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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ON CERTIFICATION FROM THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

SANDRA C. THORNELL, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

SEATTLE SERV. BUREAU, INC. d/b/a
NATIONAL SERV. BUREAU, INC. and STATE
FARM MUT. AUTO INS. CO.,

Defendants.

AMICUS CURIAE BRIEF ON BEHALF OF
CERTAIN WASHINGTON-BASED COMPANIES

Stephen M. Rummage, WSBA #11168
Fred B. Burnside, WSBA #32491
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

Robert M. McKenna, WSBA #18327
Orrick, Herrington & Sutcliffe
705 Fifth Avenue, Suite 5600
Seattle, Washington 98104-7097
206-839-4300 Phone
206-839-4301 Fax

Attorneys for *Amici Curiae* Amazon.com,
Expedia, Inc., Holland America Line N.V.,
Microsoft Corporation, and T-Mobile USA, Inc.

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I. INTRODUCTION

Amici are five nationally-known companies headquartered in Washington (the “Washington Companies”) that develop innovative products and services, which they make available to consumers across the country.¹ They offer this amicus curiae brief to provide the Court with their perspective on the application of state consumer protection laws in proposed nationwide class actions. The Washington Companies ask the Court to reject Ms. Thornell’s invitation (Thornell Brf. (May 15, 2015) at 22) to hold that the Washington Consumer Protection Act (“WCPA”) always governs consumer transactions by Washington businesses, even when (a) those transactions occur in other states and (b) choice of law principles otherwise require application of the law of the consumer’s home state.² The Washington Companies in this brief address three points:

First, Ms. Thornell erroneously argues the WCPA *must* apply whenever it theoretically *could* apply. In other words, she asserts that if the WCPA has extraterritorial reach (as she claims it does), Washington courts must allow consumers across the country to assert claims under the WCPA, even if choice of law principles would otherwise require application of another state’s law. Ms. Thornell’s argument is as wrong as it is dangerous. If both Washington and another state have significant

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

² To avoid duplication, the Washington Companies do not repeat State Farm’s and Seattle Service Bureau’s statutory interpretation arguments as to whether the WCPA affords a cause of action to non-residents against Washington-based businesses.

contacts with the disputed act or transaction, courts must apply choice of law principles to decide which state's law governs. If the law were otherwise, states could pass laws of purported national application (a decidedly federal function) and thereby intrude on the sovereignty of other states. But courts properly do not allow this to occur. Instead, courts use accepted choice of law tests to determine what states' consumer protection laws govern consumer claims, a process that necessarily involves declining to apply laws that might apply absent the conflict analysis.

Second, Ms. Thornell advocates an approach to choice of law in consumer deception cases that focuses on where the defendant is located rather than where the consumer engaged in the transaction and allegedly suffered injury. But her approach runs counter to this Court's recent decision in *FutureSelect Portfolio Mgt., Inc. v. Tremont Group*, 180 Wn.2d 954 (2014), as well as decisions of courts across the country. Dozens of courts (including this one) reject the notion that the law of the defendant's headquarters state governs claims asserted by consumers across the country, for sound reasons that go to the heart of federalism. No matter how the Court answers the certified questions, it should (a) make clear that *FutureSelect* means what it says and (b) emphasize that Washington choice of law principles honor other states' sovereignty without imposing unique burdens on Washington businesses.

Third, Ms. Thornell wrongly implies the WCPA could apply extraterritorially even where a contractual choice of law clause requires

application of another state's law. This Court long ago recognized that businesses can include binding choice of law clauses in their contracts—including their consumer contracts. Under choice of law principles, courts routinely honor clauses prescribing application of the law of the consumer's home state to resolve disputes, as this Court did in *Schnall v. AT&T Wireless*, 171 Wn.2d 260 (2011). To the extent this Court addresses choice of law issues, it should follow *Schnall* and reject Ms. Thornell's argument that the CPA should apply even when choice of law considerations dictate otherwise.

II. ARGUMENT

A. **The Court Should Reject Ms. Thornell's Invitation to Abandon the Choice of Law Inquiry This Court Has Repeatedly Mandated.**

Ms. Thornell suggests the WCPA applies whenever a dispute has any connection to Washington, without regard to choice of law principles: "This Court must apply the CPA as the legislature intended, regardless of whether another state's laws might apply. No need exists to examine choice-of-law factors to determine applicable law." Thornell Brf. (May 15, 2015) at 22. This wrong-headed choice of law approach tramples the interests of other states, invites nationwide lawmaking by states, and threatens to impose litigation burdens on Washington businesses that their competitors in other states do not bear.

By definition, a court must engage in a choice of law inquiry only when (a) multiple states' laws (including statutes) could govern the

disputed conduct and (b) the competing laws differ in material ways. Courts confront these circumstances on a regular basis. Almost without exception, courts address these conflicts by applying traditional choice of law principles, *not* by ignoring choice of law (as Ms. Thornell suggests) and applying the forum state's statute to the widest extent possible.

Most notably, this Court has applied choice of law principles to decide whether a Washington statute governs a claim, without treating the Washington statute's territorial reach as dispositive, as Ms. Thornell urges. *See, e.g., FutureSelect*, 180 Wn.2d at 968-69 (applying choice of law principles to determine whether Washington State Securities Act ("WSSA") governed claim of Washington residents against New York company arising from securities sales); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 134-36 (1987) (applying choice of law principles to determine whether WSSA governed claim of New York interveners against Washington securities issuer). No Washington decision suggests a court may dispense with a choice of law inquiry on the theory that the forum state's law may have an extraterritorial reach.

Other appellate courts take the same approach. In *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), in an opinion by Judge Gould, the Ninth Circuit evaluated whether to apply California's consumer protection statutes based on a choice of law analysis—without questioning whether the California statutes could reach the conduct at issue—and held the laws of consumers' home states would govern. *See*

also *Coe v. Phillips Oral Healthcare Inc.*, 2014 WL 5162912, at *3 (W.D. Wash. Oct. 14, 2014) (relying on *Mazza*; even if “Washington recognizes WCPA claims asserted by non-resident consumers against Washington corporations,” law of “the putative class members’ home states” controls consumer deception claims). And in *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946-47 (6th Cir. 2011), plaintiffs sued for violation of Ohio’s consumer protection statute and common law unjust enrichment on behalf of a putative nationwide class, alleging a deceptive healthcare discount program. While acknowledging ambiguous state court decisions suggesting the Ohio statute could reach out-of-state sales, *id.* at 947, the Sixth Circuit applied traditional choice of law rules and concluded “the consumer-protection laws of the State where each injury took place would govern these claims.” *Id.* Similarly, in *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1119-21 (8th Cir. 2005), the Eighth Circuit held the reach of Minnesota’s consumer protection statutes could not “relieve courts from performing” a choice of law analysis. *See also Corder v. Ford Motor Co.*, 272 F.R.D. 205, 210, 212-13 (W.D. Ky. 2011) (assuming Kentucky law could apply nationwide, but concluding “choice of law principles would mandate the application of the laws of the states in which the putative class members purchased their vehicles”).

The district court squarely addressed the issue in *In re Skelaxin (Metaxalone) Antitrust Litigation*, 299 F.R.D. 555 (E.D. Tenn. 2014). In that case, indirect purchasers of a prescription muscle relaxant alleged that

pharmaceutical companies engaged in anti-competitive conduct to delay entry of a generic version of the drug into the market. The plaintiffs sued under the Tennessee Trade Practices Act (“TTPA”) and sought to represent indirect purchasers across the country. *Id.* at 580. Like Ms. Thornell, plaintiffs claimed the court could dispense with a choice of law analysis: because the TTPA had “an out-of-state reach,” they argued, “no real choice-of-law issue is presented.” *Id.* at 582 (citations omitted). The court rejected that argument, saying plaintiffs

miss the point: the basic purpose of the choice of law doctrine is that more than one state’s laws may be implicated in a given case. [Citations omitted.] ... That [Tennessee] recognizes the applicability of the TTPA outside of Tennessee does not end the Court’s analysis. Regardless of whether the TTPA provides a viable claim against Defendants, the Court must still under[take] the appropriate choice-of-law analysis.

Id. at 582. The TTP’s “broad reach ... merely indicates a choice of law analysis is required because multiple state laws are at issue, not that a choice-of-law analysis is unnecessary.” *Id.* at 585. After applying the Restatement’s “most significant relationship” test for conflict of laws, the court held it “must apply the law of the state where the injury occurred, not Tennessee’s.” *Id.* at 588.

For these reasons, even if the Court were to decide that a non-Washington resident may sue under the WCPA, it should reject Ms. Thornell’s assertion that the WCPA *must* apply in every case having any connection to this state. Rather, under settled conflict of laws principles, where both Washington law and another state’s law arguably

may apply, Washington courts must conduct a choice of law analysis to decide which state's law governs the controversy. Because that choice of law inquiry lies outside the scope of the certified questions, the Court should return the case to federal court to conduct it.

B. If the Court Engages in a Choice of Law Analysis, It Should Reject Ms. Thornell's "Headquarters State" Approach to Choice of Law in Consumer Cases.

The Washington Companies have no interest in the outcome of the choice of law analysis in this particular case. They do, however, have an interest in ensuring that Washington courts apply choice of law principles on an even-handed basis, without any predisposition to favor (or disfavor) any party based on its status. Ms. Thornell, however, advocates a result-oriented approach to choice of law that favors applying the law of the state where a corporate defendant has its headquarters to any dispute involving consumers in multiple states. *See* Thornell Brf. at 23-27. Her argument appears designed to make Washington law a means of facilitating nationwide class actions against Washington businesses.

Ms. Thornell's approach contradicts this Court's most recent choice of law decision. Because it also falls outside mainstream jurisprudence, it would also impose unfair burdens on Washington businesses that their competitors in other states do not bear. To the extent this Court reaches choice of law issues, it should reject the approach Ms. Thornell advocates.

1. **Washington Choice of Law Factors Generally Favor Application of the Law of the Consumer's Home State in Consumer Deception Cases.**

In *FutureSelect*, this Court adopted Restatement (Second) of Conflict of Laws § 148(2) to guide choice of law in deception claims. *FutureSelect Portfolio Mgt.*, 180 Wn.2d at 968. Under § 148, courts consider six factors in deciding which state has the most significant contacts with a deception-based claim:

- (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 domicil[e], 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.

Id. In practical terms, § 148 **generally** results in applying the law of each consumer's home state to consumer deception claims, since consumers typically read advertising, shop, buy, use products or services, and make payments from their state of residence. And in fact, the Restatement teaches that "[t]he domicil[e], residence and place of business of the **plaintiff** are more important than the similar contacts on the part of the defendant." Restatement § 148, cmt. i (emphasis added). If any two

factors other than the defendant's residence favor a single state, that state's law usually applies. *Id.*, cmt. j. In short, in the typical consumer deception case, almost every factor will point to the consumer's home state. *See* Restatement § 148, cmt. f (describing causation); *id.* §148, cmt. g (focus on where consumers see allegedly deceptive advertising).

This conclusion does not rest on mechanical contact-counting. Instead, it recognizes the reality that consumers reasonably expect their home states' laws to regulate their in-state purchases. Absent a valid contractual choice of law (discussed below), consumers buying products or services without leaving home do not expect to subject themselves to a foreign state's law. Similarly, without a contrary agreement, companies serving customers in other states expect to follow local rules that govern their conduct (not to export their home state laws), just as businesses marketing to Washington consumers must follow Washington rules. Courts—including Washington courts—therefore routinely look to laws of the consumers' home states to resolve consumer disputes.

2. Courts Apply a Consumer's Home State Law to Deception Claims Based upon Principles of Federalism and Choice of Law Considerations.

The proposition that states may prescribe rules of liability within their own boundaries is as old as the nation. “A basic principle of federalism is that each state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). For that

reason, the notion Ms. Thornell advocates, i.e., “that one state’s law would apply to claims by consumers throughout the country—not just those in [Washington], but also those in California, New Jersey, and Mississippi—is a novelty.” *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002). Her headquarters approach to choice of law allows a single state to decide who wins and who loses in disputes affecting consumers across the country, arrogating to a company’s home state an authority comparable to that entrusted to Congress, i.e., the power to prescribe rules of liability not only for resident corporations but also for consumers across the nation who do business with the corporation. Courts regularly (and properly) reject that approach.

The Ninth Circuit, for example, consistently recognizes the right of each state to set its own liability rules for disputes arising from transactions with its consumers. In *Zinser v. Accufix, Inc.*, 253 F.3d 1180 (9th Cir. 2001), plaintiff advocated the application of Colorado law, where the defendant was based, to facilitate a nationwide class action about allegedly defective medical devices. The Ninth Circuit held the trial court “correctly rejected the contention that the law of a single state ... applies to this action.” *Id.* at 1188. “Every state has an interest in having its law applied to its resident claimants.” *Id.* Judge Gould reiterated the point in *Mazza*, emphasizing each state’s interest “in setting the appropriate level of liability for companies conducting business within its territory,” including non-resident companies. *Mazza*, 666 F.3d at 591-92 (citation

omitted). As Judge Gould explained:

As it is the various states of our union that may feel the impact of such effects [of deceptive conduct], it is the policy makers within those states, within their legislatures and, at least in exceptional or occasional cases where there are gaps in legislation, within their state supreme courts, who are entitled to set the proper balance and boundaries between maintaining consumer protection, on the one hand, and encouraging an attractive business climate, on the other hand.

Id. at 592.

The other federal circuits likewise recognize the paramount interest of the state within which a consumer transaction occurs. In the leading case, *Bridgestone/Firestone*, 288 F.3d at 1020, the Seventh Circuit reversed a ruling that a court could apply Michigan consumer protection law to Ford Motor Company, and Tennessee consumer protection law to Firestone Tire Company, because their headquarters were in those states, and because decisions and consumer disclosures emanated from those states. The Seventh Circuit rejected the idea that plaintiffs could use that tactic to paper over state law variations.³ “Differences across states may

³ The differences among state consumer protection acts are beyond debate. “[T]he states need not, and in fact, do not, provide ... protection [from deceptive trade practices] in a uniform manner.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-69 (1996). “State consumer-protection laws vary considerably.” *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1018. They “present different procedural and substantive elements, including differing requirements of privity, demand, scienter and reliance.” *Kaczmarek v. IBM*, 186 F.R.D. 307, 312 (S.D.N.Y. 1999). The “[c]onsumer fraud ... laws of the states differ with regard to the defendant’s state of mind, type of prohibited conduct, proof of injury-in-fact, available remedies, and reliance, just to name a few differences.” *In re Prempro*, 230 F.R.D. 555, 564 (E.D. Ark. 2005); *see also Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 314 (5th Cir. 2000) (different jurisdictions “have different conceptions of what adequate compensation is” in consumer cases); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219 (E.D. Pa. 2000) (“State consumer protection acts vary on a range of fundamental issues.”); *see also In re Gen’l Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1536-37 (E.D. Mo. 1997) (offering examples of variances).

be costly ... but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.” *Id.*

The Second, Third, Fifth, and Sixth Circuits have all reached the same conclusion as the Seventh and Ninth. *Johnson v. Nextel Communications Inc.*, 780 F.3d 128, 144 (2d Cir. 2015) (employee plaintiffs’ home states “have the most significant relationship to their residents’ tort claims” rather than New York, where one defendant was based); *Maniscalco v. Brother Intern. (USA) Corp.*, 709 F.3d 202, 210 (3d Cir. 2013) (“the interest of South Carolina in having its law apply to its own consumers outweighs the interests of New Jersey in protecting out-of-state consumers from consumer fraud”); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 312-13 (5th Cir. 2000) (rejecting application of law of Georgia, where defendant was incorporated, assembled and distributed products, and did warranty work; claims “implicate[d] the tort policies of all 51 jurisdictions in the United States, where proposed class members live and bought” products); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011) (“the State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by *its consumer*-protection laws—are harmed by it”). State supreme courts reach the same conclusion. *See, e.g., Barbara’s Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 920-24 (Ill. 2007); *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1035-37 (Okla. 2006); *Compaq Computer Corp. v. Lapray*, 135 S.W. 3d 657, 681 (Tex. 2004); *Henry Schein, Inc. v.*

Stromboe, 102 S.W. 3d 675, 698 (Tex. 2002). Dozens of courts agree.⁴

Washington likewise has a sovereign interest in deciding when its residents can assert claims arising out of transactions here. Thus, “[t]he Washington Legislature passed the Consumer Protection Act ... to protect Washington citizens from unfair and deceptive trade and commercial practices.” *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547-48 (2000); *cf. FutureSelect*, 180 Wn.2d at 970 (“Washington has a strong interest in giving Washington investors the benefit of Washington law and in requiring the sellers of securities to comply with it.). But Washington choice of law principles do not have any unique attribute counseling (let alone compelling) a choice of a company’s headquarters state law to govern claims of non-residents and facilitate nationwide class actions.

Instead, as discussed above, Washington follows the “most significant relationship” approach to choice of law espoused in § 148. *See FutureSelect*, 180 Wn.2d at 968. And many courts have rejected the headquarters state theory under the § 148 test. *See, e.g., Spence*, 227 F.3d

⁴ The following cases decided in the last few years illustrate the point: *Miller v. Samsung Electronics America, Inc.*, 2015 WL 3965608 (D.N.J. June 29, 2015) (§ 148 mandated application of Florida law, where consumer purchased Samsung product, not New Jersey, its headquarters); *In re Vioxx Products Liability Litig.*, 861 F. Supp. 2d 765 (E.D. La. Mar. 20, 2012) (applying § 148 under New Jersey law; “The majority of apposite cases have applied the law of the state of the plaintiff’s residence to the plaintiff’s consumer fraud claim, and the Court is persuaded by the weight of that authority.”); *St. Gregory Cathedral School v. LG Electronics, Inc.*, 2014 WL 979196 (E.D. Tex. Mar. 5, 2014) (dismissing claims under New Jersey Consumer Fraud Act where defendant was headquartered in New Jersey, but plaintiffs received the alleged misrepresentations and were injured in their home states, which were the proper source of consumer-protection laws); *Putzier v. Ace Hardware Corporation*, 50 F. Supp.3d 964 (N.D. Ill. 2014) (applying § 148 under Florida law; franchisees’ states bore most significant relationship to fraud claims rather than Illinois, where defendant headquartered).

at 312-14; *Maniscalco*, 709 F.3d at 206-210; *Miller v. Samsung Electronics America, Inc.*, 2015 WL 3965608, *6 (D.N.J. June 29, 2015); *Putzier v. Ace Hardware Corporation*, 50 F. Supp.3d 964, 973-76 (N.D. Ill. 2014); *In re Vioxx Products Liability Litig.*, 861 F. Supp. 2d 756, 763-65 (E.D. La. Mar. 20, 2012); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 215 (E.D. Pa. 2000). Under *every* choice of law theory, the issue is the same: the headquarters approach focuses on a single factor—the defendant’s domicile—and makes it dispositive by pointing to the unremarkable fact that corporations make decisions (and often manufacture products) in their headquarters state. By contrast, other factors favor the state where the consumer lives, views the defendant’s representations, makes a buying decision, and uses a product or service. See Restatement §§ 145, 148; *Spence*, 227 F.3d at 314-15; *Lyon*, 194 F.R.D. at 215. Injury where the plaintiff lives and buys products is what one would expect; it is not a “fortuitous” contact, as when a plane crashes in a jurisdiction it happens to pass over. *Spence*, 227 F.3d at 315.

To the extent this Court addresses choice of law at all, it should squarely recognize the implications of *FutureSelect*: in the typical case, absent an applicable choice of law clause to the contrary, the law of a consumer’s home state will govern a consumer deception claim against a business. Principles of federalism require no less. Any departure from these principles would impose costs (through nationwide class actions) on Washington businesses that businesses in other states do not face.

C. Ms. Thornell’s Approach Would Require Courts to Disregard Choice of Law Clauses in Consumer Contracts.

The Washington Companies—like many companies having substantial interstate consumer-facing business—avoid choice of law disputes by including choice of law clauses in their consumer contracts, which specify the law governing disputes.⁵ Courts, including this Court, generally enforce choice of law clauses in consumer contracts, particularly when they select the consumer’s home state law. In advocating application of the WCPA to out-of-state consumers “regardless of whether another state’s laws might apply,” Thornell Brf. at 22, Ms. Thornell implies the WCPA trumps any choice of law clause. To the extent the Court reaches choice of law issues, it should flatly reject that notion, which contradicts prior decisions of this Court.

Under Washington law, the first step in deciding whether to enforce a choice of law clause requires a court to decide whether an “actual conflict” exists between Washington law and the law of the chosen state. *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 692 (2007). The absence of a conflict moots the conflict of laws issue. But if a conflict exists, the Court must decide whether the choice of law clause is effective.

⁵ Some of these clauses have been discussed in published cases. *See, e.g., Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 198 (2001) (cruise contract to be “construed in accordance with the laws of the State of Washington, U.S.A.”); *In re Detwiler*, 305 Fed. Appx. 353, 2008 U.S. App. LEXIS 27244, at *2 (9th Cir. Dec. 12, 2008) (T-Mobile contract; choice of law of the “state in which your billing address in our records is located”); *In re Microsoft Xbox 360 Scratched Disc Litig.*, 2009 U.S. Dist. LEXIS 109075 (W.D. Wash. Oct. 5, 2009) (“The laws of your state of residence will apply to any tort claims and/or any claims under any consumer protection statutes.”).

Id. Section 187 of the Restatement (Second) Conflict of Laws governs this inquiry. *See Erwin*, 161 Wn.2d at 694; *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384 (2008). Section 187 requires a court to enforce a contractual choice of law unless (a) without the provision, Washington law would apply; and (b) the chosen state’s law violates a fundamental public policy of Washington⁶; and (c) Washington’s interest in the determination of the issue materially outweighs the chosen state’s interest. *McKee*, 164 Wn.2d at 384. Washington law will enforce the choice of law unless the clause fails **all three** of these tests. *Id.*; *see also Digital Control Inc. v. Radiodetection Corp*, 294 F. Supp. 2d 1199, 1204 n.6 (W.D. Wash. 2003) (“an express choice of law clause in a contract will be given effect [in Washington], as expressing the intent of the parties, so long as application of the chosen law does not violate the fundamental public policy of the forum state”).

This Court has applied these principles to consumer choice of law provisions. In *Schnall v. AT&T Wireless*, 171 Wn.2d 260 (2011), AT&T Wireless sought to enforce a contractual choice of law clause requiring application of the law of the state corresponding to the consumer’s area code. This Court affirmed the trial court’s enforcement of the clause, quoting the trial court’s explanation as follows:

⁶ To overcome an otherwise valid choice of law, a “fundamental policy” of Washington should be a “clear and unequivocal statement by the people of Washington through their elected representatives.” *O’Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 686 (1979). No one could plausibly argue the legislature in the WCPA made anything resembling a clear and unequivocal statement suggesting a policy of regulating consumer transactions in states thousands of miles away.

[t]here does not seem to be any public policy reason not to enforce the choice of law provision of the agreements in this case. The law of the State associated with the area code will generally be the law of the customer's home state, thereby applying to that customer the law with which he or she is most familiar.

Id. at 268-29. Based on this choice of law provision, the Court held out-of-state consumers could assert claims *only* under the laws of their home states, noting that “nothing ... prevent[s] persons outside of Washington from filing statewide class actions in each of their respective home states,” under their home state law. *Id.* at 269. Given the contractual choice of consumers’ local laws, the Court held “[a] nationwide class action would be unmanageable and unduly burdensome on the trial court and the state judicial system and serve no real benefit to plaintiffs who are free to bring statewide class actions in their home states.” *Id.* at 280. It then remanded for the trial court to assess whether to certify a class limited to Washington residents suing for breach of contract and alleged WCPA violations, “consider[ing] proof of causation [under the WCPA] only with regard to the facts and evidence pertaining to a Washington class action.” *Id.*

This Court’s decision in *McKee* is consistent with *Schnall*: even though it declined to enforce a choice of law provision on the peculiar facts of the case, it expressed a preference for application of the law of the consumer’s home state. In *McKee*, AT&T sought to enforce its contract with a *Washington* consumer, which contained a clause choosing the law of New York, AT&T’s home state. The Court first considered whether Washington law would govern absent the choice of New York law. Citing

Restatement (Second) of Conflict of Laws § 188, the Court set forth the factors relevant to deciding governing law on a contract claim:

Courts weigh the relative importance to the particular issue of (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance of the contract, (d) the location of the subject matter of the contract, and (e) the domicile, residence, or place of incorporation of the parties.

McKee, 164 Wn.2d at 385-85 (citation omitted). Applying these factors (which resemble the § 145 factors for tort claims and the § 148 factors for deception claims), this Court ruled the law of the consumers' home state—Washington—would govern in the absence of the choice of law clause:

Here, Washington [i.e., the consumer's home state] is the place of contracting, the place of negotiation (what little there was), the place of performance, the location of the subject matter, and the residence of one of the parties. New York's only tie to this litigation is that it is the state of incorporation of AT&T.

Id. at 385. Applying *Erwin* and § 187 of the Restatement, the Court decided applying New York law to McKee's dispute with AT&T would violate a "fundamental public policy" of Washington by enforcing a class action waiver that Washington had recently found contrary to public policy.⁷ *Id.* Thus, on *McKee*'s facts, the Court declined to enforce a choice of law provision—but only after *first* finding the law of the

⁷ Since then, in the wake of the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Ninth Circuit held that the Federal Arbitration Act preempts Washington's policy against individual arbitration clauses with class action waivers. See *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159-61 (9th Cir. 2012).

consumer's home state (Washington) would govern in the absence of the clause and *then* assessing Washington's fundamental public policies.⁸

Federal courts applying Washington conflict of laws principles likewise enforce choice of law clauses specifying the law of the consumer's home state. In *In re Detwiler*, 305 Fed. Appx. 353, 2008 U.S. App. LEXIS 27244 (9th Cir. Dec. 12, 2008), a Florida consumer sued T-Mobile, a Washington corporation. The plaintiff asked the court to apply Washington law despite T-Mobile's contract clause choosing the consumer's home state law. Applying *McKee*, the Ninth Circuit affirmed enforcement of the choice of law, holding Florida had the most significant relationship to the dispute as "the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the residence of one of the parties." 2008 U.S. App. LEXIS 27244, at *4; *see also In re Microsoft Xbox 360 Scratched Disc Litig.*, 2009 U.S. Dist. LEXIS 109075, at *15-16, at *18 (W.D. Wash. Oct. 5, 2009) (enforcing choice of law clause and rejecting nationwide application of Washington law).

Nothing in this body of law remotely suggests the WCPA, no matter how long its reach, trumps a valid choice of law clause. Indeed,

⁸ A contractual choice of law provision can govern not only interpretation of the contract but also tort or statutory claims arising out of the parties' relationship. *See, e.g., Kuehn v. Children's Hosp., Los Angeles*, 119 F.3d 1296, 1302 (7th Cir. 1997); *see also In re Microsoft Xbox 360 Scratched Disc Litig.*, 2009 U.S. Dist. LEXIS 109075, at *15-16 (W.D. Wash. Oct. 5, 2009) ("Plaintiffs fail to point to a Washington case holding that the State's public policy is to guarantee *nationwide* class-action resolution of small claims, and this Court does not read ... *McKee* as stating that much.").

considerations of Washington policy do not even bear on a choice of law clause's enforceability under *Erwin, McKee*, and § 187 *unless* Washington law would otherwise apply. And as explained above, Washington law typically will *not* be the default rule with respect to a claim by a non-resident arising from a transaction within the consumer's home state.

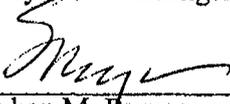
The Court's answer to the certified questions should do nothing to undermine the efficacy of choice of law clauses.

III. CONCLUSION

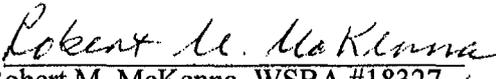
The Washington Companies ask the Court to reject Ms. Thornell's assertion that the WCPA must apply in every case having any arguable connection to this state. Any choice of law inquiry should be conducted after the case returns to federal court. To the extent the Court resolves choice of law issues, the Washington Companies ask the Court to hold (a) the choice of law principles applicable to deception claims, adopted in *FutureSelect*, generally preclude application of a single state's law (i.e., the defendant's headquarters state) to govern consumer deception claims; and (b) the mere fact that a state's consumer protection statute may reach out-of-state conduct does not trump a valid choice of law clause selecting another state's law.

RESPECTFULLY SUBMITTED this 4th of September, 2015.

Davis Wright Tremaine LLP
Attorneys for Washington Companies

By 
Stephen M. Kummage, WSBA #11168
Fred B. Burnside, WSBA #32491

Orrick, Herrington & Sutcliffe
Attorneys for Washington Companies

By 
Robert M. McKenna, WSBA #18327 by 

OFFICE RECEPTIONIST, CLERK

To: Rummage, Steve
Cc: mmurphy@baileyglasser.com; bterrell@tmdwlaw.com; TFrederi@winston.com; LCoberly@winston.com; NMurphy@winston.com; jhampton@bpmlaw.com; dsyhre@bpmlaw.com; Hasson@dhlaw.biz; Liz@dhlaw.biz; Burnside, Fred; McKenna, Rob
Subject: RE: Thornell v. Seattle Serv. Bureau, et al., Supreme Ct. No. 91393-5 - Motion for Leave to File Amicus Curiae Brief; Proposed Amicus Curiae Brief

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Subject: Thornell v. Seattle Serv. Bureau, et al., Supreme Ct. No. 91393-5 - Motion for Leave to File Amicus Curiae Brief; Proposed Amicus Curiae Brief

I attach for filing a *MOTION OF CERTAIN WASHINGTON-BASED COMPANIES FOR LEAVE TO FILE AMICUS CURIAE BRIEF* as well as an *AMICUS CURIAE BRIEF ON BEHALF OF CERTAIN WASHINGTON-BASED COMPANIES* in the above-referenced matter.

Case Name: Thornell v. Seattle Service Bureau, et al.
Case Number: No. 91393-5
Attorney Filing: Stephen M. Rummage, WSBA No. 11168
Phone No. (206) 757-8136
Email: SteveRummage@dwt.com

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Thank you for your assistance. Please let us know if you have any questions.

Steve Rummage | Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200 | Seattle, WA 98101
Tel: (206) 757-8136 | Fax: (206) 757-7136
Email: steverummage@dwt.com | Website: www.dwt.com

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