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~~SUPREME COURT~~ OF THE STATE OF WASHINGTON
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MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

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STATE OF WASHINGTON

**RESPONDENTS' ANSWER TO AMICUS CURIAE MEMORANDUM
OF CHAMBER OF COMMERCE**

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Respondents Martin Schnall, Kelly Lemons, and Nathan Riensche Answer the Amicus Curiae Memorandum by the Chamber of Commerce of the United States (“Chamber”) in support of the petition for review.

I. INTRODUCTION

This action involves breach of contract and Consumer Protection Act [CPA] claims by former consumers of AT&T Wireless Services, Inc. [AWS]. The consumers allege that AWS added to their monthly bill for service a “universal connectivity charge” that was not disclosed prior to sale, was not explained in the bill and was not set out as part of the price of service in the contract. While the charge per consumer was very small, amounting to \$1.00 or so a month, AWS collected millions of dollars in “universal connectivity charge” from its consumers.¹

The issue presented in the Petition concerns whether a class action should have been certified. The Court of Appeals held that the trial court should have granted class certification of the consumers’ claims because Washington court’s liberally construe the requirements of Rule 23 in favor of finding certification; class actions under the CPA serve the underlying “private attorney general” purpose of the private cause of action permitted by the statute, and the Washington Attorney General, acting as amicus,

¹ AWS was purchased by Cingular Wireless Services in 2004 and ceased operating in 2005. Cingular Wireless Services was purchased by AT&T in 2006 and no longer operates as Cingular Wireless Services.

strongly supported certification as a necessary adjunct to its ability to enforce the CPA. Additionally, the Court held that the CPA claim should have been certified because the consumers alleged a non-disclosure or omission of information concerning the “universal connectivity charge,” and the trial court erred in holding as a matter of law that the only way to establish causation and damages on a omission claim was by proving individual reliance on the omission. The Court reasoned that a consumer could not be held to a standard requiring personal reliance on an omission of information and that other methods of proving that Defendant’s deceptive conduct caused the consumer’s damages were possible. In so stating though, the Court recognized that it was inappropriate for the trial court to focus on the merits of the claim or whether the consumers were likely to succeed. Rather, the focus was on a determination of whether the requirements of Rule 23 had been met.

Finally, the Court of Appeals held that certification of the contract claim was appropriate because AWS had chosen to use a single standard form contract with all consumers and that AWS did not permit consumers to individually negotiate the terms of their agreement. Under such circumstances, the Court reasoned, the terms of the contract should be given a uniform and consistent interpretation for all consumers.

The Chamber urges this Court to take review of the Court of Appeals' decision contending the decision is inconsistent with prior Washington precedent, the case law of other states, and eliminates essential elements of the private consumer claim under the CPA. The contentions are without merit and the Chamber cites no Washington authority that questions the well established grounds for the Court of Appeals decision. As discussed below, it is well established that on a motion for class certification, the trial court is to liberally construe the requirements of Rule 23, should err in favor of certifying the action and that certification is warranted if common liability questions predominate over questions affecting only individual class members. It is also well established that the trial court does not consider the merits of the claims or whether the Plaintiff and class are likely to succeed on the claims.

Further, it is well established that certification of small consumer class actions supports the "private attorney general" purpose of the CPA and that individual reliance is not, as the trial court held, the sole and exclusive way of proving causation in a failure to disclose or omission case. This Court has previously held that proof of causation through individual reliance in an omission case is not practicable and would prevent redress in cases where the deceptive act was to not disclose

information to the consumer. The Court's approach to omission cases is consistent with other states.

Finally, it is well settled that standard form adhesion contracts should be interpreted in the same manner for all consumers.

II. ANSWER TO AMICUS

This appeal concerns a motion for a class certification and not a decision on the merits.² It is well settled that trial courts are not to decide the merits of a claim at that stage of the proceedings, and are to resolve all doubts in favor of certifying a class. See, *Pierce v. Novastar Mortgage*, 238 F.R.D. 624 (W.D. Wash. 2006). The Court of Appeals correctly concluded that the trial court had failed to follow this rule by declaring that there is one and only one way to prove a "causal link" between a deceptive act and the consumer's injury under the CPA, and that is by positive, individual proof of reliance. Contrary to the Chamber's suggestion, the Court of Appeals' decision is consistent with the majority of other states' consumer protection statutes as well as Washington's.

² On October 18, 2007, this Court filed its decision in *Indoor Billboard/Washington, Inc. v. Integra of Washington, Inc.*, No. 79977-6, ___P.3d ___. The decision did not concern class action certification under Rule 23. Rather, the Court reversed a summary judgment on the merits of a CPA claim. The Court held that there were disputed issues of fact on whether Plaintiff's damages were caused by Defendant's intentional misrepresentation of a "PICC" charge, or by Plaintiff's own investigation of the charge. As the Court of Appeals correctly noted, the merits of the claim or the likelihood of success at trial, are not issues raised or properly considered by the trial court on a Rule 23 motion for class certification.

In a failure to disclose or “omission” case, it is well-settled under Washington law that individual proof of reliance is not practicable because a consumer cannot rely on something that wasn’t disclosed to him in the first place. It would not be reasonable to expect a consumer to prove a hypothetical—what a consumer would have done had omitted information not been omitted. *Novastar Mortgage*, supra. at 629-630:

The Court is aware of no Washington authority explicitly holding that causation under the CPA requires proof of reliance on an omission. See, e.g., *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 315, 858 P.2d 1054 (1993) (enough evidence on causation to submit case to jury where physician testified that he would have acted differently if there had been no omission); *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 113, 119, 22 P.3d 818 (2001); *Nuttall v. Dowell*, 31 Wn. App. 98, 111, 639 P.2d 832 (1982).

It is difficult to conceive of how a plaintiff may be expected to affirmatively show reliance on an omission other than through the filing of self serving affidavits. In this regard, the Court is persuaded by the rationale in *Morris v. International Yogurt Co.*, 107 Wn.2d 314, 329, 729 P.2d 33 (1986):

If plaintiffs were required to prove reliance on an omission of material fact, defendants who should be held accountable for their failure to disclose material facts could escape liability, given the difficulties of such proof. On the other hand, if causation in fact is conclusively established by proof of nondisclosure of a material fact, some plaintiffs who did not actually rely on the nondisclosure might recover undeservingly.

At this stage, proof of reliance is not necessary in order to satisfy the CPA's causation element. Whether the plaintiffs will succeed in proving causation through other means is an issue not now before the Court. The Court should hold that the CPA's causation requirement does not defeat class certification.

The Court of Appeals decision in the instant matter is consistent with Washington law. The Petition for Review should be denied.

The Chamber also argues that the Court should take review in this case in order to correct the Court of Appeals' mistaken view that a consumer need not prove he was actually deceived in order to bring a claim under the CPA. But it is well settled that under the Washington CPA that actual deception is not required. This Court has long held that a practice which has the "capacity to deceive a substantial portion of the public" is actionable. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). Actual deception has not been required. *Nelson v. Nat'l Fund Raising Consultants*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992). The reason for the courts' focus on the "capacity" to deceive rather than actual deception is "to deter deceptive conduct *before* injury occurs." *Hangman Ridge*, 105 Wn.2d at 785. Thus, a practice is actionable "if it induces contact through deception, even if the consumer later becomes fully informed before entering the contract." *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn.

App. 104, 116, 22 P.3d 818 (2001); *see also Nelson*, 120 Wn.2d at 392 (deceptive practice found where amount of franchisor's markup was disclosed after contract was entered).

The Chamber also erroneously conflates the concept of "inducement" under the CPA into a requirement that in every case, the Plaintiff can only prove causation and damages, entirely different elements and concepts, through proof of individual reliance. Even so, this Court expressly rejected the argument that satisfying the inducement element required proof of the consumer's reliance on the seller's misrepresentations in *Eastlake Construction Co., Inc. v. Hess*, 102 Wn.2d 30, 50-51, 686 P.2d 465 (1984). Instead, the Court said it was sufficient to show that the misrepresentations were the *type* used to induce potential purchasers. *Id.* at 51. As the Court explained, to require proof the consumer was actually induced to act by the defendant's deceptive acts would frustrate the legislature's objective of deterring and punishing deceptive trade practices. "Courts should not readily find an absence of inducement to act in cases where evidence is presented of a pattern of deceptive practices." *Id.* at 52 (emphasis added).

This approach has been affirmed in cases like this one, where the plaintiffs demonstrate a deceptive course of conduct whose nature is to induce potential purchasers. In *Dwyer v. J.I. Kisliak Mortgage Co.*, 103

Wn. App. 542, 13 P.3d 240 (2000), for example, the court found for plaintiffs who challenged a mortgage company's practice of presenting miscellaneous fees in mortgage payoff statements in a manner that suggested the fees had to be paid in order to release the mortgage. The fee was fully disclosed, but in a misleading manner. It was not necessary, nor likely possible, to prove that plaintiffs would not have paid the fees had they been billed in a more candid manner. Such a requirement would place the defendant's admittedly deceptive commercial practice beyond the reach of a private CPA action. See, also, Novastar Mortgage, supra.³

The Chamber is also mistaken to suggest that the Court of Appeals' decision is inconsistent with other states' consumer protection statutes; in fact, most agree that requiring proof of consumer reliance is not appropriate in private consumer protection cases. *See, e.g., Pelman v. McDonald's Corp.*, 396 F.3d 508, 511 (2d Cir. 2005) ("a private action brought under [the New York CPA] does not require proof of actual reliance"); *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 486 (Mass. 2004) ("A successful [Massachusetts CPA] action based on deceptive acts

³ In *Indoor Billboard, supra.*, this Court held that payment of an invoice with a deceptive charge on it may or may not be sufficient to establish causation and damages, when the consumer pays the bill. The holding shows that individual reliance is not *always* required in every case, irrespective of the claim asserted or the facts regarding the payment of the deceptive invoice. Here, the claim is that AWS acted in a deceptive manner by adding a "universal connectivity charge" to the consumer's bill which was not disclosed pre-sale, its nature as a discretionary charge was not disclosed in the bill and the charge itself was not set out in the contract for service with the consumer.

or practices does not require proof that a plaintiff relied on the representation”); *Weigand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 812-13 (Minn. 2004) (“a private consumer fraud class action [in Minnesota] does not necessarily require the justifiable reliance standard of common law fraud”); *Turner Greenberg Assocs., Inc. v. Pathman*, 885 So. 2d 1004, 1009 (Fla. Dist. Ct. App. 2004). (“A demonstration of reliance by an individual consumer is not necessary in the context of [the Florida CPA]”); *Harvey v. Ford Motor Credit Co.*, 1999 Tenn. App. LEXIS 448, *3 (1999) (“The Tennessee Consumer Protection Act does not require reliance.”); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 366 (N.J. 1997) (New Jersey CPA “does not require proof of reliance” nor proof that “any person has in fact been misled, deceived or damaged”); *Meyers v. Cornwell Quality Tools, Inc.*, 674 A.2d 444, 453 (Conn. 1996). (“The [Connecticut CPA] plaintiff need not prove reliance or that the representation became part of the basis of the bargain”); *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 99 (Tex. 1994) (“[W]e conclude that the legislature specifically rejected reliance as an element of recovery” under Texas CPA); *Dix v. American Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987) (“We hold that members of a class proceeding under the [Michigan] Consumer Protection Act need not individually prove reliance on the alleged

misrepresentations.”); *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983). (“An unlawful practice under [Delaware CPA] is committed regardless of actual reliance by the plaintiff”); *see also McAdams v. Monier, Inc.*, 151 Cal. App. 4th 667, 668, 60 Cal. Rptr. 3d 111 (2007). (“an ‘inference of common reliance’ may be applied to a [California CPA] class that alleges a material misrepresentation consisting of a failure to disclose a particular fact”).

Finally, the Chamber’s Petition does not address the well established rule that claims arising from uniform consumer contracts of adhesion are particularly well suited for class treatment. *See, Mortimore v. F.D.I.C.*, 197 F.R.D. 432, 438 (W.D.Wash. 2000) (“Since this case involves the use of form contracts, it is particularly appropriate to use the class action procedure.”). The Chamber’s Petition fails to acknowledge that the issue before the Court of Appeals was class certification and not the merits of the case or the Plaintiffs’ likelihood of successfully proving the elements of their claims. The Petition for Review should be denied.

DATED this 29th day of October, 2007.

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Please find attached the Respondents' Answer to Chamber of Commerce's Amicus Curiae Memorandum. Please file with the Washington Supreme Court.

Counsel for AT&T and the U.S. Chamber of Commerce are copied herewith.

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