the marketing materials and service agreements originated in Washington at the direction of Washington employees. All of the billing and disclosure decisions were made by AT&T employees in Washington. All relevant evidence and witnesses are in Washington. Washington has a strong interest in regulating the activities of Washington businesses. And most importantly, as a

Washington business, AT&T is subject to Washington law. *Schnall*, 139 Wn. App. at 294. The court below thus focused only on conduct that followed from AT&T Wireless's headquarters location in Washington, even though it dealt with consumers in their home states.

In fact, Section 148 mandates application of the law of consumers' home states to their claims against AT&T Wireless. Although Division I relied on AT&T Wireless's domicile in Washington, the Restatement teaches that "[t]he domicile, residence and place of business of the *plaintiff* are more important than the similar contacts on the part of the defendant." Restatement § 148, cmt. i (emphasis added). Indeed, if any two factors other than the defendant's residence favor a single state, that state's law usually applies. *Id.*, cmt. j. Here, the factors that Division I ignored – (a) the place where plaintiff acted on the alleged deception; (b) the place where plaintiff received the misrepresentations; (c) the place where the defendant allegedly perpetrated deception in print or electronic media; (d) the plaintiff's domicile; and (f) the places where the plaintiff performed – *all* favor the consumers' home states. *See* Restatement § 148, cmt. f (describing causation); *id.* §148, cmt. g (focus on where consumers see allegedly deceptive advertising).⁸

The Restatement test thus unequivocally favors application of the laws of consumers' home states. This does not amount to a mere counting of contacts. *Cf. Schnall*, 139 Wn. App. at 294 ¶ 20. Rather, the

⁸ The Court of Appeals emphasized the location of evidence and witnesses. But that factor bears on forum selection; it *never* has had a bearing on choice of law, and there is no logical reason why it would. *See Johnson v. Spider Staging*, 87 Wn.2d 577, 579-80 (1976) (applying location of evidence and witnesses to choice of forum issues).

relationship between consumers and the companies with which they do business centers in the consumer's home state, where a consumer reads advertising, shops, buys, uses products, and makes payments.

2. Courts Across the Country Reject the “Headquarters State” Approach to Choice of Law for Consumer Claims.

Absent a valid contractual choice of law clause,⁹ companies that serve customers in other states must follow local rules that govern their conduct – just as businesses that come to Washington must follow this state's rules. Consumers assume that when they buy products or services without leaving home, they do not subject themselves to a foreign state's law, unless they agree to choose that state's law. Courts – including courts in this state – routinely decide disputes between resident consumers and routinely use the laws of the consumers' home states to do so.¹⁰

These principles are as old as the nation. “A basic principle of federalism is that each state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). For that reason, the decision of the Court of Appeals “that one state's law would apply to claims by consumers throughout the country – not just those in

⁹ AT&T Wireless's contracts choose the law of the subscriber's home state, which corresponds to the choice of law that would follow from application of the Restatement factors. Although the trial court declined to apply that choice of law, that clause as well favors application of consumers' home state law here.

¹⁰ Indeed, the parties' briefs show that AT&T Wireless is now defending an identical claim in California, in which plaintiffs represent a class of California customers of AT&T Wireless suing under California law. See *Randolph v. AT&T Wireless*, Alameda Cty. (Calif.) No. RG05193855. Most of the Washington Companies also have defended class actions in other states under the laws of the states where proposed class members live.

[Washington], but also those in California, New Jersey, and Mississippi – is a novelty.” *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002). This Court should set that novelty aside and restore Washington to the mainstream.

The “headquarters” approach to choice of law arrogates to a company’s home state authority comparable to that entrusted to Congress, i.e., the power to prescribe rules of liability for that corporation and for consumers across the nation who do business with the corporation. Courts regularly reject that approach. In *Bridgestone/Firestone*, 288 F.3d at 1020, the Seventh Circuit reversed a ruling that a district court could apply Michigan consumer protection law to Ford Motor Company, and Tennessee consumer protection law to Firestone Tire Company, because their headquarters were in those states, and because decisions and disclosures emanated from those states. “Differences across states may be costly ... but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.” In *Zinser v. Accufix, Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001), the Ninth Circuit affirmed a trial court that reached the same conclusion, holding that it “correctly rejected the contention that the law of a single state – either California or Colorado – applies to this action.” And in *Spence v. Glock, Ges. m. b. H.*, 227 F.3d 308, 312-13 (5th Cir. 2000), the Fifth Circuit reversed certification of a nationwide class under Georgia law, even though the defendant was incorporated, and it assembled and distributed products, and did warranty work in Georgia. The claims in that case

“implicate[d] the tort policies of all 51 jurisdictions in the United States, where proposed class members live and bought” products. *Id.* at 313. Recent state supreme court cases stand for the same proposition. *See, e.g., Barbara’s Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 920-24 (Ill. 2007); *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1035-37 (Okla. 2006); *Compaq Computer Corp. v. Lapray*, 135 S.W. 3d 657, 681 (Tex. 2004); *Henry Schein, Inc. v. Stromboe*, 102 S.W. 3d 675, 698 (Tex. 2002). Dozens of trial and intermediate appellate decisions agree.¹¹

Washington choice of law principles do not have any unique attribute that counsels a different result. Washington follows the “most significant relationship” approach to choice of law espoused in the Restatement (Second) of Conflict of Laws, *see Johnson*, 87 Wn.2d at 580, and many courts reject the headquarters state theory under the Restatement test. *See, e.g., Spence*, 227 F.3d at 312-14; *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 215 (E.D. Pa. 2000). Courts applying the *lex loci delicti*

¹¹ The following cases decided since the beginning of 2007 are illustrative: *Thompson v. Jiffy Lube Int’l, Inc.*, 250 F.R.D. 607, 627-28 (D. Kan. 2008) (“the simple expedient of selecting a defendant’s home state law for the apparent purpose of facilitating a nationwide class action strongly resembles the ‘bootstrapping’ criticized by the U.S. Supreme Court”); *Berry v. Budget Rent A Car Systems, Inc.*, 497 F. Supp. 2d 1361, 1364-66 (S.D. Fla. 2007) (refusing to certify class against car rental company under New Jersey law; claims governed by law of states in which each plaintiff rented car); *Lantz v. Am. Honda Motor Co., Inc.*, 2007 WL 1424614, at *4-6 (N.D. Ill. May 14, 2007) (deceptive marketing claim against California defendant; refusing to apply California law to non-California residents); *In re Gen. Motors Corp. Dex-Cool Prod. Liability Litig.*, 241 F.R.D. 305, 315-18, 324 (S.D. Ill. 2007) (refusing to certify nationwide breach of warranty class action; claims governed by laws of states in which consumer bought cars); *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 192-94 (E.D. Pa. 2007) (refusing to certify warranty class under Pennsylvania law, defendant’s principal place of business and place of conduct); *Beegal v. Park West Gallery*, 925 A.2d 684, 696-702 (N.J. Super. Ct. App. Div. 2007) (reversing class certification in consumer class action against cruise ship company; action governed by law of the plaintiffs’ home states).

approach, *e.g.*, *Bridgestone/Firestone*, 288 F.3d at 1016, or the “state interests” approach, *e.g.*, *Zinser*, 253 F.3d at 1188, likewise decline to apply headquarters state law. Under *every* choice of law theory, the problem is the same: the “headquarters” approach focuses on a single factor – the defendant’s domicile – and makes it dispositive by pointing to the unremarkable fact that corporations make decisions (and often manufacture products) in their headquarters state.

By contrast, the other Restatement factors, including the place where the injury occurs, the plaintiff’s domicile, and the place where the relationship of the parties is centered, favor the state where the consumer lives, interacts with the seller, makes a buying decision, and uses a product. *See* Restatement §§145, 148; *Spence*, 227 F.3d at 314-15; *Lyon*, 194 F.R.D. at 215. Injury where the plaintiff lives and buys products is not a “fortuitous” contact, as when a plane crashes in a jurisdiction that it happens to pass over. *Spence*, 227 F.3d at 315. Further, “[e]ach plaintiff’s home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws.” *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997).

Washington law has the same essential purpose. The CPA focuses *not* on redressing wrongs in Florida or New Jersey (states with their own consumer protection statutes) but on “commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010. “The Washington Legislature passed the Consumer Protection Act ... to protect

Washington citizens from unfair and deceptive trade and commercial practices.” *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547-48 (2000). Like consumer protection laws in other states, the CPA “operate[s] on the local or ‘intra-state’ level” and targets practices “with primarily a local impact.” John J. O’Connell, “Washington Consumer Protection Act – Enforcement Provisions and Policies,” 36 WASH. L. REV. 279, 284 (1961) (article by Attorney General upon passage of CPA).¹²

3. This Court’s Decision in *McKee* Rejects the Headquarters State Approach to Choice of Law.

This Court’s most recent choice of law decision came in the context of a putative consumer class action. Although the Court in *McKee v. AT&T Corp.*, No. 81006-1, 2008 WL 3932188 (Wash. Aug. 28, 2008), addressed only choice of law for contract claims, its reasoning supports the mainstream view rejecting the “headquarters state” theory. In *McKee*, the Court discussed a contract with a Washington consumer that contained a clause choosing the law of New York, AT&T’s home state. In deciding whether to enforce that clause, the Court first had to decide which state’s

¹² Although the Court of Appeals assumed that the Washington CPA has extraterritorial effect, this Court has not decided that issue, and the better-reasoned authority holds that laws such as the CPA should have intrastate reach. In *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), the Illinois Supreme Court held that Illinois’ Consumer Fraud Act applied only to conduct “primarily and substantially” within Illinois. The court recounted a state senator’s comment that the act reached only “trade and commerce that is not included within the interstate concept” – a comment almost identical to Attorney General O’Connell’s article contemporaneous with passage of the CPA. *Id.* at 852. Further, relying on the canon of statutory construction that “a statute is without extraterritorial effect unless a clear intent ... appears from the express provisions of the statute,” *id.*, the court held that the Act does not “apply to fraudulent transactions that take place outside Illinois.” *Id.* at 853. The *Avery* court then concluded that the allegedly deceptive transactions in that case took place throughout the United States, making it error to certify a nationwide class action under the Illinois Act. *Id.* at 854, 855.

law would govern absent the contractual choice of law. The Court wrote:

Courts weigh the relative importance to the particular issue of (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance of the contract, (d) the location of the subject matter of the contract, and (e) the domicile, residence, or place of incorporation of the parties. *Id.* (citing Restatement, *supra*, § 188). Here, Washington is the place of contracting, the place of negotiation (what little there was), the place of performance, the location of the subject matter, and the residence of one of the parties. New York's only tie to this litigation is that it is the state of incorporation of AT & T.

McKee, No. 81006-1, 2008 WL 3932188, at *4 ¶16 (citation omitted).

Thus, applying factors similar to those that the Restatement applies to tort claims, this Court ruled that Washington law – the law of the consumers' home state, not the law of the defendant's headquarters state – applied.

Courts in other states likewise would expect their laws to apply to claims asserted by consumers with respect to transactions in their states.

III. CONCLUSION

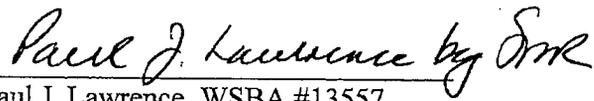
The Washington Companies urge the Court to reverse the Court of Appeals, reaffirm that the causation principles set forth in *Indoor Billboard* apply in class actions, as in individual actions, and reject the discredited "headquarters state" approach to choice of law issues.

RESPECTFULLY SUBMITTED this 29th of September, 2008.

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BY RONALD R. CARPENTER

No. 80572-5

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 29, 2008, I served counsel of record with true and correct copies of the following documents:

1. Motion of Certain Washington-Based Companies for Leave to File Amicus Curiae Brief;
2. Amicus Curiae Brief on Behalf of Certain Washington-Based Companies; and
3. Certificate of Service

by sending the same via email (pursuant to agreement with counsel) to the following:

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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed at Seattle, Washington on September 29, 2008.

By 

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ATTACHMENT TO EMAIL**

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To: Rummage, Steve
Cc: Breskin-Johnson; Kipling, Michael; ShannonS@ATG.WA.GOV; AMICUS WSTLA Foundation; Lawrence, Paul
Subject: RE: Schnall v. AT&T Wireless, Inc. (S.C. #80572-5) - Motion & Proposed Amicus Curiae Brief

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To: OFFICE RECEPTIONIST, CLERK
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Subject: Schnall v. AT&T Wireless, Inc. (S.C. #80572-5) - Motion & Proposed Amicus Curiae Brief
Importance: High

Re: *Martin Schnall, et al. v. AT&T Wireless Services, Inc.*

Mr. Carpenter: I am attaching the following documents for electronic filing in the above-referenced matter:

1. Motion of Certain Washington-Based Companies for Leave to File Amicus Curiae Brief;
2. Amicus Curiae Brief on Behalf of Certain Washington-Based Companies; and
3. Certificate of Service.

Thanks very much for your assistance.

Filed on behalf of:

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