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Court of Appeals Case No. 57523-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner AT&T Wireless Services, Inc. (“AWS”) asks this Court to review the Court of Appeals decision designated in Part II.

II. COURT OF APPEALS DECISION

AWS seeks review of the Published Opinion filed June 18, 2007. (Appendix (“App.”), A-1 - A-12 (“COA Op.” or “Opinion”)), which effectively rewrites the Washington Consumer Protection Act by eliminating the requirement that a claimant prove she was injured as a result of a violation of the Act. Worse yet, the Opinion applies Washington’s CPA to the claims of millions of out-of-state residents, even though the laws of their own states (which have much more significant contacts with their claims) would not award damages. Washington will become a magnet for national class actions, as counsel file here to avoid the stricter standards of the consumer laws of other states. This Court should accept review under RAP 13.4.

III. ISSUES PRESENTED FOR REVIEW

1. May a plaintiff recover damages under the CPA without proving that the alleged violation of the Act was the proximate cause of her injury?
2. Does Washington’s CPA apply to the claims of consumers who reside in other states, where the following events all occurred in the consumers’ home states: (a) the alleged misrepresentations were communicated and allegedly relied on; (b) the parties entered into a contract that was to be performed there; and (c) the contract included a choice of law

provision that chose the consumer's home state's laws?

3. Under the circumstances in Issue No. 2, does application of Washington law offend the due process clause of the U.S. Constitution under *Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)?

4. Did the trial court abuse its discretion when it decided that the putative contract class should not be certified because (a) a trial in which 50 different state laws apply would be unmanageable; and (b) individual inquiry into several factors was necessary to decide the contract claims?

IV. STATEMENT OF THE CASE

A. **Plaintiffs Challenge A Line Item Charge That The FCC Expressly Permits AWS to Pass Through**

Plaintiffs seek certification of a nationwide class of AWS customers challenging the Universal Connectivity Charge (“UCC”), a line item charge on their bills. The UCC was a pass-through of the “contribution” into the Universal Service Fund (“USF”) that the Federal Communications Commission requires AWS and other carriers to pay. The USF, created by the Telecommunications Act of 1996, supports subsidized services to rural and low income areas, as well as to facilities such as hospitals and schools.¹ The FCC specifically authorizes recovery of USF contributions from customers by way of a line item on monthly bills. 47 C.F.R. § 54.712 (App., A-19); *In re Federal-State Joint Board on Universal Service*, 21st Order on Reconsideration, 15 F.C.C.R. 12,050 at ¶ 3 (2000).

¹ See 47 U.S.C. § 254; *In re Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (1997).

As the trial court found, AWS used a number of different contracts with its customers during the claims period, and the language in those agreements varied in ways that the trial court considered material to Plaintiffs' claims. The agreements generally provided that the customer is responsible for "any taxes, surcharges, fees, assessments, or recoveries imposed on you or us as a result of use of the Service," but some agreements also expressly mentioned the UCC as one of the fees, taxes and surcharges for which the customer was responsible. Memorandum Opinion Denying Motion for Class Certification ("Mem. Op."), p. 2 (CP 418); *see also* CP 3510-11; 3515-16; 3236.

The UCC was specifically identified on each customer's bill. Initially, it appeared under the heading "Other Charges & Credits"; later, AWS changed the form of its bills and the UCC appeared under the heading "Taxes, Surcharges & Regulatory Fees." CP 3396. Both headings categorize accurately the UCC, and millions of customers—including the Named Plaintiffs—paid it every month without complaint.

B. The Trial Court Denied Plaintiffs' Motion For Class Certification Based on an Extensive Evidentiary Record

After reviewing an extensive evidentiary record, the trial court denied Plaintiffs' motion for class certification.² Mem. Op. (CP 417-22). Contrary to the Court of Appeals' characterization (COA Op., ¶ 4), the trial court did not deny CPA class certification because it believed that

² The trial court was very familiar with the factual record in the case, having previously decided motions on preemption and primary jurisdiction, as well as summary judgment motions on the contract claims and the choice of law on the "consumer protection" claim.

“individual reliance” is the only way to establish causation in a private CPA damages claim. Instead, the trial court applied the well-established rule that a private CPA plaintiff must show a *causal link* between his injury and the alleged CPA violation, and found “in the context of this case” that proof of causation necessarily will involve evidence individual to each potential class member. Mem. Op., p. 6 (CP 422).³

The trial court denied the contract class for three independent reasons: (1) applying the law of 50 different states would necessarily make trial of the contract claims unmanageable; (2) there are material differences among the contracts and the task of identifying which contract applied to a particular customer would render the class unmanageable; and (3) based on its earlier decision denying AWS’ motion for summary judgment on the contract claims, extrinsic evidence was necessary to interpret the contract. Mem. Op., p. 3 (CP 419).

C. The Court Of Appeals Opinion

The Court of Appeals reversed and remanded the trial court’s order. As discussed in more detail below, the Court of Appeals misinterpreted the legal basis for the trial court’s order denying class certification on both the CPA and contract claims and ignored substantial evidence in the record that supports the trial court’s decision.

The Court of Appeals also denied AWS’ cross-appeal, affirming the trial court’s decision that the Washington CPA applies to the claims of

³ The trial court also found that the CPA applied to the claims of all AWS subscribers nationwide. Mem. Op., p. 5 (CP 421). AWS cross-appealed on this issue.

all subscribers, including millions of subscribers who reside in other states. As discussed below, the home states of these subscribers have far more significant contacts with their claims than does Washington.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary of Argument

As this Court is well aware, the issue of the proof necessary to establish causation in a private CPA damages claim is “a debatable question without a clear answer under Washington law.” *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 197, 35 P.3d 351 (2001) (“*Pickett II*”). The uncertainty on this point increases the cost of litigation and leads to uneven results.⁴ This case is an extreme example; the standard that the Court of Appeals adopted effectively rewrites the CPA, eliminating the requirement of a causal link between the alleged deception and the injury suffered. Each of the four considerations set forth in RAP 13.4(b) supports review of this issue.

The decision to apply the CPA to claims brought by non-Washington residents that arose in other states also raises compelling reasons for this Court to accept review. This latter decision conflicts with rulings of this Court and raises important constitutional issues. RAP 13.4(b)(1), (3) and (4).

⁴ For example, compare the Court of Appeals decision in this case with the decision in *Davies v. Phillip Morris U.S.A., Inc.*, 2006 WL 1600067 (Wash. Super.)

B. The CPA Causation Issue

1. The Court of Appeals Opinion rewrites the statute and conflicts with decisions of this Court (RAP 13.4(b)(1)).

RCW 19.86.090 (App., A-13) provides that private CPA claims may be asserted only by a “person who is injured in his or her business or property by a violation of RCW 19.86.020[.]” This Court clearly and repeatedly has held that causation is an essential element of a private CPA damages claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986) (“A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff.”); *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (“The jury was properly instructed that it had to find ‘[t]hat [defendant’s] unfair or deceptive act or practice was a proximate cause of the injury[.]’”). This Court also has made clear that “the causal link must exist between the *deceptive act* . . . and the *injury suffered*.” *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 167, 795 P.2d 1143 (1990) (emphasis in original).

The proximate cause requirement includes two elements: cause-in-fact and legal causation. WPI 310.07 (App., A-14 - A-15); WPI 15.01 (App., A-16 - A-18) (incorporated by reference into WPI 310.07), Washington Pattern Jury Instructions – Civil. “Cause-in-fact refers to the “but for” consequences of an act—the physical connection between an act and an injury.” WPI 15.01, *cmt.* In other words, “but for” the violation, injury would not have occurred.

The Opinion effectively eliminates the element of causation-in-fact. Plaintiffs claim that AWS violated the CPA when it allegedly advertised its service at set prices per month but then, after the sale, added undisclosed charges to the consumer's monthly bill. Appellants' Opening Brief (to the Court of Appeals), p. 1. It cannot reasonably be argued that a subscriber was *injured by the violation* unless she shows that she would have acted differently had she been fully informed regarding the additional taxes, surcharges and other fees for which she would be responsible.⁵ But the Court of Appeals held that "[plaintiffs] cannot be required to prove that they would not have purchased wireless service had they known about [the UCC]." COA Op., ¶ 16. The Opinion opens the door to a recovery of "damages" by subscribers who did not suffer any injury at all as a result of the alleged CPA violation. As discussed below, this is particularly inappropriate here because millions of customers—including some Named Plaintiffs—renewed their contracts with AWS after they clearly knew about the UCC.

The evidentiary record, which the Court of Appeals ignored, shows that it cannot simply be presumed that every customer was misled as to the UCC. To the contrary, the record shows that a massive amount of information regarding the UCC and the USF was available to consumers.

⁵ The trial court correctly stated the issue: "In the context of this case, each plaintiff must show that AWS' alleged misrepresentation about the plaintiff's obligation to pay a UCC affected the plaintiff's decision to choose AWS as a wireless provider." Mem Op., p. 6 (CP 422). Of course, AWS contends that subscribers were fully informed about the fact that other charges would appear on the bills.

- AWS' contracts provided that the customer is responsible for "any taxes, surcharges, fees, assessments, or recoveries" and some expressly mentioned the UCC.⁶
- The UCC was disclosed as a separate line item on monthly bills. CP 3396, 3459, 3470.
- Between February 1998 and August 2000 AWS sent its customers three bill messages regarding the UCC. These messages described the USF and the manner in which AWS computed the UCC.⁷
- Other telecommunications providers (wireless and landline) also passed through their USF contributions. Many AWS customers had prior experience with these providers so they were aware of USF pass-throughs when they came to AWS. CP 3874–76.
- There were many other sources of information regarding the USF from the industry, the government and the media. *Id.*; CP 1210–14. For example, the FCC website displayed a "Sample Wireless Phone Bill" that included the "Universal Connectivity Charge" under "Taxes, Surcharges and Regulatory Fees."⁸

The record before the trial contained thousands of pages of public information regarding the USF and the UCC. CP 3872–4054, 1210–3071.

⁶ Mem. Op., p. 2 (CP 418). AWS' advertisements that mentioned service plans or prices during the class period also disclosed that subscribers would be subject to taxes and other charges. CP 3517. Some advertisements specifically referred to the UCC. *Id.* In addition, information regarding the UCC and other charges was provided at the point of sale and through customer care representatives. CP 3115–21; CP 3302–18.

⁷ CP 3396–98. The August 2000 bill message, which falls squarely within the class period, stated: "Telecommunications companies are required to contribute to the Federal Universal Service Fund. AT&T Wireless Services recovers its contributions to the fund through the Universal Connectivity Charge ("UCC"), which appears on your bill. Beginning with your August bill, this charge will change from a flat monthly fee of 35¢ to approximately 0.84% of your total access, airtime, roaming, and long distance usage. The UCC may be subject to changes in the future." CP 3398

⁸ CP 3873; 3878–80. The Court of Appeals' statement that "the appellants in this case . . . were forced to rely solely on the defendant's representations about the UCC" (COA Op., ¶ 14) cannot be reconciled with the record.

There is also compelling evidence that customers would have acted exactly the same way had the UCC been differently disclosed. Even the Named Plaintiffs paid the UCC month after month without protest and several of them then chose to renew their agreements with AWS.⁹ As the trial court found, under these circumstances, proof of causation requires proof that “must necessarily be individual for each potential class member.” Mem. Op., p. 6 (CP 422).

We recognize that recent opinions of this Court discuss the importance of consumer class actions. *Scott v. Cingular Wireless*, 2007 WL 2003404; *Dix v. ICT Group, Inc.*, 2007 WL 2003407. However, the fact that this case involves a putative class cannot change the substantive law governing the CPA claims. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *see also Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 (D.C. Cir. 1976); *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 332, 100 S. Ct. 1166, 632 L. Ed. 2d 427 (1980) (the “right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims”). Indeed, this Court’s authority to adopt rules such as CR 23 is limited to procedural matters. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Any change in the substantive law must come from the Legislature. *Id.*

⁹ CP 4264, 4272, 4275–76, 4289, 4298–99, 4301. In this, they were not alone. On average, AWS customers (all of whom were charged the UCC) renewed their contracts two or more times during the claims period. CP 31–32.

Regardless of how this Court ultimately resolves the question preserved in *Picket II*--i.e., whether individual reliance and knowledge is required to prove causation—it is nonetheless clear that *some* proof of causation-in-fact is required. The Opinion, however, requires certification of a class even though there is no way to prove causation-in-fact without individual inquiry into whether a particular subscriber suffered injury as a result of the alleged deception. That holding cannot be squared with this Court’s rulings in *Fisons*, *Schmidt* and *Hangman Ridge*.

2. The Opinion conflicts directly with Court of Appeals decisions that impose a specific reliance requirement (RAP 13.4 (b)(2)).

The Opinion squarely conflicts with *Nuttall v. Dowell*, which imposes a specific reliance requirement for proof of causation in a CPA case involving alleged deception. 31 Wn. App. 98, 639 P.2d 832 (1982). “[A] party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it.” *Id.* at 111. Although this Court has described *Nuttall* as the only decision that directly imposes a specific reliance requirement, the holding has been carried forward at least implicitly in a series of Court of Appeals cases, including *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 119, 22 P.3d 818 (2001) and *Mayer v. Sto Industries, Inc.*, 123 Wn. App. 443, 458-59, 98 P.3d 116 (2004), *rev’d on other grounds*, 156 Wn.2d 677, 122 P.3d 115 (2006).¹⁰

¹⁰ The Court of Appeals attempts to distinguish *Nuttall*, without success. The fact that *Nuttall* did not involve a class certification motion is irrelevant, because the class action device is procedural and is not intended to affect the substantive elements of a

3. The Opinion Creates a Significant Question of Law Under the Supremacy Clause of the U.S. Constitution (RAP 13.4(b)(3)).

The Opinion appears to hold that causation is established merely because: (1) the UCC was billed to customers; and (2) they paid it. COA Op., ¶ 17. Even if that holding were valid in another context (which is doubtful),¹¹ it cannot be applied here because FCC regulations expressly permit wireless carriers to pass their USF contributions through to customers as a separate line item. 47 C.F.R. § 54.712 (App., A-19).¹²

Under the Supremacy Clause of the U.S. Constitution, any state action that conflicts with FCC regulations or stands as an obstacle to the accomplishment and execution of Congressional objectives is preempted. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).¹³ A state court damages award based

claim. See discussion, *supra*. While it may be true that the facts in *Nuttall* would not have satisfied the public interest element of a CPA claim at the time the case was decided, the *Nuttall* Court did not rest its decision on the lack of public interest but on the failure to “establish some causal link between defendant’s unfair act and his injury.” 31 Wn. App. at 110; *Pickett II*, 145 Wn.2d at 196.

¹¹ This is essentially the same analysis that this Court criticized in *Pickett II*. The Opinion also ignores a fundamental difference between the facts here and those in *Pickett*. In the latter case, the Court found that the fees at issue were described as pass-through charges when they were not. Here, the UCC is a pass-through of a specific government charge.

¹² The Opinion likewise adopts Plaintiffs’ argument that the UCC should have been treated as “overhead,” which apparently means it should have been recovered, if at all, as part of the monthly fee charged for wireless service. COA Op., ¶ 4. But this conclusion directly conflicts with 47 C.F.R. § 54.712 (App., A-19).

¹³ It is well-established that this preemption applies to state courts as well as state legislatures and administrative agencies. The Supreme Court long has recognized that “regulation can be as effectively exerted through an award of damages” or other judicial relief as through legislative or administrative action. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); see also

on the mere fact of billing the UCC as a separate line item would conflict with the FCC's decision to permit the practice and frustrate the Congressional objective to ensure adequate funding of the USF.¹⁴

4. This is an issue of substantial public interest (RAP 13.4(b)(4)).

The standard of proof necessary to show causation in a private CPA damages claim is a recurring issue. At least one other case is now before this Court on a similar issue. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, Supr. Ct. No. 79977-6.

The causation issue also affects a great number of people, both as litigants and absent class members. Uncertainty over the standard of proof undoubtedly increases the cost of litigation. If CPA class actions for damages may be prosecuted under the standard adopted by the Court of Appeals, it also is quite likely that many more such claims will be filed here, which will increase the burden on Washington's courts.

The Court of Appeals has effectively amended RCW 19.86.090 so that a class can recover "damages" without having to show any injury as a result of the allegedly deceptive practice. This would make Washington's CPA very similar to California's Unfair Competition Law, prior to its amendment in November 2004. *See* Cal. Bus. & Prof. Code §17200. The lack of an "injury-in-fact" requirement under the California statute, it is

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578-79, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981).

¹⁴ *Id.* In the trial court, Plaintiffs disavowed any claim that they were contesting the right to pass through the UCC and conceded that their CPA claims were based solely on deception. CP 1054-55. They cannot now claim damages without showing some causal link to deception.

widely believed, gave rise to a number of frivolous lawsuits that were “a major drag on the state’s business climate.” See, e.g., W. Olsen, “*Stop the Shakedown*,” Wall Street Journal, October 29, 2004 at A14 (available at <http://nextraterrestrial.com/pdf/wsj-shakedown.htm>). As a result, in 2004 California voters passed Proposition 64, which “limits [an] individual’s right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss because of, an unfair business practice.” Proposition 64, Official Title and Summary (available at http://www.sos.ca.gov/elections/bp_nov04/prop_64_ballot_title_and_summary.pdf).

C. The Choice Of Law Issue

1. The Opinion conflicts with *Kammerer v. Western Gear Corp.* (RAP 13.4(b)(1)).

Since *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 425 P.2d 623 (1967), Washington has followed the “most significant contacts” approach set out in the Restatement (Second) Conflict of Laws. In *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981), this Court applied the Restatement to claims involving fraud and misrepresentation. As in this case, the defendant was headquartered in Washington, but the plaintiff resided in California, the representations were received and the reliance upon which the fraud claims were based occurred there, and the parties chose California law. The Court held:

California has an obvious interest in the protection of its citizens against fraud, which is enhanced when the negotiations on which the fraud claim is based occurred in California

Because Washington has no interests superior to or inconsistent with the interests of California in this controversy, application of the Restatement rule dictates that California law govern the Kammerers' claim for fraud.

Id. at 422 (quoting appellate court decision).

The pertinent section of the Restatement (Second) Conflict of Laws, when claims of misrepresentation are alleged, is § 148: "The rule of this Section applies to actions brought to recover pecuniary damages suffered on account of false representations, whether fraudulent, negligent or innocent." *Id.*, cmt. a. Section 148 likewise applies to claims brought under state consumer protection statutes, where (as here) the claims are based on alleged deception. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 82 – 83 (D. Mass. 2005); *Fink v. Ricoh Corp.*, 365 N.J. Super. 520, 839 A.2d 942, 986 (2003).

Under § 148, as applied in Washington and elsewhere, the choice of state law is based on an analysis of which state has the most significant contacts, in light of the issues raised by the misrepresentation claim. The Restatement lists several important contacts to be considered, including at least four that are particularly significant in this context. These include:

- "The place, or places, where the plaintiff acted in reliance upon the defendant's representations." *Id.*, cmt. f.
- "The place where the plaintiff received the representations." *Id.*, cmt. g.
- "The plaintiff's domicil or residence." *Id.*, cmt. i.
- "The place where the plaintiff is to render performance under the contract." *Id.*

All four of these significant contacts point to the application of the law of the customer's home state. For example, Named Plaintiff Schnall resided in New Jersey. CP 760; *see also* CP 4, 186. He entered into a contract to purchase wireless service in New Jersey allegedly based on representations that he received there. CP 4249. His performance under the contract, which in his case consisted of paying his bills, was rendered in New Jersey. CP 760. Although the Restatement provides that there are no hard-and-fast rules as to the application of § 148,

if any two of the above-mentioned contacts . . . are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues.

Id., cmt. j. Here, at least four of the critical contacts on which Mr. Schnall's misrepresentation claims are based occurred in New Jersey. Under the Restatement, New Jersey law should apply to any claims based on these alleged misrepresentations.¹⁵

2. Applying Washington's CPA to a nationwide class raises constitutional questions under the due process clause and undermines principles of federalism (RAP 13.4(b)(3) and (4)).

The Opinion concludes that the claims of consumers from 49 other states who allegedly received and relied on representations, entered into and performed their contracts, and received service entirely within their

¹⁵ The only other possible choice of law would be New York's, as Mr. Schnall's contract provided that it was subject to the law of the state associated with his phone number, i.e., New York. CP 764, 775. Although such a provision is not necessarily conclusive as to the choice of law for tort claims that arise out of the contractual relationship, it is an important factor in determining which state has the most significant relationship to those claims. *Haberman v. WPPSS*, 109 Wn.2d 107, 159, 744 P.2d 1032 (1987); *Kammerer*, 96 Wn.2d at 423. The decision to apply Washington law to his claims is clearly inconsistent with the Restatement and *Kammerer*.

home states, will be decided under the CPA, rather than the laws of their own states. What authority does Washington have to supplant the consumer protection laws enacted by the legislatures of the other states?

The U.S. Supreme Court dealt with this question in *Phillips Petroleum Corp. v. Shutts, supra*. In that case, plaintiff asserted claims in Kansas state court on behalf of a class of royalty owners. The Supreme Court ruled that, because all class members had received notice and an opportunity to opt out, it was not improper for the nationwide class action to be maintained in Kansas. However, the Court held that it violated constitutional principles of due process for Kansas to apply its law to all claims:

Even if one could say that the plaintiffs ‘consented’ to the application of Kansas law by not opting out, plaintiff’s desire for forum law is rarely, if ever, controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. ‘If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible.’

472 U.S. at 820 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337, 101 S. Ct. 633, 633 L. Ed. 2d 521 (1981)). This Court discussed the *Phillips Petroleum* case in *Pickett II*, noting that “the United States Constitution puts limits on the application of state law to national class action lawsuits.” 145 Wn.2d at 198. This Court reversed *Pickett I* in part because of the risk that Washington’s CPA could not constitutionally be applied to the claims of the out-of-state class members. *Id.*

The U.S. Senate recently recognized that the decision by one state to apply its law to transactions that occur elsewhere raises a risk to the principles of federalism. “The effect of class action abuses in state courts

is being exacerbated by the trend toward ‘nationwide’ class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.” Senate Report on the Class Action Fairness Act of 2005, p. 24 (S. Rep. 14, 109th Cong., 1st Sess.). Congressional concern over such state court decisions was one of the key factors that led to passage of the Class Action Fairness Act of 2005. *Id.*

The due process and federalism concerns addressed in *Phillips Petroleum* and *Pickett* are particularly compelling in the context of consumer protection statutes, because “state consumer protection acts are designed to protect the residents of the states in which the statutes are promulgated.” *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 216 (E.D. Pa. 2000); *In re Pharmaceutical Industry*, 230 F.R.D. at 83; *In re Relafen Antitrust Litigation*, 221 F.R.D. 260, 277 (D. Mass. 2004); *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547-48, 13 P.3d 240 (2000). Because each of the sovereign states, just like Washington, has a significant interest in protecting its own consumers, “[c]ourts have generally rejected application of the law of a defendant’s principal place of business to a nationwide class.” *In re Pharmaceutical Industry, supra*, 230 F.R.D. at 83; *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002).

D. If the Court accepts review, it also should review the Opinion as to the contract class (RAP 13.7(b)).

If the Court accepts review of this case, Petitioner respectfully requests that the Court review the Opinion regarding the putative contract

class. The Opinion misinterprets the basis for the trial court's denial of certification of the contract claims and ignores substantial evidence. As the trial court properly found, the record in this case shows that a class-wide trial on the contract claims would be unmanageable. As a result, the Opinion will result in enormous, unnecessary costs for the parties and the court unless this error is corrected.

The trial court denied certification of a class on the contract claims for a number of reasons. First, the trial court properly concluded that the laws of 50 different states will apply to the claims of the putative class. The Court of Appeals agreed. COA Op., ¶ 25. But the mere task of applying the laws of 50 states makes a class-wide trial unmanageable. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multi-state Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 64 (1986); see also *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (“[V]ariations in state law may swamp any common issues[.]”); *In re Bridgestone/Firestone*, 288 F.3d at 1015; *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 421 – 22 (E.D. La. 1997).

Moreover, the Opinion wrongly assumes that the language in the AWS subscriber agreements is the same for each member of the putative class. This ignores, as the trial court found, that some of the subscriber agreements incorporated language that specifically listed the “Universal Connectivity Charge as one of the fees, taxes and surcharges which the customer is responsible for payment.” Mem. Op., p. 2 (CP 418). The task

of identifying which class members were subject to one of the latter agreements will involve individual inquiries that will occupy an enormous amount of time and overwhelm any advantage in a class-wide trial.

Finally, the premise of the Opinion—that the trial court can resolve the contract claims solely on the language of the contract (COA Op., ¶ 27)—ignores the fact that the trial court already has concluded that it cannot decide the claims without resort to extrinsic evidence. When AWS brought a summary judgment motion on this very issue prior to the class certification decision, Plaintiffs argued that the contract’s meaning could not be resolved on the basis of its language alone: “The contract language is clearly ambiguous because it does not come right out and say that the consumer will be charged this contribution.” CP 1117-18.¹⁶ The trial court denied AWS’ motion for summary judgment, finding that interpretation of the contract raises “an issue [of] fact [] as to whether this charge actually comes within that language or not.” RP (11/22/02), 19:13-15. The only way for the trial court to resolve this issue is to resort to extrinsic evidence. The most compelling extrinsic evidence here is found in the parties’ own performance of the contract prior to the time this dispute arose. *See, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990) (“In discerning the parties’ intent, subsequent conduct of the contracting parties may be of aid.”); *see also In re Avon Securities Litigation*, 2004 WL 3761563 at *5 (S.D.N.Y.) (“The parties’ performance under the

¹⁶ *See also* RP (4/25/03), 5:16-23, where Plaintiffs’ counsel argues for consideration of extrinsic evidence to interpret the contract.

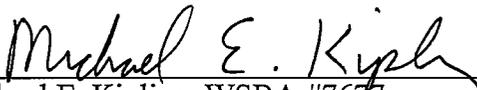
contract is considered to be the most persuasive evidence of the agreed intention of the parties.”). As to the Named Plaintiffs, their conduct shows they understood their obligation to pay the UCC.¹⁷

VI. CONCLUSION

Petitioner respectfully requests that the Court grant review under RAP 13.4.

DATED this 17 day of July, 2007.

KIPLING LAW GROUP PLLC

By: 
Michael E. Kipling, WSBA #7677

Counsel for Petitioner AT&T Wireless Services, Inc.

¹⁷ Without citing any authority, the Opinion holds that extrinsic evidence is not necessary because the subscriber agreements were standardized contracts. *Id.*, ¶ 28. To the contrary, as this Court held in *Berg*, extrinsic evidence may be considered in order to interpret any agreement, whether or not it is ambiguous. This Court has never adopted a contrary rule to be applied in the case of “standardized agreements.” Indeed, *Berg* has been applied in a number of cases that involved agreements that were “standardized.” See, e.g., *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004); *Western Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 7 P.3d 861 (2000).

APPENDIX



Schnall v. AT & T Wireless Services, Inc.
 Wash.App. Div. 1,2007.

Only the Westlaw citation is currently available.

Court of Appeals of Washington, Division 1.
 Martin **SCHNALL**, a New Jersey resident; Nathan
 Riensche, a Washington resident; and Kelly Lemons,
 a California resident; individually and on behalf of all
 the members of the class of persons similarly
 situated, Appellants/Cross-Respondents
 and John Girard, a California resident; and Sean
 O'Day, a Florida resident; Plaintiffs,

v.

AT & T WIRELESS SERVICES, INC., a domestic
 corporation, Respondent/Cross-Appellant.

No. 57523-6-I.

June 18, 2007.

Background: Consumers brought class action
 against communications company, alleging breach of
 contract and violation of Washington Consumer
 Protection Act (CPA). The Superior Court, King
 County, Douglass A. North, J., denied class
 certification. Consumers appealed and
 communications company cross-appealed.

Holdings: The Court of Appeals, Agid, J., held that:

- (1) individual reliance was not required to prove
 causation on CPA claim;
- (2) Washington law, rather than law of state in which
 communications company was headquartered,
 governed CPA claims; and
- (3) certification of class was warranted,
 notwithstanding existence of individual issues.

Reversed and remanded.

[1] Appeal and Error 30 949

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k949 k. Allowance of Remedy and
 Matters of Procedure in General. Most Cited Cases

Parties 287 35.9

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.9 k. Discretion of Court. Most Cited

Cases

Trial court's class certification decision is
 discretionary and will not be overturned absent an
 abuse of that discretion.

Trial court's class certification decision is
 discretionary and will not be overturned absent an
 abuse of that discretion.

[2] Parties 287 35.1

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.1 k. In General. Most Cited Cases

Washington courts favor a liberal interpretation of
 class certification rule to avoid multiplicity of
 litigation, free defendants from the harassment of
 identical future litigation, and save the cost and
 trouble of filing individual suits. CR 23.

[3] Antitrust and Trade Regulation 29T 138

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and
 Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk138 k. Reliance; Causation;

Injury, Loss, or Damage. Most Cited Cases

Individual reliance is not the exclusive means of
 proving causation in class action Consumer
 Protection Act (CPA) claims; it is sufficient to prove
 that a practice has the capacity to deceive a
 substantial portion of the public. West's RCWA
19.86.090.

[4] Parties 287 35.33

287 Parties

287III Representative and Class Actions

287III(B) Proceedings

287k35.33 k. Evidence; Pleadings and
 Supplementary Material. Most Cited Cases

Trial courts must take plaintiffs' substantive allegations as true when ruling on a motion for class certification. CR 23.

[5] Antitrust and Trade Regulation 29T  136

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk136 k. Fraud; Deceit; Knowledge and Intent. Most Cited Cases

Deceptive acts or practices are unlawful under Consumer Protection Act (CPA) whether or not they actually deceive anyone. West's RCWA 19.86.090.

[6] Antitrust and Trade Regulation 29T  131

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk131 k. What Law Governs; Territorial Limitations. Most Cited Cases

Washington law, rather than law of state in which communications company was headquartered, governed consumers' Consumer Protection Act (CPA) class action claims against communications company, given that most significant contacts were in Washington; all marketing materials and service agreements originated in Washington at the direction of Washington employees, all billing and disclosure decisions were made by employees in Washington, all relevant evidence and witnesses were in Washington, communications company was a Washington business subject to Washington law, and Washington had a strong interest in regulating the activities of Washington businesses. West's RCWA 19.86.090.

[7] Contracts 95  206

95 Contracts

95II Construction and Operation

95II(C) Subject-Matter

95k206 k. Legal Remedies and Proceedings.

Most Cited Cases

Although contractual choice of law provisions may be considered, they do not dictate the choice of law for tort claims.

[8] Parties 287  35.13

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.13 k. Representation of Class;

Typicality. Most Cited Cases

Representative plaintiffs satisfy the typicality requirement for class certification if their claims arise from the same conduct that gives rise to the claims of other class members and are based on the same legal theory. CR 23(a).

[9] Parties 287  35.13

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.13 k. Representation of Class;

Typicality. Most Cited Cases

Where the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement for class certification. CR 23(a).

[10] Parties 287  35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest;

Commonality. Most Cited Cases

Commonality requirement for class certification is qualitative rather than quantitative and is satisfied so long as class members have one issue in common. CR 23(a).

[11] Parties 287  35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest;

Commonality. Most Cited Cases

To satisfy commonality requirement for class certification, class members must share more than a legal theory of recovery. CR 23(a).

[12] Parties 287  35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest;

Commonality. Most Cited Cases

It is not necessary that the shared questions of law or fact be identical to satisfy commonality requirement for class certification; rather, the commonality requirement is satisfied when the legal question linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated. CR 23(a).

[13] Parties 287 35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest; Commonality. Most Cited Cases

There is a common question of law and fact to satisfy commonality requirement for class certification if the "course of conduct" that gives rise to the cause of action affects all the class members and all class members share at least one of the elements of the cause of action. CR 23(a).

[14] Parties 287 35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest; Commonality. Most Cited Cases

Court may certify a class even though there are individual factual or legal issues; the relevant inquiry is whether the issue or issues shared by the class members are the dominant, central, or overriding issues. CR 23(b)(3).

[15] Parties 287 35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest; Commonality. Most Cited Cases

Time it may take to resolve individual issues is not a basis for denying class certification when a single common issue is the overriding one in the litigation, because courts have a number of methods for dealing with individual issues in class litigation. CR 23(b)(3).

[16] Contracts 95 129(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k129 Obstructing or Perverting

Administration of Justice

95k129(1) k. Agreements Relating to Actions and Other Proceedings in General. Most Cited Cases

Washington courts will enforce an express choice of law clause so long as applying it does not violate the fundamental public policy of the forum state.

[17] Contracts 95 206

95 Contracts

95II Construction and Operation

95II(C) Subject-Matter

95k206 k. Legal Remedies and Proceedings.

Most Cited Cases

Absent contrary intent, a choice of law contract clause refers only to the local law of the state but not to its conflict rules.

[18] Appeal and Error 30 949

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases
Appellate court reviews the trial court's decision to enforce a choice of law clause for abuse of discretion.

[19] Parties 287 35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest; Commonality. Most Cited Cases

To determine whether common issues predominate over individual ones, for purposes of class certification, a trial court pragmatically examines whether there is a common nucleus of operative facts in each class member's claim. CR 23(b)(3).

[20] Parties 287 35.71

287 Parties

287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.71 k. Consumers, Purchasers, Borrowers, or Debtors. Most Cited Cases

Certification of class of consumers was warranted in action against communications company, alleging breach of contract and violation of Washington Consumer Protection Act (CPA) based on the charging of an amount not authorized under contract,

and improperly represented as a government tax, surcharge, or fee; claims involved common nucleus of fact and were based on common legal theory, central issue of whether charge was a government tax, surcharge, or fee was common to all claims, claims involved standardized contract consumers were not able to negotiate or change on an individual basis, and subclasses and master's hearings were available for resolving any individual issues. West's RCWA 19.86.090; CR 23.

David Elliot Breskin, Daniel Foster Johnson, Short Cressman & Burgess, Seattle, WA, William Walter Houck, Issaquah, WA, for Appellants/Cross-Respondents.

Michael Edward Kipling, Kipling Law Group PLLC, Seattle, WA, for Respondent/Cross-Appellant.

Shannon E. Smith, Office of the Attorney General, Seattle, WA, for Amicus Curiae on behalf of Attorney General of Washington.

AGID, J.

*1 ¶ 1 Appellants brought a class action lawsuit on behalf of all AT & T Wireless Services customers who were charged a "universal connectivity charge" (UCC) from 1998 through 2003. They allege that AT & T violated Washington's Consumer Protection Act (CPA) ^{FN1} by charging the fee without disclosing it in its advertisements, misleading its customers by categorizing it as a tax, surcharge or regulatory fee, and breaching its customer contracts by raising the fee without notice. The trial court denied class certification on all of the appellants' claims on two grounds: (1) the appellants were required to prove each class member's individual reliance to establish a CPA claim and (2) choice of law issues made a class action on the contract claims unmanageable because individual issues predominated over common ones.

¶ 2 The trial court correctly ruled that the CPA applies to the appellants' nationwide claims. AT & T's most significant contacts were within the state, Washington has an important interest in regulating business activities within its state, and the alleged misleading acts occurred before any consumer contracts were executed. We also agree with the trial court that causation is an essential element of private class action claims under RCW 19.86.090. But proof of individual reliance is not the only means by which consumers may make a prima facie showing on this element. Finally, while the trial court correctly enforced the choice of law provisions in each consumer's contract, its denial of class certification on the contract claim was in error because the mere existence of individualized issues does not preclude a

class claim so long as there are both a common nucleus of operative facts and a common legal issue. Here, the appellants claim, that AT & T breached its contracts by charging them a fee that was neither disclosed in their contracts nor properly categorized as a government fee, tax or surcharge, was enough to certify the class at this stage of the proceedings.

FACTS

¶ 3 AT & T sells its wireless service on monthly plans, and subscribers pay monthly fees for the service. AT & T advertises its monthly rates in the media and other marketing materials and provides a pre-printed standard form contract to each new customer explaining the terms and conditions of service. Customer contracts include a choice of law clause. ^{FN2}

¶ 4 In addition to its monthly fees and mandatory government taxes and fees, AT & T began charging new subscribers a universal connectivity charge in 1998. In January and February 1998, AT & T sent its existing customers a notice with their bill that described the UCC and what it would cost. From 1998 through 2003, AT & T billed its customers for the UCC under the "Taxes, Surcharges, and Regulatory Fees" category. The appellants allege that the UCC is an element of AT & T's overhead, not a government mandated charge, because it reimburses fees required by the Federal Communications Commission (FCC) for the Universal Service Fund (USF), which was created to subsidize cellular service to low-income and rural areas. According to the appellants, the FCC allows, but does not require, cellular providers to recover their contributions to the USF from their customers. When customers called the AT & T service center, the appellants assert AT & T told them it was "federally mandated and not an [AT & T] initiative."

*2 ¶ 5 The appellants filed a motion to certify a class of AT & T customer plaintiffs who, like them, signed up for service between March 1998 and February 2003 and were charged and paid the UCC even though it was not in their service contract and was misrepresented as a government fee or tax. The trial court found that the CPA applied to all nationwide members of the class because CPA claims arise from statute rather than the contract, and the factual basis for the claims occurred before the parties entered into their respective contracts. But it denied class certification on both the CPA and contract claims because the appellants did not satisfy the

commonality and typicality tests set forth in CR 23(a) and CR 23(b)(3). In its memorandum opinion, the trial court explained that it denied certification on the CPA claim because each class member was required to establish causation by proving individual reliance. It denied certification on the contract claims because the choice of law provision in each consumer's contract created individualized issues of liability and provided affirmative defenses that made a class action unmanageable.

¶ 6 We granted discretionary review of the class certification issue. On January 24, 2006, the trial court entered final judgment and this appeal was converted to an appeal of right under RAP 2.2(a)(1). The appellants appeal the trial court's denial of their motion for class certification. AT & T cross-appeals the trial court's decision that the CPA applies to non-Washington plaintiffs.

DISCUSSION

[1][2] ¶ 7 A trial court's class certification decision is discretionary and will not be overturned absent an abuse of that discretion.^{FN3} The "primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group." ^{FN4} Washington courts favor a liberal interpretation of CR 23 to avoid multiplicity of litigation, free defendants from the harassment of identical future litigation, and save the cost and trouble of filing individual suits.^{FN5} Because Federal Rule of Civil Procedure 23 is identical to CR 23, courts may look to federal decisions for guidance in interpreting and construing the state rule when state and federal issues are substantially similar.^{FN6}

¶ 8 When the trial court heard the certification motion, the complaint alleged breach of contract and violations of the CPA. The appellants argue that their claims meet all of the threshold requirements of CR 23(a) and CR 23(b)(3), common issues predominate over individual ones, and a class action is superior to individual claims because the monetary losses are small. The appellants assert that the trial court's decision was an abuse of discretion and based on an erroneous view of the law because it ignored the Legislature's mandate to apply CR 23 liberally in favor of granting class certification.

Consumer Protection Act

*3 ¶ 9 The appellants allege a violation under the CPA on the ground that AT & T sold its service at an advertised price but charged the UCC, which it identified as "Taxes, Surcharges, and Regulatory Fees," in order to recoup overhead costs. When customers questioned the UCC on their bill, the appellants allege that AT & T customer service told customers it was a government-mandated charge rather than an AT & T initiative. The appellants, and the Attorney General in his amicus brief, assert that the trial court erred as a matter of law when it ruled that individual reliance is required to establish private claims under the CPA.

¶ 10 AT & T asserts that RCW 19.86.090 requires a causal link between the allegedly unfair or deceptive acts and the injury suffered by the appellant under the holding in Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.^{FN7} AT & T argues there was no basis to conclude that every AT & T subscriber was misled about his or her obligation to pay the UCC, and a class-wide trial runs the risk of giving a windfall to millions of consumers who were fully informed and paid the UCC freely and voluntarily. Relying upon Nuttall v. Dowell,^{FN8} Hangman Ridge and the Supreme Court's analysis in Pickett v. Holland Am. Line-Westours, Inc. (Pickett II),^{FN9} AT & T argues that proof of individual reliance is required to satisfy the causation requirement. AT & T contends the trial court correctly concluded that individual questions of fact predominate over common ones because a long line of cases requires proof of causation through an individual showing of reliance.

¶ 11 RCW 19.86.090 provides a private right of action to allow private individual citizens to bring suit to enforce the CPA. In Hangman Ridge, the Washington Supreme Court identified five elements that plaintiffs in private CPA claims must show to prevail: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) which affects the public interest, (4) injury to the plaintiff's business or property, and (5) a causal link between the unfair or deceptive act complained of and the injury suffered.^{FN10} Hangman Ridge did not explain how a plaintiff should or could establish causation under this test.

¶ 12 In Nuttall v. Dowell, a pre-Hangman Ridge case relied on by the trial court and AT & T, we affirmed denial of class certification in a case involving a dispute between an individual and a real estate broker.^{FN11} The plaintiff alleged that the real estate

broker confirmed the legal accuracy of a boundary and the location of an easement on property he purchased.^{FN12} After purchasing the property, Nuttall's neighbors conducted a more accurate survey that showed the true boundary line which reduced Nuttall's property from 10 to 9 acres. On appeal, we affirmed the trial court's ruling that a private CPA claim did not arise because Nuttall did not rely entirely on the accuracy of the broker's representations but independently investigated the accuracy of the boundaries by contacting a previous owner.^{FN13} We held that he failed to establish a causal relationship with a misrepresentation of fact because he did not convince the trier of fact that he relied upon it.^{FN14}

*4 ¶ 13 After *Hangman Ridge*, we held in *Pickett v. Holland America Line-Westours, Inc. (Pickett I)*, that injury and causation in CPA claims could be satisfied by means other than reliance.^{FN15} In *Edmonds v. John L. Scott Real Estate, Inc.* and *Mason v. Mortgage Am., Inc.*, this included proof that the plaintiff lost money because of unlawful conduct.^{FN16} The Supreme Court did not reverse this substantive ruling. Rather, it ruled in *Pickett II* that we had erred by deciding the merits of the court's denial of class certification rather than confining ourselves to the question whether the settlement between the parties was fair.^{FN17} Acknowledging that *Hangman Ridge* did not elaborate on the proof required to show causation, the Supreme Court recognized that *Nuttall*, *Edmonds* and *Mason* were all means by which causation could be found in CPA claims. But it did not overrule *Nuttall* or decide whether reliance is a necessary component of causation because the issue was a "debatable question without a clear answer under Washington law."^{FN18}

[3] ¶ 14 Both parties agree that causation is required under RCW 19.86.090 and the holding in *Hangman Ridge*. Here the trial court relied on *Nuttall* to deny the plaintiff's CPA claims. But contrary to AT & T's assertion, *Nuttall* is not the only Washington authority on point. While *Nuttall* has never been expressly overruled, given the many differences between *Nuttall* and this case, it is easily distinguished. First, *Nuttall* did not involve a class certification motion and its attendant liberal construction rules. Second, the facts in *Nuttall* would not have satisfied the public interest element of a CPA claim because it involved a single transaction and the misrepresentation was not one that was likely to injure other consumers. Unlike the appellants in this case who were forced to rely solely on the defendant's representations about the UCC, the

plaintiff in *Nuttall* was able to investigate the property boundary on his own and evaluate the realtor's representations. These facts made reliance a critical component of causation in *Nuttall*.

¶ 15 In *Pickett I*, a private consumer class action brought under the CPA, this court said there is more than one way to satisfy the *Hangman Ridge* causation requirement. There, the plaintiffs established causation by showing that consumers bought tickets for a cruise and the cruise line retained a portion of the ticket charges it had represented were port charges or taxes. We held that it was not necessary to prove the consumers' reliance.

We need not engage in an inquiry whether each plaintiff would have purchased a cruise ticket had they known about the port charges and taxes. We simply hold that Holland America cannot impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes, and fees-pass-through charges-when they are not....^{FN19}

*5 ¶ 16 In its amicus brief, the Attorney General emphasizes the importance of CPA actions brought by "private attorneys general" which supplement the efforts of his office. If individual reliance were the exclusive means of proving causation in class action CPA claims, particularly those concerning misrepresentations or nondisclosure of material facts, many meritorious private CPA claims could not be brought. Such a rule would place class plaintiffs in the impossible position of proving a negative; that is, that they believed the opposite of the omitted fact when they made their purchase. The Attorney General directs our attention to *Morris v. Int'l Yogurt Co.*, in which the court stated:

it is virtually impossible to prove reliance in cases alleging nondisclosure of material facts. The inquiry that would normally be made in a case of affirmative misrepresentation-did the plaintiff believe the defendant's representation, and did that belief cause the plaintiff to act-does not apply in a case of nondisclosure.^{FN20}

We agree. Because these appellants allege they did not know about the nature of the UCC, they cannot be required to prove that they would not have purchased wireless service had they known about it.^{FN21}

[4][5] ¶ 17 Trial courts must take the appellants' substantive allegations as true when ruling on a motion for class certification.^{FN22} Thus, here, as in *Pickett I*, it is enough to establish causation that they

purchased the service and AT & T charged them a fee that was not a tax or government surcharge. This is particularly true because deceptive acts or practices are unlawful whether or not they actually deceive anyone.^{FN23} It is sufficient to prove that a practice has the capacity to deceive a substantial portion of the public to prevail on a CPA claim.^{FN24} We hold that the trial court erred in denying class certification on the CPA claim. Plaintiffs are not required to prove that each individual class member relied on AT & T's nondisclosure because, as the courts in *Pickett I* and *Pickett II* recognized, reliance is not the only means by which causation can be proven in CPA cases.

Impact of Choice of Law Clause on CPA Claims

¶ 18 The trial court held that the choice of law provisions in the contracts did not apply to the CPA claims because those claims were based on the statute rather than contract and arose before the class members entered into their contracts with AT & T. The trial court also ruled that the legislature intended that the CPA regulate Washington businesses whether their conduct affects Washington or non-Washington consumers. In so doing, the trial court applied Restatement (Second) of Conflict of Laws section 145 (1971), which tends to focus on the defendant's contacts:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

*6 (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

[6] ¶ 19 AT & T argues the trial court erred by considering its headquarters location rather than the forum in which each consumer purchased wireless service. AT & T contends the court should have relied on Restatement (Second) of Conflict of Laws section 145 (1971), which focuses on the plaintiff's

substantial contacts and the forum where the plaintiff was allegedly deceived and purchased service.

[7] ¶ 20 Where reliance upon false or fraudulent representations or advertising is a substantial factor in inducing a plaintiff and proposed class members to purchase a defendant's goods or services, Restatement (Second) of Conflict of Laws section 148(2) (1971) identifies the following factors to determine the forum state based on a determination of which state has the most significant relationship to the occurrence and parties:

- (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.^{FN25}

Although contractual choice of law provisions may be considered, they do not dictate the choice of law for tort claims.^{FN26} While many of the factors outlined in both section 145 and section 148 center on the plaintiffs' contacts, the analysis focuses on the most significant contacts, not merely those that are greater in number.

¶ 21 Here, the trial court found that the 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. These are significant factors which the trial court correctly applied to conclude that the Washington CPA applies to all of the appellants' CPA claims. Accordingly, we reject AT & T's cross-appeal.

Contract Claims

*7 [8][9] ¶ 22 As we noted earlier, when ruling on a motion for class certification, a court must take the substantive allegations of the complaint as true.^{FN27} CR 23(a) contains four threshold requirements: numerosity, commonality, typicality, and adequacy of representation.^{FN28} Representative plaintiffs satisfy the typicality requirement if their claims arise from the same conduct that gives rise to the claims of other class members and are based on the same legal theory.^{FN29} “Where the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement.”^{FN30}

[10][11][12][13] ¶ 23 The test for commonality has a low threshold. It is qualitative rather than quantitative and is satisfied so long as class members have one issue in common.^{FN31} But class members must share more than a legal theory of recovery. Some courts have expressed reluctance to certify a class where individualized proof is required to resolve an allegedly common issue, or resolution of a common legal issue is dependent upon highly specific factual and legal determinations that will be different for each class member.^{FN32} It is not necessary that the shared questions of law or fact be identical.^{FN33} Rather, the commonality requirement is satisfied when the legal question “linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.”^{FN34} There is a common question of law and fact if the “course of conduct” that gives rise to the cause of action affects all the class members and all class members share at least one of the elements of the cause of action.^{FN35}

[14][15] ¶ 24 In order to certify a class, the court must also find the plaintiffs have satisfied one of the requirements of CR 23(b).^{FN36} Appellants rely on CR 23(b)(3) which requires that common legal and factual issues predominate over individual issues. The court may certify the class even though there are individual factual or legal issues. The relevant inquiry is whether the issue or issues shared by the class members are the dominant, central, or overriding issues.^{FN37} Further, “[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.”^{FN38} And the time it may take to resolve those individual issues is not a basis for denying class certification because courts have a number of methods for dealing with individual issues in class litigation.^{FN39}

[16][17][18] ¶ 25 Here, the trial court denied class certification on the appellants' contract claims because the choice of law provisions in Subscriber Agreements created a predominance of individual issues and made the class unmanageable. The language of the choice of law provisions in the appellants' contracts varied.^{FN40} The trial court ruled it should enforce the choice of law clauses because they were not included for any anti-competitive or anti-consumer reasons. Washington courts will enforce an express choice of law clause so long as applying it does not violate the fundamental public policy of the forum state.^{FN41} Absent contrary intent, a choice of law clause refers only to the local law of the state but not to its conflict rules.^{FN42} We review the trial court's decision to enforce a choice of law clause for abuse of discretion.^{FN43} A customer's area code generally covers the area in which a customer lives. The trial court found that the clause should be enforced as written because it chooses the law with which the customer is most familiar. We agree.

*8 ¶ 26 In its Memorandum Opinion, the trial court made several findings about the individual issues the contract claim raised: (1) liability issues differ based on the materials consumers relied upon, whether those materials were a service contract or advertising or promotional material explicitly mentioning the UCC; (2) contract interpretation rules would differ among class members from different states in light of the choice of law provisions of each Subscriber Agreement; (3) the type of context evidence that could apply to contract interpretation under the varying state laws could vary based on the information a customer may have obtained from the AT & T website about the UCC and evidence about contacts between customers and AT & T after a customer received his first billing; and (4) the types of affirmative defenses that might arise under the varying state laws, including voluntary payment and enforcement of an arbitration clause. Based on the number of potential individual issues, the trial court concluded that the commonality and typicality requirements of CR 23(b) and (c) were not satisfied and that individual issues predominated over common class issues.

[19][20] ¶ 27 To determine whether common issues predominate over individual ones, a trial court pragmatically examines whether there is a common nucleus of operative facts in each class member's claim.^{FN44} The common question here is whether the language AT & T used in its consumer contracts permitted it to charge, and later increase, the UCC.

The appellants' complaint asserted that AT & T breached their agreements by charging the UCC to recover a cost of doing business and not informing customers each time they raised the UCC. Appellants rely on language in the agreements that required them to pay "charges to [an] account, including but not limited to ... any taxes, surcharges, fees, assessments, or recoveries imposed on you or us as a result of the use of the Service" but nothing more. The common nucleus of facts among all class members on this breach of contract claim is that AT & T charged all customers from 1998 through 2003 a UCC it represented was a government tax, surcharge or fee. The common legal theory is that AT & T charged an amount not authorized under the contracts because like the fees at issue in *Pickett I*, the UCC was an overhead offset amount, not a government-mandated charge it was merely passing on to consumers. As explained above, the existence of individual issues alone should not defeat class certification when the legal and factual question at issue is substantially related to the resolution of the litigation. If the UCC is a government tax, surcharge or fee, then the matter will be resolved because it is an amount authorized under the contract. If not, there are mechanisms available, such as subclasses and master's hearings for resolving individual claims. Class certification of the issue will be an efficient means of determining this claim given the small amounts of money at issue and its broad impact.^{FN45}

*9 ¶ 28 Contrary to AT & T's argument, extrinsic evidence to determine the individual consumer's intent at formation will not be necessary here because these consumers entered into a standardized contract they were not able to negotiate or change on an individual basis. Having availed itself of the benefits of a standardized, boilerplate contract used across the nation, AT & T cannot now assert that the contracts are to be interpreted individually based on the intent of each consumer at the time of purchase. The choice of law provisions may result in some variations in damages, but they do not alter the meaning of the express terms of the agreement or destroy the common claims among this class of plaintiffs.

¶ 29 We reverse and remand to the trial court for further proceedings.

WE CONCUR: DWYER and GROSSE, JJ.

FN1. Chapter 19.86 RCW.

FN2. Some of the choice of law clauses identified a specific state law but most

identified the customer's area code as the forum for the choice of law.

FN3. *Lacey Nursing Ctr. v. Dep't of Revenue*, 128 Wash.2d 40, 47, 905 P.2d 338 (1995).

FN4. *Smith v. Behr Process Corp.*, 113 Wash.App. 306, 318-19, 54 P.3d 665 (2002) (quoting *Brown v. Brown*, 6 Wash.App. 249, 253, 492 P.2d 581 (1971)).

FN5. *Brown*, 6 Wash.App. at 256-57, 492 P.2d 581.

FN6. *Smith*, 113 Wash.App. at 319, 54 P.3d 665 (citing *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash.2d 178, 188, 35 P.3d 351 (2001), cert. denied, 536 U.S. 941, 122 S.Ct. 2624, 153 L.Ed.2d 806 (2002)).

FN7. 105 Wash.2d 778, 719 P.2d 531 (1986).

FN8. 31 Wash.App. 98, 639 P.2d 832, review denied, 97 Wash.2d 1015 (1982).

FN9. 145 Wash.2d 178, 196, 35 P.3d 351 (2001), cert. denied, 536 U.S. 941, 122 S.Ct. 2624, 153 L.Ed.2d 806 (2002) (*Pickett II*).

FN10. 105 Wash.2d at 785, 719 P.2d 531.

FN11. 31 Wash.App. at 99-103, 639 P.2d 832.

FN12. *Id.* at 103-04, 639 P.2d 832.

FN13. *Id.* at 104, 639 P.2d 832.

FN14. *Id.* at 111, 639 P.2d 832.

FN15. *Pickett v. Holland America Line-Westours, Inc. (Pickett I)*, 101 Wash.App. 901, 918, 6 P.3d 63 (2000), reversed on other grounds, *Pickett v. Holland Am. Line-Westours, Inc. (Pickett II)*, 145 Wash.2d 178, 196, 35 P.3d 351 (2001), cert. denied, 536 U.S. 941, 122 S.Ct. 2624, 153 L.Ed.2d 806 (2002) (citing *Edmonds v. John L. Scott Real Estate*, 87 Wash.App. 834, 847, 942 P.2d 1072 (1997), review denied, 134 Wash.2d 1027, 958 P.2d 313 (1998); *Mason v. Mortgage Am., Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990)).

FN16. *Edmonds*, 87 Wash.App. at 847, 942 P.2d 1072; *Mason*, 114 Wash.2d at 854, 792 P.2d 142.

FN17. *Pickett II*, 145 Wash.2d at 201, 35 P.3d 351. The trial court in *Pickett* denied class certification on several bases. Pickett appealed the trial court's class certification motion, but his interlocutory appeal was denied. A class was then certified for settlement purposes. The appeal concerned only the settlement amount, not the trial court's initial class certification decision. *Id.* at 185-86, 35 P.3d 351.

FN18. *Id.* at 197, 35 P.3d 351.

FN19. *Pickett I*, 101 Wash.App. at 920, 6 P.3d 63.

FN20. 107 Wash.2d 314, 328, 729 P.2d 33 (1986) (citing *Wilson v. Comtech Telecomms. Corp.*, 648 F.2d 88, 92 n. 6, 93 (2d Cir.1981)).

FN21. The sheer number of negatives required to construct this sentence demonstrates the impossibility of the proof requirement AT & T seeks to impose on the appellants.

FN22. *Blackie v. Barrack*, 524 F.2d 891 (9th Cir.1975), cert. denied, 429 U.S. 816, 97 S.Ct. 57 (1976).

FN23. See *Pickett I*, 101 Wash.App. at 920, 6 P.3d 63.

FN24. AT & T presents numerous arguments concerning the legitimacy of the UCC. None of this is relevant to the issue here because the trial court must take the substantive allegations of the complaint as true at the certification stage. *Blackie*, 524 F.2d at 901.

FN25. Restatement of Conflict of Laws § 148 (1971).

FN26. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 159, 744 P.2d 1032 (1987), appeal dismissed, 488 U.S. 805, 109 S.Ct. 35 (1988).

FN27. *Blackie*, 524 F.2d at 901.

FN28. CR 23(a) provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Numerosity and adequacy of representation are not at issue here.

FN29. *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir.1996).

FN30. *Smith*, 113 Wash.App. at 320, 54 P.3d 665 (citing *Baby Neal v. Casev.* 43 F.3d 48, 58 (3d Cir.1994)).

FN31. *In re Am. Med. Sys.*, 75 F.3d at 1080.

FN32. *Id.*

FN33. *Id.* (citing *Brown*, 6 Wash.App. at 255, 492 P.2d 581).

FN34. *Miller v. Farmer Bros. Co.*, 115 Wash.App. 815, 824, 64 P.3d 49 (2003) (internal quotation marks omitted) (quoting *Yslava v. Hughes Aircraft Co.*, 845 F.Supp. 705, 712 (D.Ariz.1993)).

FN35. *Id.* (citing *Lockwood Motors v. Gen. Motors Corp.*, 162 F.R.D. 569, 575 (D.Minn.1995)).

FN36. CR 23(b) provides:

Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual

members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FN37. *Id.* at 825-26, 64 P.3d 49 (citing 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 4.25, at 4-85 (3d ed.1992)).

FN38. *Id.* at 825, 64 P.3d 49 (quoting 1 NEWBERG § 4.25, at 4-84).

FN39. *Id.* (citing 1 NEWBERG § 4.25, at 4-83).

FN40. For example, some contained a clause stating: “ ‘This Agreement is subject to applicable federal laws, federal or state tariffs, if any, and the laws of the state associated with the [consumer’s phone] number.’ ” Schnall’s Subscriber Agreement included the following language: “This agreement is subject to applicable federal and state laws, and tariffs, and the laws of the state associated with the Number, without regard to such state’s conflict of law rules.” According to AT & T, other contracts contained choice of law clauses

naming specific states.

FN41. *McGill v. Hill*, 31 Wash.App. 542, 547, 644 P.2d 680 (1982).

FN42. *Id.* at 547-48, 644 P.2d 680. See also Restatement (Second) of Conflict of Laws § 187 (1971), which states:

§ 187 Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

FN43. *Erwin v. Cotter Health Ctrs., Inc.*, 133 Wash.App. 143, 135 P.3d 547 (2006), review granted, 159 Wash.2d 1011, 154 P.3d 919 (2007).

FN44. *Smith*, 113 Wash.App. at 323, 54 P.3d 665 (citing *Clark v. Bonded Adjustment Co.*, 204 F.R.D. 662, 666 (E.D.Wash.2002)).

FN45. On appeal, AT & T raises numerous arguments concerning the propriety of categorizing the UCC as a government charge and the steps taken to inform its customers about the UCC. But these arguments go to the merits of the plaintiffs’ claim and are not relevant to a decision

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concerning class certification.
Wash.App. Div. 1, 2007.
Schnall v. AT & T Wireless Services, Inc.
--- P.3d ---, 2007 WL 1733117 (Wash.App. Div. 1)

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19.86.090. Civil action for damages--Treble damages authorized--Action by governmental entities

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed the amount specified in RCW 3.66.020. For the purpose of this section, "person" shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in the superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2007 c 66 § 2, eff. April 17, 2007; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

Washington Practice Series TM
Current Through the 2005 UpdateWashington Pattern Jury Instructions—Civil
Washington Supreme Court Committee On Jury InstructionsPart XIV. Consumer Protection
Chapter 310. Consumer Protection Actions
Copr. (C) West 2007 No Claim to Orig. U.S. Govt. Works**WPI 310.07 Causation in Consumer Protection Act Claim**

(Insert name of plaintiff) has the burden of proving that (name of defendant's) unfair or deceptive act or practice was a **proximate cause** of (name of plaintiff's) injury.

“**Proximate cause**” means a **cause** which in direct sequence [unbroken by any new independent **cause**] produces the injury complained of and without which such injury would not have happened.

[There may be one or more proximate causes of an injury.]

Note on Use

Use this instruction when intervening causation is an issue. If multiple causation is an issue, see the Comment below. Use bracketed material as applicable.

Comment

In Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993), the court stated that, “[h]ere, the jury was properly instructed that it had to find ‘[t]hat Fisons Corporation's unfair or deceptive act or practice was a **proximate cause** of the injury to plaintiff Dr. Klicpera's business or property’” See also Guijosa v. Wal-Mart Stores, 144 Wn.2d 907, 917, 32 P.2d 250 (2001).

Whether individual reliance is required for causation under the CPA is a “debatable question without a clear answer under Washington law.” Pickett v. Holland Am. Line-Westours, Inc., 145 Wn.2d 178, 197, 35 P.3d 351 (2001) (approving class action settlement as fair in part because this question posed a risk to the class claim), cert. denied in Bebchick v. Holland America Line-Westours, Inc., 536 U.S. 941, 122 S.Ct. 2624, 153 L.Ed.2d 806 (2002).

The traditional definition of “**proximate cause**” in WPI 15.01, **Proximate Cause—Definition**, 6 Washington Practice, Washington Pattern Jury Instructions: Civil (5th ed.), is incorporated in this instruction. For alternative definitions of “**proximate cause**,” see WPI Chapter 15, **Proximate Cause**, in 6 Washington Practice, *supra*.

In negligence cases, when there is evidence of more than one **proximate cause**, use of the article “a” is insufficient to inform the jury on the law of concurring negligence and multiple **proximate causes**, and it is error to use WPI 15.01 without the bracketed sentence stating that an event may have one or more **proximate causes**. Jonson v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co., 24 Wn.App. 377, 380, 601 P.2d 951 (1979).

In Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 167, 795 P.2d 1143 (1990), the court rejected the argument of one defendant, who had ordered an inflated real estate appraisal but had not had contact with the plaintiffs, that a “causal link must exist between plaintiffs [to whom another defendant later showed the appraisal]

and himself,” stating “This is incorrect. Instead, the causal link must exist between the *deceptive* act (the inflated appraisal) and *injury suffered*.” (Emphasis in original.)

See the Comment to WPI 15.01, **Proximate Cause—Definition**, in 6 Washington Practice, supra. In particular, note that an instruction setting forth the legal effect of multiple **proximate causes** has been held to be necessary when both sides raise complex theories of multiple causation. Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 709 P.2d 774 (1985); Brashear v. Puget Sound Power and Light Co., Inc., 100 Wn.2d 204, 667 P.2d 78 (1983). See also WPI 15.04, **Negligence of Defendant Concurring With Other Causes**, 6 Washington Practice, supra, for suggestions regarding the wording of an instruction on multiple causation.[Current as of April 2004.]

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Washington Practice Series TM
Current Through the 2005 UpdateWashington Pattern Jury Instructions—Civil
Washington Supreme Court Committee On Jury InstructionsPart II. Negligence—Risk—Misconduct—Proximate Cause
Chapter 15. Proximate Cause**WPI 15.01 Proximate Cause—Definition**

The term “proximate cause” means a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

[There may be more than one proximate cause of an [injury] [event].]

Note on Use

This instruction is the standard definition of proximate cause. For an alternative wording of this instruction, see WPI 15.01.01, Proximate Cause—Definition—Alternative.

Use WPI 15.02, Proximate Cause—Substantial Factor Test, instead of WPI 15.01 or WPI 15.01.01 when the substantial factor test of proximate causation applies.

Use bracketed material as applicable.

The last sentence in brackets should be given only when there is evidence of a concurring cause. In the event the last sentence is used, consideration should be given to WPI 15.04, Negligence of Defendant Concurring with Other Causes.

Comment

Elements of Proximate Cause. Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See Christen v. Lee, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985) and cases cited therein. Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. WPI 15.01 describes proximate cause in this factual sense. Hartley v. State, 103 Wn.2d at 778, 698 P.2d 77. The question of proximate cause in this context is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion, in which case cause in fact is a question of law for the court. Baughn v. Honda Motor Co., 107 Wn.2d 127, 142, 727 P.2d 655 (1986).

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” Schooley, 134 Wn.2d at 478–79, 951 P.2d 749. This inquiry depends on “mixed considerations of logic, common sense, justice, policy, and precedent.” See Hartley v. State, 103 Wn.2d at 779, 698 P.2d 77; Tyner v. DSHS, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The existence of a

duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues (see Taggart v. State, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992)), “[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established.” Schooley, 134 Wn.2d at 479–80, 951 P.2d 749.

There have been many attempts to define “proximate cause.” In Washington it has been defined both as a cause which is “natural and proximate,” Lewis v. Scott, 54 Wn.2d 851, 341 P.2d 488 (1959), and as a cause which in a “natural and continuous sequence” produces the event, Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 (1950). Some jurisdictions, in an effort to simplify the concept of proximate cause for jurors, have substituted the term “legal cause.” See California’s BAJI instructions (BAJI 3.75 and 3.76) and Restatement (Second) of Torts § 9 (1965). However, the “direct sequence” and “but for” definition adopted in this instruction is firmly entrenched in Washington law. See Alger v. Mukilteo, 107 Wn.2d 541, 730 P.2d 1333 (1987) (“direct sequence”); Tyner v. DSHS, 141 Wn.2d at 82, 1 P.3d 1148 (“but for”).

Substantial Factor Test. Section 431 of Restatement (Second) of Torts sets forth the substantial factor test of proximate cause, under which a defendant’s conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In Blasick v. City of Yakima, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected this approach in favor of the “but for” definition contained in WPI 15.01 for general negligence actions. For a more detailed discussion of the substantial factor test and the types of cases to which it applies, see WPI 15.02, Proximate Cause—Substantial Factor Test.

Multiple Proximate Causes. Using WPI 15.01 without the last paragraph is error if there is evidence of more than one proximate cause. Jonson v. Milwaukee Railroad Co., 24 Wn.App. 377, 601 P.2d 951 (1979).

An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation. Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 709 P.2d 774 (1985); Brashear v. Puget Sound Power and Light Co., Inc., 100 Wn.2d 204, 667 P.2d 78 (1983). Failure to give WPI 15.04, Negligence of Defendant Concurring With Other Causes, may be reversible error even though WPI 15.01 is given including the bracketed last paragraph. WPI 15.01 does not inform the jury that the act of another person does not excuse the defendant’s negligence unless the other person’s negligence was the sole proximate cause of the plaintiff’s injuries. Brashear v. Puget Sound Power and Light Co., Inc., supra (failure to give WPI 15.04 was reversible error); Jones v. Bayley Construction, 36 Wn.App. 357, 674 P.2d 679 (1984), overruled on other grounds, 102 Wn.2d 235, 684 P.2d 73 (1984) (failure to give WPI 15.04 was error, but harmless given the jury’s special verdict findings).

Foreseeability. It is error to add to WPI 15.01 the words “even if such injury is unusual or unexpected.” Blodgett v. Olympic Savings and Loan Association, 32 Wn.App. 116, 646 P.2d 139 (1982). It is improper to inject the issues of foreseeability into the definition of proximate cause. State v. Giedd, 43 Wn.App. 787, 719 P.2d 946 (1986); Blodgett v. Olympic Savings and Loan Association, supra.

Special Instructions on Proximate Cause. In Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 107–08, 431 P.2d 969 (1967), and Young v. Group Health Cooperative of Puget Sound, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975), the Washington Supreme Court held that, when proximate cause was a central issue in the case and experts called for both sides differed as to what actually caused the plaintiff’s claimed injury, an instruction was warranted to inform the jury that the causal relationship must be established by evidence which rises above speculation, conjecture, or mere possibility. The Young court affirmed the trial court’s giving of the following instruction:

You are instructed that the causal relationship of the alleged negligence of the defendants to the resulting condition of the child must be established by medical testimony beyond speculation and conjecture.

The evidence must be more than that the alleged act of the defendants “might have,” “may have,” “could have,” or “possibly did” cause the physical condition.

It must rise to the degree of proof that the resulting condition probably would not have occurred but for the defendants' conduct, to establish a causal relationship.

See also Richards v. Overlake Hosp. Med. Ctr., 59 Wn.App. 266, 277-78, 796 P.2d 737 (1990), (affirming the trial court's giving of an instruction that stated: "The evidence must rise to the degree of proof that any injury plaintiffs claim ... probably would not have occurred but for the defendants' conduct, to establish a causal relationship").

The Court of Appeals in Ford v. Chaplin, 61 Wn.App. 896, 899-901, 812 P.2d 532 (1991), while affirming the giving of an instruction worded similarly to that approved in Young, cautioned that:

[T]he rather argumentative phraseology of the challenged instruction reads much more like an outmoded advocacy instruction than the neutral format favored in current trial practice. The instruction does not appear to be necessary where proper instructions are given on the issues, standard of care and burden of proof. If such an instruction is given at all, it would be preferable to avoid this style.

[Current as of May 2002.]

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47 C.F.R. § 54.712

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Effective: July 10, 2006

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Title 47. Telecommunication

Chapter I. Federal Communications
Commission (Refs & Annos)

Subchapter B. Common Carrier Services

☑ Part 54. Universal Service (Refs & Annos)☑ Subpart H. Administration (Refs & Annos)

→ § 54.712 Contributor recovery of universal service costs from end users.

(a) Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.

(b) [Reserved]

[67 FR 79533, Dec. 30, 2002; 68 FR 15672, April 1, 2003; 71 FR 38797, July 10, 2006]

SOURCE: 62 FR 32948, June 17, 1997; 66 FR 22133, May 3, 2001, unless otherwise noted.

AUTHORITY: 47 U.S.C. 1, 4(j), 201, 205, 214, and 254 unless otherwise noted.

47 C. F. R. § 54.712, 47 CFR § 54.712

Current through July 12, 2007; 72 FR 38026