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NO. 91393-5

SUPREME COURT OF THE STATE OF WASHINGTON

SANDRA C. THORNELL,

Respondent,

v.

SEATTLE SERVICE BUREAU, INC., d/b/a/ NATIONAL SERVICE
BUREAU, INC., and STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellants.

**BRIEF OF *AMICUS CURIAE* THE ATTORNEY GENERAL OF
THE STATE OF WASHINGTON**

Filed
Washington State Supreme Court

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I. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General submits this amicus brief to urge the Court to answer the two questions certified to this Court by the United States District Court of the Western District of Washington in the affirmative and hold that (1) the Consumer Protection Act, RCW 19.86 (“CPA”), creates a cause of action for a plaintiff residing outside Washington to sue a Washington defendant for unfair or deceptive acts; and (2) the CPA creates a cause of action for an out-of-state plaintiff to sue an out-of-state defendant for the unfair or deceptive acts of its Washington agent.¹

The Attorney General’s constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest. *See Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). This case presents issues of significant public interest, including whether private CPA actions may only be brought by Washington residents, even when the defendant engaging in unfair or deceptive practices is based in Washington or carries out its business

¹ With respect to the choice of law issues addressed in the parties’ briefing, the Attorney General notes that the federal district court did not reach this issue because the factual record relevant to a choice of law analysis was not fully developed. *See* Dkt. No. 42 at 7 (“[a]ssuming without deciding that a conflict exists because the question has not been briefed in any detail, the Court concludes that the final choice-of-law analysis depends on factual issues and declines to decide the issue at this stage in the proceeding”).

practices via a Washington agent. The Attorney General's position is that limiting the scope of private CPA actions in this way would eliminate an important and necessary means of protecting the public and fostering fair and honest competition. *See* RCW 19.86.920. In addition, while the issues certified by the federal court are limited by their terms to private CPA plaintiffs, the Court's answers to those questions have implications for the scope of the Attorney General's authority to bring CPA enforcement actions under RCW 19.86.080 to protect the public interest.

The Attorney General enforces the CPA on behalf of the public, RCW 19.86.080, and has an interest in the development of CPA case law, RCW 19.86.095, including the availability of private CPA claims:

Private actions by private citizens are now an integral part of CPA enforcement. Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.

Scott v. Cingular Wireless, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007).

II. ISSUES ADDRESSED BY AMICUS

The Attorney General files this brief to address both questions certified by the federal district court, and respectfully requests the Court answer both questions in the affirmative.

III. STATEMENT OF THE CASE

For purposes of this appeal, the Attorney General relies on the summary of Plaintiff/Respondent Sandra Thornell's allegations as set forth in the federal district court's Order on Defendant/Appellant State Farm Mutual Automobile Insurance Company ("State Farm") Motion to Dismiss and Motion to Strike and Defendant/Appellant Seattle Service Bureau, Inc.'s ("SSB") joinder in those motions. Dkt. No. 41. As the federal court noted, for purposes of a motion to dismiss, the court "accepts all facts in the Complaint as true." *Id.* at 2. In particular, with respect to the alleged agency relationship between State Farm and SSB, the federal court found that "additional evidence to support these allegations will be necessary to demonstrate agency at the summary judgment stage." *Id.* at 4-5 (citing *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 182, 159 P.3d 10 (2007), *aff'd on other grounds by Panag v. Farmers Inc. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009)). Thus, for purposes of considering the answer to the certified questions, the Court must assume that if SSB violated the CPA, State Farm, as SSB's principal, would be vicariously liable for SSB's unfair and deceptive collection practices. Indeed, as discussed below, if a defendant – even an out-of-state defendant – *is* found vicariously liable for the unfair or deceptive acts of its Washington agent, the question of whether a non-Washington plaintiff can

sue that defendant for CPA violations can be answered without a need to analyze whether the statute's language bars out-of-state plaintiffs from bringing CPA actions.

IV. ARGUMENT

The certified questions ask the Court to determine whether Washington's interest in preventing unfair or deceptive business practices stops at the state border, even when a Washington resident or Washington business is engaged in unfair or deceptive practices targeting out-of-state consumers, or when an out-of-state person or entity uses a Washington agent to conduct its business. Specifically, the issue is whether the Court should adopt a bright-line rule that a CPA defendant cannot be held accountable for its unfair or deceptive practices when the plaintiff resides outside of Washington.

State Farm and SSB urge the Court to hold that an out-of-state plaintiff can never bring a CPA action, and that, by extension, the Attorney General's authority is limited to bringing suit on behalf of injured Washington consumers. State Farm's Reply Br. at 6-7; SSB's Reply Br.-Joinder at 1. Rather than adopt this constrained construction of the CPA, the Court should follow its precedent and liberally construe the CPA as the Legislature intended, and hold that all persons who engage in unfair or deceptive acts or practices that directly or indirectly affect the

people of Washington are liable for violation of the CPA. *See* RCW 19.86.080(1). The territorial limitations that State Farm and SSB ask this Court to create circumscribe the CPA and defeat the statute's primary purposes of protecting the public and fostering fair and honest competition and are not supported by the plain language of the statute or its legislative history.

A. The Court Must Construe the CPA Liberally to Ensure that All Persons Who Engage in Unfair or Deceptive Acts and Practices that Directly or Indirectly Affect Washington Consumers and Businesses Are Held Accountable.

The CPA was enacted "to protect the public and foster fair and honest competition." RCW 19.86.920. The Legislature directed that the CPA "shall be liberally construed that its beneficial purposes may be served." *Id.* Liberal construction requires courts to broadly interpret the CPA's scope and coverage. *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991) (explaining that "'liberal construction' is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined"). A narrow construction of the CPA would conflict with this legislative mandate. *See Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (explaining that the CPA demonstrates "a carefully drafted attempt to bring within its

reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce”) (emphasis in original).

The CPA’s provisions are deliberately broad: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” RCW 19.86.020. The Legislature’s definition of “trade” and “commerce” also is expansive and includes “*any* commerce directly *or* indirectly affecting the people of the state of Washington.” RCW 19.86.010(2) (emphasis added). The definition of “trade” and “commerce” does not describe *who* may sue under the CPA but rather, the scope of the acts and practices the CPA is designed to prevent.

Interpreting the CPA to permit defendants engaging in unfair or deceptive acts or practices to escape liability merely because the injured person does not reside in Washington, without consideration of the direct *or* indirect effect of the defendant’s conduct on the people of the state of Washington, is inconsistent with the Legislature’s mandate of liberal construction. *See* RCW 19.86.920. This interpretation is also inconsistent with this Court’s precedent. Over 40 years ago, in *State v. Reader’s Digest Assn., Inc.*, the Court rejected an interpretation of the CPA that would limit the application of RCW 19.86.020 strictly to intrastate commerce. *Reader’s Digest*, 81 Wn.2d 259, 279-80, 501 P.2d 290 (1972).

In that case, a defendant in New York mailed a sweepstakes lottery to Washington residents and argued it was exempt from the CPA pursuant to RCW 19.86.170 because it was regulated by the Federal Trade Commission, which has the authority to regulate interstate business. *Id.* at 279-80.² The Court explained that adopting the defendant's position "would require us to ignore RCW 19.86.920 which provides that in determining the relative market or effective area of competition we should not be limited to the boundaries of this state." *Id.* at 280.

Mindful of the Legislature's directive that the CPA be liberally construed, this Court has since confirmed that an expansive interpretation of the CPA is appropriate and has repeatedly declined to circumscribe the CPA's scope beyond the express exemptions, limits, and defenses set forth in the statute. *See, e.g., Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) (actual deception is not required to prove a CPA violation, only that the act or practice has "the capacity to deceive a substantial portion of the public"); *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 86, 170 P.3d 10 (2007) (the voluntary payment doctrine is not an affirmative defense in a CPA case); *Panag*, 166 Wn.2d at 37-41, (rejecting the argument that the CPA applies only to consumer or business

² RCW 19.86.170 exempts from the CPA actions or transactions otherwise permitted, prohibited, or regulated by state or federal regulators.

transaction disputes and that only a consumer or someone in a business relationship with the defendant can bring a private CPA claim); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 787-88, 295 P.3d 1179 (2013) (declining to narrow scope of practices that are “unfair” for purposes of the CPA); *McCarthy Fin., Inc. v. Premera*, 182 Wn.2d 936, 942-43, 347 P.3d 872 (2015) (explaining that the filed rate doctrine is not a complete bar to CPA claims).

Reading the CPA narrowly to prohibit non-resident private plaintiffs from bringing a CPA action as a matter of law, even in cases where the party engaging in unfair or deceptive conduct is a Washington corporation, or where a non-resident defendant engages in unfair or deceptive conduct via a Washington agent, is a constricted interpretation this Court should reject. Such an interpretation is contrary to the statute’s plain, unambiguous, and deliberately expansive language and does not benefit Washington consumers, businesses, or the marketplace.

B. A Bright-Line Rule Permitting Defendants to Avoid CPA Liability by Targeting Out-of-State Consumers Is Inconsistent with the CPA’s Purpose to Protect the Public Interest and Foster Fair Competition.

Barring non-Washington residents from bringing a CPA lawsuit against a Washington business, or that business’s out-of-state principal, is contrary to the CPA’s purpose and long history of protecting Washington

businesses that compete for out-of-state customers, and undermines full and meaningful enforcement of the statute consistent with the Legislature's intent. *See* RCW 19.86.920. If the CPA cannot be enforced as to Washington businesses – or out-of-state businesses that work through Washington agents – regardless of where the affected consumers reside, Washington could become a haven for businesses that target out-of-state consumers, which would limit law-abiding Washington competitors fair access to national markets.

Limiting the scope of private CPA claims as State Farm and SSB request would create a means for unscrupulous businesses to easily avoid CPA liability. For example, a Washington company that engages in deceptive direct mail marketing practices could evade liability under the CPA by mailing its materials only to consumers with Oregon zip codes. A resident of Portland, Oregon, who was injured by the unfair or deceptive conduct of a business in Vancouver, Washington, would not be able to bring a private CPA action, even if the Oregon resident sought injunctive relief that would benefit Washington consumers. Honest Washington businesses would be at a disadvantage, competing against businesses that generate revenue from unfair and deceptive acts that injure out-of-state consumers. This is exactly the type of *indirect* effect on the people of the state of Washington contemplated by RCW 19.86.010(2).

In addition, allowing a non-Washington defendant to escape liability for the unfair or deceptive acts of its Washington agent would only encourage other out-of-state companies to ignore, and benefit from, the illegal acts of their in-state agents. Indeed, if a defendant's Washington-based agent violates the CPA, that defendant should be liable under the CPA regardless of whether the plaintiff *or* the defendant resides in Washington. A defendant can be liable under the CPA based on its agent's unfair or deceptive acts or practices. *See Wilkinson v. Smith*, 31 Wn. App. 1, 10-11, 639 P.2d 768 (1982) (explaining that principal-agent relationship between defendants "extends responsibility" for the agents' violations of the CPA to the principal); *see also F.T.C. v. Stefanichik*, 559 F.3d 924, 930-31 (9th Cir. 2009) (explaining that under the FTC Act, "a principal is liable for the misrepresentations of his agent acting within the scope of the agent's actual or apparent authority");³ *cf Allen v. Am. Land Research*, 95 Wn.2d 841, 847, 631 P.2d 930 (1981) (citing RCW 19.86.920 and FTC cases; explaining that "[i]t has long been held under federal law that one may not escape liability by putting into the hands of another the means and instrumentalities by which to defraud others").

It would be an absurd result if a defendant would not be liable for unfair or deceptive acts or practices when its Washington agent acted

³ The Court may be guided by federal court decisions interpreting the FTC Act, upon which the CPA is modeled. RCW 19.86.920.

within the scope of its actual or apparent authority. In this case, if the trial court determines SSB has violated the CPA, and State Farm is found to be vicariously liable for SSB's unfair or deceptive practices, on an agency theory or otherwise, the question of State Farm's CPA liability stops there, and the court need not engage in an analysis of whether the CPA's language bars Ms. Thornell from bringing suit against State Farm because she is a Texas resident.

The narrow construction State Farm and SSB advocate, which focuses on consumer injury, would also restrict the Attorney General's enforcement authority. The Attorney General's primary responsibility in bringing CPA actions "is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals." *Seaboard Sur. Co. v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 746, 504 P.2d 1139 (1973). Restitution for private consumers' injuries is incidental to injunctive relief. *Id.* at 744-46. Using Washington consumers' *injury* as a measure of whether the Attorney General has authority to file a CPA action in a specific case, rather than whether the unfair or deceptive acts or practices occur in trade or commerce, as those terms are defined by the CPA, is inconsistent with the Attorney General's responsibility to enjoin unlawful business practices and would have the potential to make Washington a haven for

unscrupulous businesses who could painstakingly avoid engaging in commerce directly with Washington consumers and as a result, engage in unfair or deceptive acts or practices that the Attorney General would have no authority to enjoin or penalize.

C. Well-Established Principles of Statutory Construction Confirm that the CPA Applies to All Unfair or Deceptive Acts and Practices Arising in Washington.

“The court must give effect to legislative intent determined within the context of the entire statute. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (internal citations and marks omitted). Where, as here, a statute is unambiguous, it is inappropriate to resort to extrinsic aids to construction, such as legislative history. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d.4 (2001).

Permitting non-Washington plaintiffs to bring CPA actions is supported by the express language of the statute. In every relevant statutory term, the Legislature chose to use broad language without limiting the CPA’s applicability based on the residence of either a private CPA plaintiff or a CPA defendant. As a result, the overall statutory scheme evinces the Legislature’s intent to not confine the CPA’s reach to

Washington businesses that target Washington consumers or to bar non-Washington residents from compensation for injuries caused by a Washington business's unfair or deceptive practices.

The class of "persons" who may bring suit under the CPA or otherwise benefit from its protections, as well as the class of "persons" who are subject to its prohibitions, is broadly defined to include "natural persons, corporations, trusts, unincorporated associations and partnerships" without any mention of a person's residence. RCW 19.86.010(1). Nor are there territorial restrictions on those who may file a private CPA action: the statute creates a cause of action for "[a]ny person who is injured in his or her business or property by a violation of RCW 19.86.020. . ." RCW 19.86.090 (emphasis added). State Farm and SSB ask this Court to qualify the Legislature's deliberately broad language to mean that only a *Washington resident* may file a private CPA action when injured by unfair or deceptive practices emanating from Washington. The Court should decline to read into the CPA language that the Legislature omitted. *See State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002).

State Farm and SSB rely on a cramped view of the Attorney General's authority to bring CPA actions when arguing that a private plaintiff has no more authority than the Attorney General. State Farm's Br. at 11; State Farm's Reply Br. at 7; SSB's Reply Br.-Joinder at 1. They

point out that the Attorney General has authority to bring an action as *parens patriae* only on behalf of Washington residents. *Id.* But the CPA does not limit the Attorney General to only *parens patriae* actions.

The CPA authorizes the Attorney General to “bring an action in the name of the state, *or* as *parens patriae* on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful” RCW 19.86.080(1) (emphasis added). This language is disjunctive, which further undermines the narrow construction urged by State Farm and SSB. The use of “or” rather than “and” evidences the Legislature’s intent that the Attorney General’s authority to “bring an action in the name of the state” is separate and distinct from when he files suit “as *parens patriae* on behalf of persons residing in the state[.]” *See Tesoro Ref. & Mfg. Co. v. Department of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (explaining that “the word ‘or’ does not mean ‘and’ unless legislative intent clearly indicates to the contrary”). Similarly, the decision to not include a comma before the qualifying phrase “on behalf of persons residing in the state” supports an interpretation of RCW 19.86.080(1) that provides the Attorney General with authority to seek relief – injunctive or otherwise – that would apply beyond Washington’s borders and benefit non-resident consumers. *Cf. In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 781-82, 903 P.2d 443

(1995) (explaining that if there is a comma before a qualifying phrase, that is “evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one”).

Even if this language is ambiguous – and it is not – the legislative history does not support a statutory construction that would preclude application of the CPA to stop unfair or deceptive conduct that originates from Washington but is directed out of the state. The Legislature added the phrase “or as *parens patriae* on behalf of persons residing in the state” to RCW 19.86.080(1) in 2007 to clarify that the Attorney General has authority to sue on behalf of indirect purchasers of goods or services sold in violation of the CPA.⁴ The amendment simply codified the holding in *Blewett v. Abbott Labs.*, which held that indirect purchasers of goods had no private cause of action under the CPA, but that the Attorney General was authorized to bring an action on their behalf. 86 Wn. App. 782, 790, 938 P.2d 842 (1997). Thus, this language was added to enhance the Attorney General’s antitrust enforcement authority, not to limit the reach of the CPA or restrict the Attorney General’s authority to stop unfair and deceptive practices under RCW 19.86.020 and .080.

⁴ Laws of 2007, ch. 66, § 1; House Bill Report on Substitute Senate Bill 5228, 60th Leg., at 2 (2007); *see also* Final Bill Report on Substitute Senate Bill 5228, 60th Leg., at 1. A copy of this House Bill Report is attached as Appendix A. A copy of the Final Bill Report is attached as Appendix B.

The fact that one provision of the CPA, RCW 19.86.080(1), authorizes the Attorney General to bring *parens patriae* actions on behalf of Washington residents does not mean the Attorney General lacks authority to enforce the CPA against a Washington business that sends deceptive mailers or makes unlawful telemarketing calls exclusively to out-of-state consumers. Nor does it mean that an out-of-state consumer who received the deceptive marketing from a Washington business is precluded from filing an action against that business under the CPA. Well-established rules of statutory construction require the Court to presume that the Legislature made a deliberate choice by not referring to residency in other CPA provisions. *See Kucana v. Holder*, 558 U.S. 233, 248-49, 130 S. Ct. 827, 175 L. Ed.2d 694 (2010) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal citation and marks omitted). The Legislature could have included the same qualifying language with respect to actions brought “in the name of the state” as it did with *parens patriae* actions, but it did not. Besides, expressing the Attorney General’s *parens patriae* authority in terms of protecting Washington residents is wholly consistent with the doctrine of “*parens patriae*,” which refers to the state’s sovereign authority

to protect the interests of state citizens who cannot protect themselves, such as indirect purchasers who have no private right to sue for antitrust damages. *See, e.g., In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600-608, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

State Farm ignores these familiar rules of statutory construction and relies on a 1961 statement by then-Attorney General John J. O'Connell, who described the CPA as "a comprehensive 'antitrust' act designed to operate on the local or 'intra-state' level." State Farm's Br. at 11 (citing O'Connell, *Washington Consumer Protection Act – Enforcement Provisions and Policies*, 36 Wash. L. Rev. 279 (1961) ("O'Connell")). But this Court is not bound by *formal* Attorney General opinions, to which it gives substantial deference, let alone by an Attorney General's statements in a law review article. *Cf. Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1.*, 177 Wn.2d 718, 725, 305 P.3d 1079 (2013). And, while former Attorney General O'Connell's article set forth "the policies," or what he called "the attitudes, which are likely to guide my administration of this act and my use of these tools[,]" *see* O'Connell at 279, the scope of subsequent Attorney Generals' enforcement efforts is not limited by the enforcement

“attitudes” of prior Attorneys General. *Cf. Caritas Servs., Inc. v. Department of Social & Health Servs.*, 123 Wn.2d 391, 415, 869 P.2d 28 (1994) (explaining that “agencies do not have the power to amend unambiguous statutory language”). The Attorney General cannot limit legislatively granted power by choosing to limit his exercise of that authority.

The CPA’s expansive definition of “trade” and “commerce” also supports the Court’s rejection of an interpretation of the CPA that would bar out-of-state consumers from bringing CPA actions for conduct that originates from Washington. Rather than include explicit language stating that a private CPA plaintiff must reside in Washington, or that the acts or practices giving rise to a CPA claim must originate in Washington, the Legislature chose to make clear that a CPA violation could arise from unfair or deceptive practices in “*any* commerce directly *or* indirectly affecting the people of the state of Washington.” RCW 19.86.010(2) (emphasis added). The Legislature chose to include “directly or indirectly” for a reason; the language cannot be presumed to be superfluous. *See Whatcom County*, 128 Wn.2d at 546; *see also Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P. 2d 683 (1985) (“We are required, when possible, to give effect to every word, clause and sentence of a statute.”).

Rejecting a residence requirement for plaintiffs in favor of evaluating whether a given set of facts gives rise to a CPA violation is consistent with this Court's precedent, which holds that courts may ascertain the CPA's meaning through a "gradual process of judicial inclusion and exclusion." *State v. Reader's Digest Ass'n*, 81 Wn.2d at 274 (citing *Federal Trade Comm'n v. Raladalm Co.*, 283 U.S. 643, 648, 51 S. Ct. 587, 75 L. Ed. 2d 1324 (1931)); see also *Ivan's Tire Serv., Inc. v. Goodyear Tire & Rubber Co.*, 10 Wn. App. 110, 123, 517 P.2d 229 (1973), *aff'd* 86 Wn.2d 513, 546 P.2d 109 (1976) (when defining the bounds of the CPA, courts should consider the facts of each CPA case and "let the law develop on a case-by-case basis"). Whether the "commerce" at issue in a given case directly or indirectly affects the people of the state of Washington must be decided on the facts of that case. For example, if an out-of-state company, acting without the assistance or participation of an agent, contractor, employee, or other actor in Washington, advertises its products solely by deceptive mailings to consumers, but does not mail any advertising to Washington residents, and no Washington residents received the solicitation, there might be no effect on Washington consumers or businesses. That analysis might change if the out-of-state company marketed its products online – and thus to consumers nationwide, including Washington – versus mailings directed to only

certain states. A different analysis may also apply if an out-of-state company hired a Washington direct marketing company to participate in the process of designing the solicitation, subject to the out-of-state company's approval.

V. CONCLUSION

Interpreting the CPA to prohibit out-of-state plaintiffs from bringing suit is inconsistent with the Legislature's directive that the statute be liberally construed to serve its beneficial purposes. The narrow interpretation of the CPA State Farm and SSB urge the Court to adopt would have a detrimental effect on the ability of private citizens to act as private attorneys general, which, as the Court has explained, is "an integral part of CPA enforcement." *Scott*, 160 Wn.2d at 853. Such an interpretation would also impact and significantly constrain the Attorney General's authority to curtail unfair and deceptive practices, whether those practices directly *or* indirectly affect Washington consumers, businesses, and the marketplace. The Attorney General respectfully requests that the Court answer both certified questions in the affirmative.

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RESPECTFULLY SUBMITTED this 4th day of September,
2015.

ROBERT W. FERGUSON
Attorney General



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SHANNON E. SMITH, WSBA #19077
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Attorneys for Amicus Curiae
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APPENDIX A

HOUSE BILL REPORT

SSB 5228

As Passed House:

April 4, 2007

Title: An act relating to actions under chapter 19.86 RCW, the consumer protection act.

Brief Description: Revising provisions concerning actions under the consumer protection act.

Sponsors: By Senate Committee on Judiciary (originally sponsored by Senators Kline, McCaslin and Weinstein; by request of Attorney General).

Brief History:

Committee Activity:

Judiciary: 3/23/07 [DP].

Floor Activity:

Passed House: 4/4/07, 95-0.

Brief Summary of Substitute Bill

- Allows the Attorney General to sue on behalf of indirect purchasers of goods or services sold in violation of the Unfair Business Practices - Consumer Protection Act.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Bill Perry (786-7123).

Background:

Under the state's Unfair Business Practices - Consumer Protection Act (CPA), various business practices are declared unlawful. These practices include:

- engaging in unfair methods of competition and unfair or deceptive acts or practices in the conduct of commerce, including contracts, trusts or conspiracies in restraint of trade;
- monopolizing or attempting to monopolize trade;

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- entering agreements not to purchase from the competitors of a particular seller when the agreement substantially lessens competition or tends to create a monopoly; and
- acquiring corporate stock when the acquisition substantially lessens competition or tends to create a monopoly.

Several statutes elsewhere in the code also declare violations of their provisions to be violations of the CPA.

A party injured by a violation of the CPA may bring an action for damages. Recovery may include the trebling of actual damages (not to exceed \$10,000 for some violations) and reasonable attorneys' fees. For some violations, civil penalties of up to \$100,000 in the case of an individual, and up to \$500,000 in the case of a corporation, may also be imposed. A civil penalty of up to \$2,000 per violation may be imposed for each violation amounting to an unfair method of competition or an unfair or deceptive act in the conduct of commerce. In addition, the Attorney General may bring an action to restrain a person from violating the CPA.

The CPA's grant of authority to the Attorney General is expressly for the purposes of bringing an action "in the name of the state." Such an action by the Attorney General may seek to prevent or restrain violations of the CPA and may seek restoration for persons injured by violation of the CPA. As an outgrowth of federal court rulings, a question has arisen as to whether the authority of the Attorney General extends to bringing an action for a CPA violation on behalf of persons who are themselves "downstream" or "indirect" purchasers of goods or services. An example of an indirect purchaser might be the ultimate consumer of a product that was bought from a retailer who bought from a producer who violated the CPA. The retailer would be the direct purchaser, and the consumer would be the indirect purchaser of the product.

The U.S. Supreme Court in *Illinois Brick Co v. Illinois*, 431 U.S. 720 (1977), held that under federal antitrust law, indirect purchasers may not bring an action. Only a party who directly purchases from the violator can sue. However, *Illinois Brick* left open the possibility of states enacting their own laws to allow indirect purchasers to sue for unfair business practices. Many states have enacted so-called "Illinois Brick Repealer" laws. Some of these laws allow an indirect purchaser to bring a suit directly, while others allow such suits only when brought by the Attorney General on behalf of the indirect purchasers.

Washington has not enacted an "Illinois Brick Repealer." However, based in part on dicta from the state Court of Appeals decision in *Blewett v. Abbott Laboratories*, 86 Wn. App 782 (1997), the state Attorney General has brought suits on behalf of indirect purchasers under the common law doctrine of *parens patriae*. In *Blewett v. Abbott Laboratories*, while the court rejected a CPA suit by indirect purchasers by citing *Illinois Brick*, the court noted that some of the CPA's restrictive language with respect to suits brought by indirect purchasers does not extend to suits brought by the Attorney General. The common law *parens patriae* doctrine allows the state to bring legal actions or seek remedies on behalf of individuals in order to protect them from harm. The Attorney General reports, however, that in at least one

multistate case, a federal judge has rejected the Attorney General's attempts to sue on behalf of indirect purchasers.

Summary of Bill:

The Attorney General is given explicit authority to bring parens patriae actions under the CPA on behalf of persons residing in the state.

In cases in which the Attorney General has brought an antitrust action under the CPA, the court is authorized to order restoration for an injured party regardless of whether the injury was the result of a direct or indirect purchase of goods or services.

The ability of the state itself to sue for damages under the CPA is expressly made applicable to cases in which the state is indirectly injured by an antitrust violation of the CPA.

Courts are required to prevent duplicate recoveries for a single CPA violation and are encouraged to consolidate cases where practicable.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) The bill explicitly reinstates a right that has been assumed for many years under the common law. Because of a court decision in another state, doubt has been raised as to the Attorney General's ability to bring law suits on behalf of Washington residents. The bill provides statutory authority for these suits. Eighty percent of the other states already have some form of this authority.

(Opposed) None.

Persons Testifying: Senator Kline, prime sponsor; and Mark Brevard, Office of the Attorney General.

Persons Signed In To Testify But Not Testifying: None.

APPENDIX B

FINAL BILL REPORT

SSB 5228

As Passed Legislature

Brief Description: Revising provisions concerning actions under the consumer protection act.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Kline, McCaslin and Weinstein; by request of Attorney General).

Senate Committee on Judiciary

House Committee on Judiciary

Background: Under the state's Unfair Business Practices - Consumer Protection Act (CPA), various business practices are declared unlawful. These practices include engaging in monopoly, and the restraint of trade or competition.

The Attorney General may bring an action to restrain a person from violating the CPA. An action by the Attorney General may seek to prevent violations of the act and may seek relief for persons injured by violation of the CPA. As a result of a federal court ruling, a question has arisen as to whether the Attorney General is authorized to bring an action for a CPA violation on behalf of persons who are "indirect purchasers" of goods or services. An example of an indirect purchaser might be the ultimate consumer of a product that was bought from a retailer who bought from a producer who violated the act. The retailer would be the direct purchaser, and the consumer would be the indirect purchaser of the product.

Many states have enacted laws that allow an indirect purchaser to bring a suit directly, while others allow such suits only when brought by the Attorney General on behalf of the indirect purchasers. Washington has not enacted either type of law. However, based in part on the state court of appeals decision in *Blewett v. Abbott Laboratories*, 86 Wn. App 782 (1997), the state Attorney General has brought suits on behalf of indirect purchasers under the common law doctrine of *parens patriae*, which permits the state (literally as "parent of the country") to bring legal actions on behalf of individuals in order to protect them from harm. The Attorney General reports, however, that in at least one multi-state case, a federal judge has rejected the Attorney General's attempts to sue on behalf of indirect purchasers.

Summary: The Attorney General is given explicit authority to bring *parens patriae* actions under the CPA on behalf of persons residing in the state. In cases in which the Attorney General has brought an action under the CPA for antitrust violations, the court is authorized to order restoration for an injured party regardless of whether the injury was the result of a direct or indirect purchase of goods or services. The ability of the state itself to sue for damages under the CPA is expressly made applicable to cases in which the state is indirectly injured by a violation of the act's antitrust provisions.

Courts are required to: (1) exclude from the amount of monetary relief awarded in antitrust actions brought by the Attorney General any amount already awarded for the same violation; and (2) consider consolidating or coordinating related actions to avoid duplicate recovery.

Votes on Final Passage:

Senate 47 2
House 95 0

Effective: The bill contains an emergency clause and takes effect immediately.

NO. 91393-5

SUPREME COURT OF THE STATE OF WASHINGTON

SANDRA C. THORNELL,

Respondent,

v.

SEATTLE SERVICE BUREAU, INC., d/b/a NATIONAL SERVICE
BUREAU, INC., and STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellants.

DECLARATION OF SERVICE

NATALIA CORDUNEANU declares as follows:

I certify that on September 4, 2015, I caused to be filed with the Supreme Court, via attachment to email, the Motion for Leave to File *Amicus Curiae* Brief of the Attorney General of Washington, Brief of *Amicus Curiae* of the Attorney General of Washington, and Declaration of Service. I also caused to be delivered, via electronic mail, as agreed by parties, true and accurate copies to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, WA, this 4th day of September, 2015.



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Case number: 91393-5

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Attached is the Motion for Leave to File Amicus Curiae, Amicus Curiae Brief of Washington State Attorney General, and Declaration of Service.

Thank you for your consideration of this matter.

Natalia Corduneanu

Paralegal

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WA State Attorney General's Office
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