

FACTS

Customers of AT&T filed a nationwide class action alleging the company misled consumers when it billed them for a charge that was not included in advertised monthly rates and was not described clearly in billing statements. The Federal Communications Commission (FCC) requires telecommunications companies like AT&T to contribute to the Universal Service Fund (USF), a fund created by the Telecommunications Act of 1996 that subsidizes phone and Internet service to low-income and rural areas. The FCC expressly permits companies to recover USF contributions from customers. AT&T recovered its contributions from customers by charging a Universal Connectivity Charge (UCC), listed in customer agreements as either “Other Charges & Credits” or “Taxes, Surcharges & Regulatory Fees.” Pet. for Review at 3. Named plaintiff Martin Schnall claims this categorization of the UCC violates the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, and further, that AT&T violated the terms of its contract by failing to disclose the charge at the time he signed his agreement for wireless service. Schnall further claims AT&T violated the terms of its user contracts by increasing the UCC charge without notice. Schnall sought certification of a nationwide class of all AT&T customers “who have been improperly billed and paid a universal connectivity charge that they did not owe.” Clerk’s Papers (CP) at 186 (First Am. Class Action Compl.).

The trial court determined that “individual questions predominated over common questions” and denied class certification on all of Schnall’s claims. CP at 417-18 (Mem. Op. Den. Mot. for Class Certification at 1-

2) (Mem. Op.). Schnall appealed that decision to Division One of the Court of Appeals, which reversed the trial court and certified the class. *Schnall v. AT&T Wireless Servs., Inc.*, 139 Wn. App. 280, 161 P.3d 395 (2007).

Standard of Review

The standard of review is paramount in this case: it is not our place to substitute our judgment for that of the trial court. When this court reviews a trial court's decision to deny class certification, that decision is afforded a substantial amount of deference. "[I]f the record indicates the court properly considered all CR 23 criteria," this court will not disturb its decision. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007). "[A] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Enforceability of Choice of Law Clauses

The parties initially dispute whether the choice of law clauses in the customers' contracts are enforceable. The choice of law clauses in this case require customers to litigate asserted violations of their contract in the respective jurisdiction where they signed the contract. This jurisdiction is often based on the customer's area code.

We interpret contract provisions to render them enforceable whenever possible. *Patterson v. Bixby*, 58 Wn.2d 454, 459, 364 P.2d 10 (1961). Further, "[w]e generally enforce contract choice of law provisions." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008) (citing *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 694-96, 167 P.3d 1112 (2007)). In *Erwin* we

applied section 187 of the *Restatement (Second) of Conflict of Laws* (1971) (*Restatement*) to hold the parties' contractual choice of law provision was effective. Section 187 reads in significant part:

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

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

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

Erwin, 161 Wn.2d at 694-95 (quoting *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 685, 586 P.2d 830 (1978), *adhered to on recons.*, 93 Wn.2d 51, 605 P.2d 779 (1980)). To effectively void a choice of law provision, a court must find that the chosen state has no substantial relationship to the parties *or* that the application of the chosen law would be contrary to a fundamental policy of Washington. *Id.* at 698. Further, Washington courts have also adopted the “significant relationship” test in section 145 of the *Restatement*, which gives great weight to the place where the parties' relationship was centered. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580-82, 555 P.2d 997 (1976).

Other courts have also recognized the importance of the location of the contractual relationship in deciding choice of law problems as they apply to class certification. In *Kelley v. Microsoft Corp.*, 251 F.R.D. 544 (W.D. Wash. 2008), the district court found the most significant contacts to exist in

Washington because in addition to being the location where Microsoft “developed and launched its allegedly deceptive promotional program,” “the parties’ relationship is not centered in any particular place because the parties *did not contract* with one another.” *Id.* at 552 (emphasis added) (citing *Restatement* § 145(2)(b), (d) and applying Washington state law to class action certification of CPA and contract claims). Though not a class action, in *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 423, 635 P.2d 708 (1981), we held that because the parties contracted in California to have California law apply, the choice of law clause should be enforced.

The choice of law provisions in this case were mostly based on customers’ area codes, not on forums having no substantial relationship to the parties or location of the transaction between them. The customer’s area code is left to the discretion of the customer, and this area code often corresponds with the customer’s place of residence: in effect, the *customer* selected which forum’s law would apply when he requested phone service from AT&T. AT&T should not now be forced to face the enormous cost and complexity presented by a nationwide class action when it conscionably included choice of law provisions in its customers’ contracts and the choice of forum is dictated by the consumer. *See generally* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 13:63, at 476 (4th ed. 2002) (“Like all litigation, complex cases are more likely to be settled than tried. The stakes in the case and the cost of pretrial activity increase that likelihood.”).

Schnall presents no valid reason why we should now invalidate the choice of law clause each customer signed when he or she

purchased wireless service from AT&T.² The trial court did not abuse its discretion when it held that

[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.

CP at 418 (Mem. Op. at 2). Upholding the trial court's decision to deny certification of a nationwide class does nothing to prevent persons outside of Washington from filing statewide class actions in each of their respective home states. Indeed, the citizens of California have already filed such a statewide class action. Suppl. Br. of Pet'r AT&T, Ex. A (Order Granting Approval of Form Class Notice, *Randolph v. AT&T Wireless Servs., Inc.*, No. RG05193855).

Class Certification of Contract Claims

Schnall brings two types of claims before the court: one based in contract, the other based on the CPA. The differences between these two types of claims have important implications for analysis of their suitability as class action claims. AT&T argues the trial court was correct in deciding that the choice of law clauses in each customer's contract caused individual issues to predominate over common ones.

As noted above, the choice of law clause in each customer's contract is valid. The trial court held: "Applying the law of the customer's home state to the contract claims in

² Among other things, Schnall also fails to explain why application of the "chosen states" law under the choice of law provisions would be contrary to a fundamental policy of this State under § 188(2)(b).

this case makes the contract claims unmanageable.” CP at 418 (Mem. Op. at 2) (citing *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); Rory Ryan, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 Baylor L. Rev. 467 (2002)).

To validly certify a nationwide class for the contract claims, Schnall must meet the requirements of CR 23(a): numerosity, commonality, typicality, and adequacy of representation. Once those have been met, he must further satisfy the tougher standard of CR 23(b)(3) and prove that common legal and factual issues *predominate* over individual issues and that a class action is an otherwise superior form of adjudication. Factors to be considered by the court when assessing predominance and superiority include

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

CR 23(b)(3). It is “incumbent upon class counsel to prove to the court . . . that there are no significant differences in the various state laws, or if there are variations, that they can be managed by the trial court.” 4 Conte & Newberg, *supra*, § 13:36, at 436-37 (citing Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 63-68 (1986)).

The Court of Appeals held that a “common nucleus of operative facts” predominated, but failed to substantially analyze the issue of predominance, especially in consideration of the potential application of 50 different states’ laws. *Schnall*, 139 Wn. App. at 298-99. The Court of Appeals’

predominance analysis reads more like a CR 23(a) commonality test: “The common nucleus of facts among all class members on this breach of contract claims *is* The common legal theory *is*.” *Schnall*, 139 Wn. App. at 299 (emphasis added). Simply stating the existence of commonalities does not prove predominance.³ The trial court’s analysis on this point is more thorough and is clearly supportable under our abuse of discretion standard.

As the Court of Appeals noted, the trial court “made several findings about the individual issues the contract claim raised.” *Id.* at 298. The trial court found that the choice of law clauses, the interpretation of the contract terms, the differences in the materials and information each potential class member received, and the availability of differing affirmative defenses created a predominance of individual issues over common ones. CP at 418-19 (Mem. Op. at 2-3).

Because CR 23 is identical to its federal counterpart, “cases interpreting the analogous federal provision are highly persuasive.” *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 19 n.24, 65 P.3d 1 (2003) (citing *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001)). The Court of Appeals reached a conclusion that flies in the face of this “highly persuasive” federal law regarding nationwide class action certification: “[b]ased primarily on the burden of applying

³ Further, the Court of Appeals relied, in part, on *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351 (2001), and the similarity between the legal theory in this case and the theory in *Pickett* to support its conclusion that common issues predominate. *Schnall*, 139 Wn. App. at 299. However, we have held *Pickett* holds little “precedential value.” *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 76, 170 P.3d 10 (2007).

multiple states' laws, an *overwhelming number* of federal courts have denied certification of nationwide state-law class actions.” Ryan, *supra*, at 470 (emphasis added) (citing *Stirman v. Exxon Corp.*, 280 F.3d 554, 564-66 (5th Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187, *amended by* 273 F.3d 1266 (9th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 678 (7th Cir. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 147 (3d Cir. 2001); *Spence v. Glock*, 227 F.3d 308, 316 (5th Cir. 2000); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995); *Walsh v. Ford Motor Co.*, 257 U.S. App. D.C. 85, 807 F.2d 1000, 1010-11 (1986); *In re Citigroup, Inc.*, No. CIV.A.10011912REK, 2001 WL 1682865, at *3 (D. Mass. Dec. 19, 2001) (unpublished); *Hammett v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 700-02 (S.D. Fla. 2001); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 605, 610-14 (W.D. Wash. 2001); *Neely v. Ethicon, Inc.*, No. 1:00-CV-00569, 2001 WL 1090204, at *8-11, *15 (E.D. Tex. Aug. 15, 2001) (unpublished); *Begley v. Acad. Life Ins. Co.*, 200 F.R.D. 489, 497 (N.D. Ga. 2001); *Oxford v. Williams Cos., Inc.*, 137 F. Supp. 2d 756, 764 (E.D. Tex. 2001); *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 308 (N.D. Ohio 2001); *Stipelcovich v. DirecTV, Inc.*, 129 F. Supp. 2d 989, 995 (E.D. Tex. 2001); *Shelley v. AmSouth Bank*, No. CIV.A.97-1170-RV-C, 2000 WL 1121778, at *8-10 (S.D. Ala. July 24, 2000) (unpublished), *aff'd*,

247 F.3d 250 (11th Cir. 2001); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 220-23 (E.D. Pa. 2000); *Adams v. Kan. City Life Ins. Co.*, 192 F.R.D. 274, 277-78 (W.D. Mo. 2000); *Hallaba v. Worldcom Network Servs. Inc.*, 196 F.R.D. 630, 645 (N.D. Okla. 2000); *Velasquez v. Crown Life Ins. Co.*, No. CIV A. NO. M-97-064, 1999 WL 33305652, at *4-7 (S.D. Tex. Aug. 10, 1999) (unpublished); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 497-98, 503 (S.D. Ill. 1999); *Carpenter v. BMW of N. Am., Inc.*, No. CIV.A.99-CV-214, 1999 WL 415390, at *4, *8 (E.D. Pa. June 21, 1999); *Chilton Water Auth. v. Shell Oil Co.*, No. CIV.A.98-T-1452-N, 1999 WL 1628000, at *8 (M.D. Ala. May 21, 1999); *Powers v. Gov't Employees Ins. Co.*, 192 F.R.D. 313, 319-20 (S.D. Fla. 1998); *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25, 33 n.7 (D.N.H. 1998); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532-34 (N.D. Ill. 1998); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 402-03 (D.N.J. 1998); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 465 (D.N.J. 1998); *Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 340-41 (N.D. Miss. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 222-26 (E.D. La. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 368 (N.D. Ill. 1998); *Poe v. Sears, Roebuck & Co.*, 1 F. Supp. 2d 1472, 1476 (N.D. Ga. 1998); *Borskey v. Medtronics*, No. CIV.A.94-2302, 1998 WL 122602, at *3 (E.D. La. Mar. 18, 1998); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 496-99, 502 (N.D. Ill. 1998); *Peoples v. Am. Fid. Life Ins. Co.*, 176 F.R.D. 637, 646 (N.D. Fla. 1998); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 376 (E.D. La. 1997); *Clement v. Am. Honda Fin.*

Corp., 176 F.R.D. 15, 23 & nn.10-12 (D. Conn. 1997); *Dubose v. First Sec. Sav. Bank*, 183 F.R.D. 583, 587 (M.D. Ala. 1997); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 347-52 (D.N.J. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 219 (E.D.N.C. 1997); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 100 (W.D. Mo. 1997); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 341-42 (N.D. Ill. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-27 (E.D. La. 1997); *Mack v. Gen. Motors Acceptance Corp.*, 169 F.R.D. 671, 679 (M.D. Ala. 1996); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 631-33 (D. Kan. 1996); *Barbarin v. Gen. Motors Corp.*, No. Civ. A. 84-0888, 1993 WL 765821, at *3 (D.D.C. Sept. 22, 1993) (unpublished); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1275 (D. Minn. 1988); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 608 (S.D.N.Y. 1982)).

Even where courts find that a nationwide, state-law governed class otherwise meets Rule 23(a) and 23(b)(3) criteria, “the choice-of-law inquiry will ordinarily make or break certification.” Ryan, *supra*, at 474. This is because if the laws of 50 jurisdictions apply to plaintiffs’ claims, “the variations in the laws of the states . . . ‘may swamp any common issues and defeat predominance.’” *Spence*, 227 F.3d at 311 (quoting *Castano*, 84 F.3d at 741); *see also Georgine*, 83 F.3d at 627 (“[B]ecause we must apply an individualized choice of law analysis to each plaintiff’s claims, the proliferation of disparate factual and legal issues is compounded exponentially” (citation omitted)); *In re Am. Med. Sys., Inc.*, 75 F.3d at 1085 (“If more than a few of the laws of the fifty states differ, the district judge would face an

impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action.”).

The choice of law provisions in this case will do more than cause variations in damages. The availability of the voluntary payment doctrine in some states could abrogate AT&T’s liability to customers in those states who voluntarily paid the UCC after receiving the informational flyer detailing their responsibility for its payment. This is only one example.

The Court of Appeals dismissed the trial court’s concerns in part because it determined that “extrinsic evidence” “will not be necessary here because these consumers entered into a standardized contract.” *Schnall*, 139 Wn. App. at 299-300. However, there is no support cited for this conclusion. Indeed, some Washington courts have held just the opposite: “When material extrinsic evidence shows that outside agreements were relied upon, those parol agreements should be given effect rather than allowing boilerplate ‘to vitiate the manifest understanding of the parties.’” *Lopez v. Reynoso*, 129 Wn. App. 165, 173, 118 P.3d 398 (2005) (quoting *Lyall v. DeYoung*, 42 Wn. App. 252, 258, 711 P.2d 356 (1985)). Further, simply because the Court of Appeals finds extrinsic evidence would be unnecessary under Washington law does not mean that the law of all other 49 states would exclude such evidence as well.

An additional concern is the availability of affirmative defenses. As the trial court noted, “[s]ome states, such as Illinois, . . . allow as a contract claim defense, the voluntary payment doctrine which prohibits a contract claim for refund of a sum voluntarily paid.” CP at 419-20 (Mem. Op. at 3-4) (citing

Smith v. Prime Cable of Chi., 276 Ill. App. 3d 843, 658 N.E.2d 1325, 213 Ill. Dec. 304 (1995)). The Court of Appeals suggested the trial court employ subclasses and master's hearings to sort out the morass. However, the availability of these mechanisms for efficient management of large class actions cannot change the predominance of the individualized issues in this case. See 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:32, at 286-87 (4th ed. 2002) (noting courts have found "subclasses would not cure the problems" of diverse factual issues and that "when a court determines that a multitude of mini-trials will be necessary to dispose of individual claims, the court will likely find that common questions do not predominate."). As the trial court noted, "[w]hile Washington would be only one of fifty jurisdictions' law[s] which would have to be addressed in resolving the contract claims, it is illustrative of the issues that would arise." CP at 418 (Mem. Op. at 2).

Superiority Analysis

Even if individualized issues did not predominate, CR 23(b)(3) also requires "that a class action [be] *superior* to other available methods for the fair and efficient adjudication of the controversy." (Emphasis added.) See also 4 Conte & Newberg, *supra*, § 13:11, at 406 ("It must be emphasized that, under the rule, a class action *must be superior, not just as good as*, other available methods." (emphasis added)). The superiority requirement "focuses upon a comparison of available alternatives." *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 256, 63 P.3d 198 (2003) (citing 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4.27 (3d ed. 1992)).

In more traditional statewide class

actions, these alternatives include joinder, intervention, or consolidation. *Id.* The most obvious alternative to the proposed nationwide class action in this case is numerous statewide class actions brought by the citizens of each state against AT&T. This is not a case where the choice is either a nationwide class action or no action at all. *Miller & Crump, supra*, at 71 (“Our analysis suggests that some of the problems of jurisdiction and choice of law could be solved by resort to statewide, as opposed to nationwide, class actions.”). Given the sheer number of AT&T customers in each of the 50 states, no one state’s citizens will be left out in the class action cold without the possibility of amassing enough individual claims within their state to cover litigation costs. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available.”).

Although it is true that small amounts of money are at issue and the decision will have broad impact, *Schnall*, 139 Wn. App. at 299, there is simply no efficiency in asking a trial judge to manage the laws of 50 different states as they apply to plaintiffs’ contract claims and the varied factual scenarios inherent therein. *See Miller & Crump, supra*, at 64 (“Beyond the difficult task of correctly determining foreign law, the nationwide class action may present an even greater problem because of the sheer burden of organizing and following fifty or more different bodies of complex substantive principles. Although the comparison obviously is inexact, one can appreciate the magnitude of the trial judge’s task by imagining a first-year law student

who, instead of a course in contracts, is required simultaneously to enroll in fifty courses, each covering the contract law of a single state, and to apply each body of law correctly on the final examination.” (footnote omitted)).

Further, Washington has limited interest in seeing telephone contracts executed by AT&T representatives in other states with citizens of those states examined and adjudicated in Washington courts. Our sister courts in other states are equally as prepared, if not better situated to apply the contract laws of their states. Our analysis might be different if AT&T was more significantly associated with Washington, but the trial court did not abuse its discretion by denying nationwide certification of the plaintiffs’ contract claims. It does appear, however, that if the contract class were constructed as a statewide class, it would meet the requirements of both CR 23(a) and (b)(3).⁴

Remaining Washington Plaintiffs’ CPA Claims

The trial court declined statewide class certification of the plaintiffs’ CPA claims on the grounds that each plaintiff would have to prove that AT&T’s allegedly false or

⁴ Amicus curiae The American Legislative Exchange Council (ALEC) contends that it was error for the Court of Appeals to conclude that the CPA may be applied to a nationwide class, arguing among other things that by its terms the CPA does not apply extraterritorially. We note that in his amicus brief in support of Schnall’s motion for reconsideration, the attorney general has provided us with credible reasons why ALEC’s position does not reflect either the language or the policy of the CPA. However, we need not reach this issue because we hold that a nationwide class action under CR 23 cannot be maintained in this case. Moreover, we generally do not address issues raised only by amicus and decline to do so here. *See Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 819, 225 P.3d 213 (2009).

deceptive advertising and billing practices caused his or her injury. “This proof must necessarily be individual for each potential class member.” CP at 421-22 (Mem. Op. at 5); *see also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.3d 531 (1986) (requiring CPA plaintiffs to establish a causal link “between the unfair or deceptive act complained of and the injury suffered”). The trial court found that each plaintiff would have to show individual reliance, making class certification inappropriate. CP at 422. Unfortunately, the trial court did not have the benefit of our recent opinion in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007), where we firmly rejected the principle that reliance is necessarily an element of the plaintiff’s case. Instead:

We conclude where a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, our case law establishes that there must be some demonstration of a causal link between misrepresentation and the plaintiff’s injury. *Indoor Billboard* urges us to adopt a per se rule and hold that payment of Integra’s invoice is per se sufficient to establish the proximate cause of plaintiff’s damages. We reject *Indoor Billboard*’s per se rule because mere payment of an invoice may not establish a causal connection between the unfair or deceptive act or practice and plaintiff’s damages. Proximate cause is a factual question to be decided by the trier of fact. Payment of an invoice may or may not be sufficient to establish a causal connection between the misrepresentation of fact and damages, but payment of the invoice may be considered with all other relevant evidence on the issue of proximate cause.

We hold that the proximate cause standard embodied in WPI 15.01 [6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01, at 181 (5th ed. 2005)] is required to establish the causation element in a CPA claim. A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.

Id. at 83-84. More specifically, WPI 15.01 provides that “[t]he term ‘proximate cause’ means a cause which in a direct sequence

[unbroken by any superseding cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened. [There may be more than one proximate cause of an [injury] [event].]” WPI 15.01 at 181. Similarly, under WPI 310.07, the plaintiff has the burden of showing “a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of without which such injury would not have happened. [There may be more than one proximate cause of an injury.]” 6A Washington Practice: Washington Pattern Jury Instructions: Civil 310.07, at 274 (5th ed. 2005). The plaintiff must merely show that the “injury complained of . . . would not have happened” if not for defendant’s violative acts. *Indoor Billboard*, 162 Wn.2d at 82.

After we established that WPI 15.01 sets forth the appropriate standard for the causation element of a private CPA action based on an affirmative misrepresentation of fact, we considered application of the WPI 15.01’s “but for” causation standard. The plaintiff in *Indoor Billboard* was a business customer, Indoor Billboard/Washington, Inc., (Indoor Billboard) who complained that the defendant, Integra Telecom of Washington, Inc. (Integra), a competitive telecommunications company, engaged in an unfair or deceptive act in violation of the CPA both in charging and collecting a surcharge it described as a presubscribed interexchange carrier charge (PICC). James Shulevitz, a vice president of Indoor Billboard, questioned the charge and conducted some independent research, but authorized payments of invoices with the PICC surcharge. *Id.* at 66-67.

We concluded that “Integra engaged

in an unfair or deceptive act or practice as a matter of law when it labeled the surcharge it imposed on local business customers a PICC” because use of this term “had the capacity to deceive a substantial portion of the public into thinking the surcharge was . . . regulated and required” by the FCC, although it was not. *Id.* at 78.

We addressed proof of the causation element as follows:

- b. Are there genuine issues of material fact regarding a causal link between Integra’s unfair or deceptive act or practice and Indoor Billboard’s injury, precluding summary judgment for Integra?

Although its primary argument is that it need only show that it paid Integra’s invoice to demonstrate causation, Indoor Billboard alternatively argues that the evidence of record is sufficient to establish genuine issues of material fact regarding causation to submit the question to a jury. Indoor Billboard points primarily to Shulevitz’s deposition testimony that he relied on and was confused by information provided by Integra in deciding to purchase Integra’s services. Indoor Billboard argues that Shulevitz paid the invoice only because he was “reluctant to contest a charge on his very first bill at the start of a multi-year contractual relationship.” Br. of Appellant at 45. It further argues that Shulevitz’s actions did not break the causal link between Integra’s unfair or deceptive act or practice and Indoor Billboard’s injury because the research was only necessary to dispel Shulevitz’s confusion and the question should more properly be decided by a jury.

Integra maintains that Shulevitz knew that Integra’s PICC was unrelated to the FCC before it signed the agreement for Integra’s services. Integra asserts Shulevitz knew the PICC was charged to all customers regardless of whether they received interexchange services from Integra and that the PICC was set by the company rather than the FCC. Further, Integra argues that Indoor Billboard did not challenge Integra’s PICC until after it had received the first invoice, even though it could have chosen not to purchase Integra’s services in the first place. Lastly, Integra argues that Indoor Billboard based its decision to challenge Integra’s PICC on information it obtained primarily from external sources—not from Integra.

We conclude it is not clear whether Integra’s actions caused Indoor Billboard’s injuries or whether Indoor Billboard’s injuries were the result of its reliance on information it obtained from Shulevitz’s investigation, as in *Nuttall* [*v. McDowell*, 31 Wn. App. 98, 639 P.2d 832 (1982)]. The evidence in the record is sufficient to demonstrate that genuine issues of material fact exist regarding a causal

link between Integra's unfair or deceptive acts or practices and Indoor Billboard's injuries. We hold that summary judgment was inappropriate and remand the matter for trial.

Id. at 83-85.

Here, the trial court did not analyze the causality element of plaintiffs' CPA claims under the "but for" standard of proximate causation under WPI 15.01, as subsequently adopted in *Indoor Billboard*. Further, the trial court did not consider proof of causation only with regard to the facts and evidence pertaining to a Washington class action. Instead, the trial court considered proof of causation in the context of a nationwide suit and with regard to whether such proof would necessarily be individual for each member of the class, rendering a class action unmanageable because individual issues would predominate over class issues. CP at 422 (Mem. Op. at 6) ("In the context of this case, each plaintiff must show that [AT&T's] alleged misrepresentation about the plaintiff's obligation to pay a UCC affected the plaintiff's decision to choose [AT&T] as a wireless provider."). It also overemphasized the importance of reliance as a component of causation. Accordingly, we remand for further consideration of this issue in accordance with our opinion.

In sum, we agree with the trial court that this action should not be certified as a *nationwide* class action. 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. We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Mary E. Fairhurst

Justice Charles W. Johnson

Justice James M. Johnson

Justice Gerry L. Alexander

No. 80572-5