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IN THE 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.

STATE FARM'S RESPONSE TO
PLAINTIFF'S AMICUS BRIEFS

Joseph D. Hampton
Daniel L. Syhre
Betts, Patterson & Mines, P.S.
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101-3927
Phone: (206) 268-8619
Fax: (206) 343-7053

Thomas J. Frederick
Linda T. Coberly
Neil M. Murphy
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60302
Phone: (312) 558-5600
Fax: (312) 558-5700

Attorneys for State Farm



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INTRODUCTION

The three amicus briefs supporting the Plaintiff vastly overstate the consequences of a ruling in Defendants' favor. The certified questions are clear; both questions ask only whether the Washington CPA creates a cause of action for a non-resident plaintiff who suffered injury out of state. Answering "no" to these questions would thus present a barrier to recovery only with respect to non-residents. If a company engages in an unfair or deceptive practice that "affect[s] the people of the state of Washington" (RCW 19.86.010(2)), those "affect[ed] . . . people" would still be able to sue—and so would the Attorney General.

Accordingly, the Attorney General has no reason to fear that the outcome of this case could impede the enforcement of the CPA and "eliminate an important and necessary means of protecting the public." AG Br. 2. There is no evidence that non-residents have ever played a significant role in enforcing the CPA, much less an "important and necessary" one. Similarly, there is no reason for the United Policyholders' fear that this case could make Washington a safe harbor for "dishonest" and "hostile" enterprises to choose to work with Washington service providers so that "the Washington courts will protect them." UP Br. 9. Defendants' position would not "protect" *any* company from consumer protection laws. It would simply make clear that a consumer who suffers injury elsewhere should look to her own state's laws for relief.

On the other hand, accepting Plaintiff's position and answering "yes" to the certified questions would have dramatic consequences indeed. *See* Amicus Briefs by

the Chamber of Commerce of the United States, Certain Washington-Based Companies (Amazon.com, Expedia.com, Holland America Lines, Microsoft, and T-Mobile USA), Association of Washington Business, Washington Legal Foundation, Washington Defense Trial Lawyers & DRI, and Joinder by Property Casualty Insurers Association. As these amici explain, accepting Plaintiff's position and answering "yes" to the certified questions would create serious uncertainty and competitive disadvantage for any company that has chosen Washington as its headquarters. Indeed, it would create a disincentive for companies to locate here or to do business with Washington service providers. Answering "yes" would also tax the resources of the Washington court system. This state would become a magnet for proposed nationwide class actions, and the resulting influx may leave the courts of this state *less* able to address the claims of Washington consumers.

In the end, the certified questions are questions of statutory interpretation—and in that respect too, the amicus briefs on Plaintiff's side underscore the weakness of her position. As discussed below, the Attorney General disagrees with Plaintiff on several critical issues. The Attorney General also apparently disagrees with the views of the Washington State Association for Justice ("WSAJ")—particularly about whether the wrongdoer's *own* presence in Washington is sufficient by itself to implicate the CPA. *Compare* AG Br. 9 *with* WSAJ Br. 14. To be clear, State Farm believes that the text of the statute unambiguously supports its position. But at a minimum, the disagreements among Plaintiff and her amici demonstrate that the Court could not rule in her favor without considering

background choice of law principles, as well as methods of statutory construction that apply when a statute is ambiguous—including the doctrine of constitutional avoidance. *All* of these interpretive tools require holding that the CPA does not create a cause of action for a non-resident plaintiff.

ARGUMENT

I. **Response to the Attorney General: A ruling that answers both questions in the negative would have no material impact on the Attorney General’s ability to enforce the Act.**

In several key respects, the Attorney General’s reading of the statutory text actually undermines the arguments by Plaintiff and the WSAJ. The Attorney General concedes that the CPA is directed toward “unfair or deceptive acts or practices that directly or indirectly affect the people of Washington.” AG Br. 4–5.¹ The Attorney General apparently disagrees with Plaintiff’s view that the people “affect[ed]” by a wrongful act necessarily include the act’s *perpetrator*. *Id.* at 9–10 (focusing instead on the wrongdoer’s impact on other people—either consumers or competitors); *accord* SF Reply Br. 3–4, 6–7.² And the Attorney General disagrees

¹ *Contrast* WSAJ Br. 12 (arguing that “the act is intended to protect members of the public outside of the state”); *id.* at 13 (arguing that the scope of the CPA is *not* defined by an unlawful practice’s impact on the people of Washington). The Attorney General does cite *State v. Reader’s Digest*, 81 Wn.2d 259 (1972), to suggest that the CPA reaches beyond purely intrastate commerce (AG Br. 6, 7), but that case merely held that an out-of-state defendant may be liable for deception directed toward Washington residents. There was no question that the suit challenged an unfair practice based on its effect on the people of this state.

² *Contrast* WSAJ Br. 14 (arguing that the “people of the state of Washington” who are “affect[ed]” by an unfair practice include “persons who *violate* the CPA”) (emphasis in original); Pl. Resp. Br. 13–14 (arguing that a corporation that originates an unfair act is itself an “affect[ed]” person under the CPA); UP Br. 3

with Plaintiff's view that the private right of action is geographically broader than the Attorney General's own power. AG Br. 14–16.³ In all these respects, the Attorney General's reading casts doubt on Plaintiff's approach.

Nevertheless, the Attorney General urges the Court to answer “yes” to both certified questions, apparently out of a concern that a contrary answer would limit his ability to enforce the Act. *See* AG Br. 11. Respectfully, that concern is unfounded. The certified questions here are about whether an out-of-state plaintiff can invoke the CPA's private right of action to remedy an out-of-state injury. Answering “no” to these questions will not have any material impact on the Attorney General's ability to enforce the Act.

Under RCW 19.86.090, the private right of action relates specifically to the plaintiff's own “injury.” The plaintiff can either “recover actual damages” or “enjoin further violations,” but either way, she is entitled to sue only to the extent that she was “injured in [] her business or property by a violation of RCW 19.86.020.” *Id.* Again, the Attorney General agrees that such violations consist of “unfair or deceptive acts or practices that directly or indirectly affect the people of Washington.” AG Br. 4–5; *see also* RCW 19.86.010(2). Indeed, an out-of-state defendant can be served and brought within the jurisdiction of the Washington courts for purposes of the CPA only if it “engaged in conduct in violation of this

(arguing that the CPA protects the public from unfair practices “that are used by Washington businesses *or* that harm Washington consumers”) (emphasis original).

³ *Contrast* Pl. Resp. Br. 19–20 (arguing that the private right of action is broader because its language does not explicitly refer to “persons residing in the state”).

chapter which has had *the impact in this state which this chapter reprehends.*” RCW 19.86.160 (emphasis added). In context, the most natural reading of these provisions is that the private right of action simply allows a lawsuit to be filed directly by any of the “people of the state of Washington” who were “affect[ed]” (that is, “impact[ed]”) by the violation. See SF Opening Br. 11–13.

The geographic limitation on the Attorney General’s *parens patriae* power supports this view. See RCW 19.86.080(1) (Attorney General may sue “as *parens patriae* on behalf of persons residing in the state”). The Legislature adopted this provision in 2007, codifying the Attorney General’s common law power “to bring legal actions or seek remedies on behalf of individuals.” State House of Reps. Judiciary Comm. Bill Analysis SSB 5228, Mar. 23, 2007 (“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.”); accord Senate Bill Rep. SB 5228, Feb. 20, 2007 (same effect); see also *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011) (“The doctrine of *parens patriae* allows a sovereign to bring suit on behalf of its citizens when the sovereign alleges injury to a sufficiently substantial segment of its population”); *State v. AU Optronics Corp.*, 180 Wn. App. 903, 908-09, 928 (2014) (addressing a *parens patriae* claim based on an alleged price-fixing conspiracy “that resulted in higher prices for Washington citizens and state agencies that purchased products containing these panels”). As the Attorney General concedes, the 2007 change was designed to “enhance,” not “limit,” the Attorney General’s existing power. AG Br. 15. If the CPA’s scope had already been

as broad as Plaintiff contends—if it extended to injuries suffered by non-residents—then presumably the Legislature would have recognized the Attorney General’s power to sue on behalf of non-residents as well. Plainly it did not. This geographic limitation in RCW 19.86.080 is thus further evidence that the Legislature intended the injuries addressed by the CPA to be injuries to people residing within the state.

To be sure, the Attorney General can also enforce the CPA “in the name of the state,” even where the violation has not yet led to any concrete injury to a consumer or competitor. *See* RCW 19.86.080. Even then, however, the Attorney General concedes that the suit must be focused on “unfair or deceptive acts or practices that directly or indirectly affect the people of Washington.” AG Br. 4–5. If the Attorney General can allege such an act or practice—whether it affects Washington consumers or Washington competitors—he may sue in the name of the state to enjoin it.⁴ Critically, no matter how this Court answers the certified questions, the Attorney General’s ability to enjoin such acts “in the name of the state” will remain unaffected.

Take, for example, the Attorney General’s example of “a Washington company that engages in deceptive direct mail marketing practices” but hopes to “evade liability under the CPA by mailing its materials only to consumers with

⁴ As the Attorney General concedes, in any action filed in the name of the state, restitution for any private consumer’s injuries is merely “incidental.” AG Br. 11 (quoting *Seaboard Sur. Co. v. Ralph Williams’ Nw. Chrysler Plymouth, Inc.*, 81 Wn. 2d 740, 746 (1973)). Consistent with this, the Attorney General does not argue that his ability to enforce the CPA requires that he be allowed to order restitution or recover damages with respect to consumers in other states.

Oregon zip codes.” AG Br. 9. According to the Attorney General, such practices (depending on the facts) might place some “[h]onest Washington businesses” at an unfair and unlawful competitive disadvantage—which, he argues, would count as an “indirect effect on the people of the state of Washington.” *Id.* But if the Attorney General can plead an unfair and unlawful competitive disadvantage in Washington, then he can sue on that basis. So could the injured Washington businesses. *See* SF Reply Br. 6–7. Answering “no” to the certified questions would not be a barrier to either lawsuit; it would simply bar any suit by the Oregon consumers themselves. As for *their* injury—suffered as Oregon consumers as a result of a scheme specifically targeted at Oregon—they can look to their own Oregon consumer protection laws for relief, as enforced by their own attorney general.

As this example shows, there is no reason to believe that a private right of action by a non-resident is either “important” or “necessary” to effective consumer protection. AG Br. 2. The Attorney General has not presented any evidence that lawsuits by non-residents have historically played a significant role in the CPA’s proper enforcement. Nor are such lawsuits necessary. If a wrongful practice really does “affect[] the people of the state of Washington,” then those affected people can sue, and so can the Attorney General. There is no reason to think that these other avenues of enforcement would be inadequate to the task.

One additional feature of this case should allay the Attorney General’s concerns: As a matter of federal civil procedure, the current posture of Plaintiff’s suit means that it depends on her own personal injuries, which were felt entirely in

Texas. See *Daley's Dump Truck Serv., Inc. v. Kiewit Pac. Co.*, 759 F. Supp. 1498, 1501 (W.D. Wash. 1991) (“The only plaintiffs whose claims may be considered in deciding whether plaintiffs have standing to bring this lawsuit are the named plaintiffs.”), *aff'd sub nom. Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303 (9th Cir. 1992). Even in a class action, the named plaintiffs “must allege and show that they *personally* have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 502, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)) (emphasis original); *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1022–23 (9th Cir. 2003) (if named plaintiff herself does not have a claim, the putative class action must be dismissed). Indeed, that is why this case is such a good vehicle for deciding the certified questions here; the only claim at issue is by a non-resident, so the Court can consider the certified questions in their purest form. But while Plaintiff Thornell cannot assert the claims of affected consumers residing in Washington, the Attorney General can. See RCW 19.86.080. For this reason too, answering “no” to the certified questions will not have any meaningful impact on the Attorney General’s enforcement of the Act.

II. Response to the United Policyholders: A ruling that answers both questions “no” will not leave any insurance company unregulated.

The brief by United Policyholders similarly overstates the consequences of Defendants’ position. According to United Policyholders, answering “no” to the certified questions would lead insurance companies across the nation to do business through Washington-based service providers so that they can “engage in hostile and

dishonest techniques to the detriment and harm of consumers nationwide, knowing that the Washington courts will protect them.” UP Br. 9. This makes no sense. No matter how this case comes out, Washington courts cannot “protect” any company from liability. Plaintiffs injured in the other 49 states will still be able to look to their own courts and their own consumer protection laws for relief. *See* Washington Legal Foundation Br. 10 (all 50 states have their own consumer protection laws). Some consumers may actually recover *more* under their home state’s laws, whereas some will have no claim at all; that is undoubtedly why Ms. Thornell preferred to bring her complaint here. But whether a particular consumer has a less favorable remedy under her own state’s consumer protection laws depends appropriately on the choices made by her own elected representatives.

For the insurance industry in particular—which seems to be the focus of most of the United Policyholders’ ire—there is an even more complex and thorough system of state-based regulation. The brief of the United Policyholders acknowledges that “each of the fifty states[]” has a “comprehensive and robust system of insurance regulation through statutes, administrative regulations, and common law rules.” UP Br. 7 n. 7 (quoting Jeffrey E. Thomas, *Ins. Law Between Bus. Law & Consumer Law*, 58 Am. J. Compl. L. 353, 353 (2010)). But if Plaintiff and the United Policyholders have their way, the CPA would be layered on top of all of these. Under their position, an insurance company that uses a Washington-based service provider may face liability under the Washington CPA no matter where the

claim arose and what other state-based regulation might apply. Neither the text of the statute nor this Court’s cases requires such an outcome.

III. Response to the WSAJ: Nothing in the CPA expresses an intent by the Legislature to “choose” Washington law even when another state plainly has a superior interest.

The argument by WSAJ goes much farther than the Attorney General’s brief—and well beyond the language of the Act. While the Attorney General concedes that the CPA addresses “unfair or deceptive acts or practices that directly or indirectly affect the people of Washington” (AG Br. 4–5), WSAJ declares that the Legislature intended to protect residents of all 50 states (WSAJ Br. 8–19). Indeed, WSAJ argues that the Legislature “chose” Washington law to apply even in cases where another state would plainly have a superior interest. *Id.* at 7. But nothing in the statute or legislative history reflects such a dramatic “choice”: all the provisions WSAJ cites are simply *silent* about suits by non-resident plaintiffs. *Id.* at 11–16. If the Legislature really intended to “choose” its own law in derogation of ordinary choice of law principles, presumably it would have said so.⁵

The definition of “commerce,” on the other hand, is *not* silent; it focuses the entire CPA on acts “affecting the people of the state of Washington.” RCW 19.86.010(2). Like Plaintiff herself, WSAJ fundamentally misreads that provision.

⁵ This is precisely why it is appropriate to consider ordinary choice of law principles in the context of the statutory interpretation questions in this case. *See* SF Opening Br. 22–30. Beyond that, however, we agree with the amici who have explained that the question of choice of law for this particular lawsuit is not before this Court and may be addressed by the federal district court on remand. *See, e.g.*, WSAJ Br. 4 (“On remand, the federal court may address any remaining choice of law and federal constitutional issues arising under the facts of this case.”); *accord* AG Br. 1 n.1; Br. of Certain Washington-Based Companies 6–7.

According to WSAJ, the “people” referred to in that passage include people “who *violate* the CPA.” See WSAJ Br. 17 (emphasis in original); *accord id.* at 18.

Tellingly, the Attorney General does not agree; like State Farm, he understands the “affect[ed]” people to be not the violators of the CPA but their victims. AG Br. 9 (focusing on whether the wrongdoer’s acts have an effect on others within Washington); *accord* SF Reply Br. 3–4, 6–7. In this respect, it is no surprise that the only authority WSAJ cites for its position is the dissent in *Schnall v. AT&T Wireless Servs.*, 171 Wn.2d 260 (2011). That view of the statute did not carry the day in 2011, and it should do no better today.

In the CPA, the Legislature authorized courts to look outside state borders in only one respect—in “determin[ing] the relevant market or effective area of competition” for purposes of “deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition.” RCW 19.86.920, *cited in* WSAJ Br. 12. This has nothing to do with a claim based on deceptive consumer communications, like Ms. Thornell’s claims here. And even for antitrust claims, while the relevant competitive market may reach across state borders, the *plaintiff itself* must still be on the Washington side. See, e.g., RCW 19.86.160, *cited in* WSAJ Br. 16 (reiterating that personal service may be made on someone outside the state only if the person “has engaged in conduct in violation of this chapter which has had the impact in this state which this chapter reprehends”). If anything, this reference to cross-border markets should give the Court confidence that when the Legislature wished to provide for extraterritoriality, it knew how to do so.

Finally, WSAJ’s position finds no support in *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93 (1994), *cited in* WSAJ Br. 18–19. Although the Court in *Burnside*

allowed a non-resident to invoke Washington anti-discrimination laws against a Washington employer, the employee himself was no stranger to Washington; he worked out of Seattle for most of his employment, and he briefly relocated to California at the request of his Washington employer, who later paid for his move back home. *Id.* at 96–97. And in any event, the only statutory basis for limiting the law’s geographic application was the word “inhabitants” in the statute’s statement of purpose. *Id.* at 98. Here, the geographic limitation appears in several different operative provisions: the definition of “commerce” as “affecting the people of the state of Washington” (RCW. 19.86.010(2)), the limitation on the Attorney General’s *parens patriae* power to “persons residing in the state” (RCW 19.86.080), and the requirement that an out-of-state defendant may be served only if its conduct had “the impact in this state which this chapter reprehends” (RCW 19.86.160). It is WSAJ itself—not Defendants—that is attempting to make a broad argument based on a brief reference in the statute’s statement of purpose.

CONCLUSION

For all the reasons set forth in State Farm’s briefs—and in the briefs by the Chamber of Commerce of the United States, Certain Washington-Based Companies, the Association of Washington Business, the Washington Legal Foundation, and the Washington Defense Trial Lawyers and DRI (joined by the Property Casualty Insurers Association)—we ask that this Court answer both of the certified questions in the negative.

Respectfully submitted this 6th day of October, 2015.

By: 

Thomas J. Frederick, *pro hac vice*
Linda T. Coberly, *pro hac vice*
Neil M. Murphy, *pro hac vice*
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60302
Phone: (312) 558-5600
Fax: (312) 558-5700

Joseph D. Hampton
Daniel L. Syhre
BETTS, PATTERSON & MINES, P.S.
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101-3927
Phone: (206) 268-8619
Fax: (206) 343-7053

Attorneys for State Farm

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on October 6, 2015, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **State Farm's Response to Plaintiff's Amicus Briefs;**
- **Certificate of Service.**

Counsel for Plaintiff Thornell:

Michael Murphy
Bailey & Glasser, LLP
910 - 17th Street, N.W., Suite 800
Washington, DC 20006
E-mail: mmurphy@baileyglasser.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Defendant SSB:

Jeffrey I. Hasson
Davenport & Hasson LLP
12707 NE Halsey Street
Portland, OR 97230-2343
E-mail: hasson@dhlaw.biz

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Plaintiff Thornell:

Beth E. Terrell
Terrell Marshall & Daudt, PLLC
3600 Fremont Avenue N.
Seattle, WA 98103-8712
E-mail: bterrell@tmdlegal.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Property Casualty Insurers Ass'n:

Michael B. King
Carney Badley Spellman PS
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
E-mail: king@carneylaw.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Washington Legal Foundation:

Steven A. Hemmat
Law Office of Steven A. Hemmat, P.S.
605 First Avenue, Suite 530
Seattle, WA 98104-2224
E-mail: steve@hemmatlaw.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Richard A. Samp
Washington Legal Foundation
2009 Mass. Avenue, NW
Washington, DC 20036
E-mail: rasamp@verizon.net

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Washington State Attorney General:

Robert W. Ferguson
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100
E-mail: judyg@atg.wa.gov

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Kimberlee L Gunning
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Email: KimberleeG@atg.wa.gov

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Washington State Ass'n for Justice Foundation:

George M. Ahrend
Ahrend Law Firm PLLC
16 Basin Street, SW
Ephrata, WA 98823-1865
E-mail: gahrend@ahrendlaw.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Bryan P. Harnetiaux
Attorney at Law
517 E. 17th Avenue
Spokane, WA 99203-2210
E-mail: amicuswsajf@wasjf.org

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Ass'n of Washington Business:

Robert A. Battles
Ass'n of Washington Business
P.O. Box 658
1414 Cherry Street SE
Olympia, WA 98501-2341
E-mail: bobb@awb.org

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Chamber of Commerce of the USA:

Eric D. Miller
Paul S. Graves
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
E-mail: emiller@perkinscoie.com
E-mail: pgraves@perkinscoie.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Certain Washington-Based Companies:

Stephen M. Rummage
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
E-mail: steverummage@dwt.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Robert M. McKenna
Orrick, Herrington & Sutcliffe LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7045
E-mail: rmckenna@orrick.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for United Policyholders:

Steve W. Berman
Ashley A. Bede
Hagens Berman Sobol Shapiro
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101-1214
E-mail: steve@hbsslaw.com
E-mail: ashleyb@hbsslaw.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Amy Bach
Daniel Wade
United Policyholders
381 Bush Street, 8th Floor
San Francisco, CA 94104
E-mail: Amy.Bach@uphelp.org
E-mail: Dan.Wade@uphelp.org

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for WDTL:

Stewart A. Estes
Keating Bucklin & McCormack
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Email sestes@kbmlawyers.com

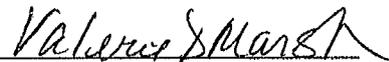
- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Melissa O'Loughlin White
Cozen O'Connor
999 Third Avenue, Suite 1900
Seattle, WA 98104-4028
E-mail: mwhite@cozen.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

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

DATED this 6th day of October, 2015.



Valerie D. Marsh

OFFICE RECEPTIONIST, CLERK

To: Diane Marsh
Cc: Dan Syhre
Subject: RE: Supreme Court No. 91393-5 - Sandra C. Thornell v. Seattle Service Bureau, Inc., et al

Received on 10-06-2015

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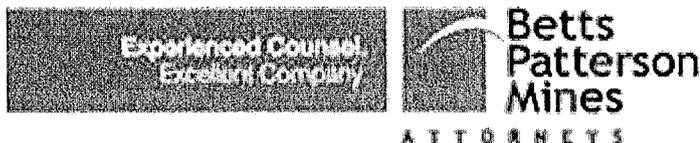
From: Diane Marsh [mailto:dmarsh@bpmlaw.com]
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Cc: Dan Syhre <dsyhre@bpmlaw.com>
Subject: Supreme Court No. 91393-5 - Sandra C. Thornell v. Seattle Service Bureau, Inc., et al

Good afternoon.

Attached for filing with the Washington State Supreme Court is State Farm's Response to Plaintiff's Amicus Briefs and an appendix in the above matter.

If I may be of further assistance, please give me a call.

Diane Marsh
Legal Assistant
Betts, Patterson & Mines, P.S.
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101-3927
D 206.268.8746 | F 206.343.7053
www.bpmlaw.com



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