

No. 80572-5

SUPREME COURT OF THE STATE OF WASHINGTON

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MAY 30 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*WJC*

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENTS MARTIN  
SCHNALL, ET AL.**

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## TABLE OF CONTENTS

I.	INTRODUCTION AND STATEMENT OF THE CASE.....	1
II.	ARGUMENT .....	5
A.	Standard of Decision and Review.....	5
B.	<i>Indoor Billboard</i> Confirms the Court of Appeals' Holding in this Case, that There are Multiple Ways of Demonstrating a Causal Link Under the CPA.....	6
C.	Plaintiffs Can Meet the Proximate Cause Standard Based on Facts that Are Common to the Class.....	7
D.	The Court of Appeals' Discussion of <i>Pickett</i> Does Not Affect the Consistency of its Holding With that of <i>Indoor Billboard</i> .....	11
E.	Requiring Proof of a Subjective State of Mind Would Virtually Eliminate Consumer Class Actions, Contrary to the Intent of Both the CPA and Rule 23. ....	14
F.	The Court of Appeals Correctly Affirmed the Trial Court's Choice of Law Analysis and Correctly Reversed the Denial of Certification of Plaintiffs' Breach of Contract Claims. ....	16
III.	CONCLUSION.....	18

## TABLE OF AUTHORITIES

### Cases

<i>DePhillips v. Zolt Constr. Co.</i> , 136 Wn.2d 26, 959 P.2d 1104 (1998) .....	12
<i>Eastlake v. Hess</i> , 102 Wn.2d 30, 686 P.2d 465 (1984) .....	15
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).....	6, 15
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	<i>passim</i>
<i>Mason v. Mortgage Am.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990) .....	9
<i>Morris v. Int'l Yogurt Co.</i> , 107 Wn.2d 314, 729 P.2d 33 (1986) .....	11
<i>Nelson v. Appleway Chevrolet</i> , 160 Wn.2d 173, 157 P.3d 847 (2007) .....	8
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 497, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) .....	17
<i>Pickett v. Holland Am. Line-Westours, Inc.</i> , 101 Wn. App. 901, 6 P.3d 63 (2000) ( <i>Pickett I</i> ), <i>rev'd on other grounds</i> , 145 Wn.2d 178, 35 P.3d 351 (2001) .....	12, 13
<i>Pickett v. Holland Am. Line-Westours, Inc.</i> , 145 Wn.2d 178, 35 P.3d 351 (2001) ( <i>Pickett II</i> ).....	12
<i>Schnall v. AT&amp;T Wireless Services, Inc.</i> , 139 Wn. App. 280, 161 P.3d 395 (2007) .....	<i>passim</i>
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 161 P.3d 1000 (2007) .....	4, 14, 15

<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.3d 665 (2002) .....	5
<i>Washington State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993) .....	5
<u>Statutes</u>	
RCW 19.86.920 .....	15
<u>Other Authorities</u>	
Comments of Attorneys General to Federal Communications Commission's <i>Second Report and Order, Declaratory Ruling, and Second Further Proposed Rulemaking</i> , CC Docket No. 98-170, FCC 05-55 (June 24, 2005) .....	2
<u>Rules</u>	
Civil Rule 23 .....	<i>passim</i>

## **I. INTRODUCTION AND STATEMENT OF THE CASE**

In this action, the Plaintiff-Respondent consumers claim that Defendant-Petitioner AT&T Wireless Services, Inc., engaged in unfair and deceptive practices that violated the Washington Consumer Protection Act (CPA) by billing its customers a “universal connectivity charge” that it did not include in the advertised price of service or disclose as an added cost of service at the time of sale. The Plaintiffs contend Defendant sought an unfair competitive advantage by a line item charge made to look like a tax or government-mandated fee, when in fact the charge it is a discretionary charge Defendant elected to bill consumers but did not disclose as part of the purchase price. The Attorneys General of nearly every state, including Washington, have identified precisely this practice as a widespread, deceptive trade practice which causes injury to consumers:

At the heart of much consumer confusion and related complaints is the carriers’ practice of incorporating carrier add-on charges as line items to the bills of [wireless] consumers to mask the true price of the services they provide. Often, when the consumer is first introduced to a [wireless] carrier’s service, through representations in carrier promotion or at the point of sale, that carrier states a monthly price for

service but fails to clearly state the additional carrier add-on charges, which the carrier knows it will include in the consumer's monthly bill, and fails to correctly represent those charges as part of the total price. These carrier add-on charges represent efforts by carriers to recover part of the cost of doing business even while offering consumers a lower "price" for their services.<sup>1</sup>

The trial court denied Plaintiffs' motion for class certification based on an erroneous view of the law: that the only way to prove a "causal link" between an unfair or deceptive act or practice and consumer injury is by proving individual "reliance," as in a common law fraud claim. The trial court concluded that proof of "reliance" would require evidence on each class member's state of mind, an individualized inquiry that precluded class certification. Clerk's Papers (CP) 421-22. The Court of Appeals reversed, holding that reliance is not the only means of proving causation under the CPA and that the liberal standards favoring Civil Rule 23 class certification of CPA claims required reversal. *Schnall v. AT&T Wireless Services, Inc.*, 139 Wn. App. 280, 291-92, ¶¶ 16-17, 161

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<sup>1</sup> See Comments of Attorneys General to Federal Communications Commission's *Second Report and Order, Declaratory Ruling, and Second Further Proposed Rulemaking*, CC Docket No. 98-170, FCC 05-55 (June 24, 2005) pp. 3-4, attached in part as Appendix A, available in full at <http://www.oag.state.tx.us/newspubs/releases/2005/062405comments.pdf>.

P.3d 395 (2007). The Court of Appeals correctly observed that if the trial court's opinion were upheld, "many meritorious private CPA claims could not be brought," and noted that the Attorney General opposed such a result as inconsistent with the purpose of the statute's goal of encouraging "private attorneys general" to help enforce the CPA. *Id.* at 291, ¶ 16. The trial court's ruling would give companies license to impose undisclosed fees on consumers with impunity.

After the Court of Appeals decision in this case, this Court decided *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007), which reviewed a summary judgment under the CPA and discussed the evidence required to prove a "causal link" between an affirmative misrepresentation and consumer injury. *Indoor Billboard* did not address the application of CR 23 to a CPA claim. The Court accepted review of this case and directed supplemental briefing on the applicability of *Indoor Billboard* to the class certification issue presented here.

The core holding of *Indoor Billboard* compels affirmance of the Court of Appeals decision in this case. *Indoor Billboard* held that causation under the CPA is established by demonstrating that the defendant's unfair or deceptive act or practice was a "proximate cause" of the consumer's injury. 162 Wn.2d at 83-84, ¶ 56. The Court held that this showing will not always be made with a single type of proof in every case, such as subjective reliance, but may be proved by a variety of evidence, depending on the facts and circumstances presented in each case. *Id.*

The trial court in this case misconstrued the CPA by viewing causation as requiring one and only one type of evidence, in the form of individualized proof of actual reliance. The trial court's view is inconsistent with *Indoor Billboard* and other precedent, and if its view were adopted, many defendants would be effectively exculpated from deceptive commercial practices, a result that is contrary to the legislature's intent in providing a private cause of action to enforce the CPA. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853-54, 161 P.3d 1000, 1007 (2007). For these reasons, the

Court of Appeals decision should be affirmed and the case remanded for further proceedings.

## II. ARGUMENT

### A. Standard of Decision and Review.

The issue on review is whether a class should have been certified under Civil Rule 23. Washington courts favor a liberal interpretation CR 23, particularly in the context of consumer claims which are too small to prosecute as individual lawsuits. *Scott*, 160 Wn.2d at 851-53, ¶¶ 11, 14-15. In deciding whether to certify a class, the court must accept the plaintiffs' substantive allegations as true, and resolve any doubts in favor of granting certification. *See id.* at 856, ¶ 20 (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 319, 54 P.3d 665 (2002)). While the trial court's decision is reviewed only for an abuse of discretion, the court necessarily abuses its discretion if its decision rests on an erroneous view of the law. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). The question upon which the Court requested supplemental briefing concerns the legal standard the trial court applied for proving causation under the

CPA. The trial court's view was incorrect, and its reversal should be affirmed.

**B. *Indoor Billboard* Confirms the Court of Appeals' Holding in this Case, that There are Multiple Ways of Demonstrating a Causal Link Under the CPA.**

In *Indoor Billboard*, this Court addressed, for the first time since *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986), the type of proof required to demonstrate a "causal link" between a defendant's unfair or deceptive act or practice and the plaintiff's injury. 162 Wn.2d at 79, ¶ 44. The defendant in that case, like the Defendant here, urged the Court to hold that a plaintiff must prove individual "reliance" on a deceptive act or practice in order to establish a causal link. *Id.* at 64, ¶ 2; Appendix B; CP 305. The Court rejected this argument and agreed with amici, the Washington State Attorney General and Washington State Trial Lawyers Association (WSTLA), that reliance is not required, and a causal link can be proven in a variety of ways, depending on the facts and circumstances, so long as the evidence meets the "proximate cause" standard set forth in the Washington Pattern Jury Instructions. *Id.* at 81-84, ¶¶ 50-51, 55-56.

That is what the Court of Appeals held in this case. As in *Indoor Billboard*, the Attorney General argued in the court below that requiring proof of reliance was not necessary to prove causation, and like this Court, the Court of Appeals agreed. *Schnall*, 139 Wn. App. at 291-92, ¶ 16. The court held that there may be a variety of ways to establish causation depending on the nature of the case, and that the trial court had erred in holding that causation can be proven *only* by proof of reliance. *Id.*, ¶ 16-17. The Court should affirm the Court of Appeals' decision that the trial court erred in denying class certification because the Plaintiffs would have to prove causation by reliance.

**C. Plaintiffs Can Meet the Proximate Cause Standard Based on Facts that Are Common to the Class.**

*Indoor Billboard* held that a consumer who brings suit under the CPA must show that the defendant's unfair or deceptive act or practice was a "proximate cause" of injury to the consumer. *Indoor Billboard*, 162 Wn.2d at 84, ¶ 57. As the Court acknowledged, proximate cause is a question of fact, and may be proven in different ways in different circumstances. *Id.* at 83-84, ¶¶ 56-57. It requires only that the plaintiff present evidence of a link between the

deceptive practice and the injury, and that, but for the deceptive practice, the injury would not have occurred. *Id.*

Deceptive practice.<sup>2</sup> In the present matter, the alleged deceptive practice is that the Defendant billed more for service than the amount advertised. Specifically, Defendant failed to either include the “universal connectivity charge” in its total advertised price for service or disclose to consumers that the charge would be added to the monthly price for service. Nonetheless, Defendant then added this undisclosed amount to Plaintiffs’ bills, under the heading “Taxes, Surcharges, and Governmental Fees,” as if it were a tax or some other fee imposed on the consumer by the government. CP 88, 188, 192; *Schnall*, 139 Wn. App. at 287-88, ¶ 9.<sup>3</sup>

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<sup>2</sup> The CPA prohibits both deceptive practices and “unfair” practices. Plaintiffs make secondary claims that Defendant engaged in unfair practices by imposing a charge on consumers that it did not include in its standard consumer contract, and by increasing the charge without notice, in breach of the contract. *See* CP 192, 327. On those claims, there can be no question that the practice—charging more than permitted by the contract—was a proximate cause of injury—paying more for the service than was contractually owed.

<sup>3</sup> The case resembles *Nelson v. Appleway Chevrolet*, 160 Wn.2d 173, 181, ¶ 8, 157 P.3d 847 (2007), in which the Court held that defendant could not impose its Business & Occupation tax on customers *after* the sale price was negotiated, as if it were a direct tax on consumers, where it was actually an overhead cost to the defendant.

Injury. The Plaintiffs' injury was paying more for their wireless service than Defendant advertised. Thus, but for Defendant's practice of billing Plaintiffs a universal connectivity charge that was not disclosed as part of the advertised price, Plaintiffs would not have been injured by paying more for service than was advertised.<sup>4</sup>

The Defendant argues, and the trial court erroneously concluded, that the Plaintiffs must prove that the consumer's decision to purchase Defendant's services was caused by their deceptive practice. That is incorrect because the Plaintiffs were not injured by their purchase of service at the advertised price, but rather by being billed more than the advertised price for that service. Standing alone, Defendant's failure to disclose the additional charge at the time of sale did not cause any injury. It was only when the Defendant later billed Plaintiffs for this undisclosed additional charge, as though it were a tax or government-mandated charge, that Plaintiffs were caused to pay more for the service than advertised,

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<sup>4</sup> Under the CPA, "injury" is distinguished from "damages." *Mason v. Mortgage Am.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). Here, the Plaintiffs' injury resulted in damage, appropriately measured by the amount they paid for the universal connectivity charge, above and beyond the advertised price.

and were thereby injured. The practice of *billing* Plaintiffs is a necessary part of the Defendant's deceptive practice, and must be included in the sequence that comprises the causal link.

The Court expressly acknowledged such a causation analysis in *Indoor Billboard*, eschewing any *per se* rule that would define the inquiry the same way in every case:

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.

*Indoor Billboard*, 162 Wn.2d at 84, ¶ 56. This case, unlike *Indoor Billboard*, presents facts on which “payment of an invoice may ... be sufficient” to establish causation because the Plaintiffs’ payment of Defendant’s invoices with the undisclosed additional charge caused Plaintiffs to pay more than the advertised price.<sup>5</sup>

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<sup>5</sup>*Indoor Billboard* involved an *affirmative misrepresentation* about a charge which the defendant disclosed to the plaintiff before the sale, and which the plaintiff then independently investigated before he decided to purchase service. 162 Wn.2d at 85, ¶ 60. The plaintiff knew he would be billed the disputed charge, and he knew the true cost of the service. Here, the Plaintiffs allege a *failure to disclose* the charge at all, and as the Court acknowledged, “a party cannot rely on something it was never aware of in the first place.” *Id.* at 83, ¶ 55; *see also Schnall*, 139 Wn. App. at 291-92

Thus, in this case, causation does not require an individualized inquiry, and presents no obstacle to class certification. Plaintiffs allege that Defendant never included the additional cost of the universal connectivity charge in its advertised price or disclosed the universal connectivity charge to consumers at the time of purchase, and that Defendant added the charge to the bills of all class members, and all class members paid more for service as a result. This unbroken sequence of acts by Defendants caused the Plaintiffs and the class to pay more for service than advertised and more than they contracted to pay; but for these acts by Defendants, Plaintiffs would not have been injured. Accordingly, causation can be proved on a class-wide basis, and the Court of Appeals decision reversing the denial of class certification should be affirmed.

**D. The Court of Appeals' Discussion of *Pickett* Does Not Affect the Consistency of its Holding With that of *Indoor Billboard*.**

Defendants may point to the Court of Appeals' discussion of its 2000 decision in *Pickett v. Holland America Line*, to argue that its

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(citing Attorney General brief and quoting *Morris v. Int'l Yogurt Co.*, 107 Wn.2d 314, 328, 729 P.2d 33 (1986)).

decision in this case is inconsistent with *Indoor Billboard*.<sup>6</sup> Obviously, the Court of Appeals did not have the benefit of this Court's opinion in *Indoor Billboard*, yet its discussion of *Pickett* is easily harmonized with *Indoor Billboard*, and does nothing to alter the consistency of the *holdings* in both cases: reliance is not the only way to prove a causal link under the CPA.<sup>7</sup>

In *Indoor Billboard*, this Court considered and rejected an extremely broad reading of *Pickett I*, proposed by the plaintiff, "that causation may be established merely by a showing that money was lost." *Indoor Billboard*, 162 Wn.2d at 81, ¶ 49. The plaintiff

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<sup>6</sup> *Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wn. App. 901, 6 P.3d 63 (2000) (*Pickett I*), *rev'd on other grounds*, 145 Wn.2d 178, 35 P.3d 351 (2001) (*Pickett II*). *Pickett* came to the appellate courts in a unique posture: After the trial court had denied class certification, the parties reached a class-wide settlement, which the trial court approved. An objector then appealed, and the Court of Appeals reversed, holding that the trial court had been wrong to deny class certification, in part because proof of individual reliance was not required to establish causation. *Pickett I*, 101 Wn. App. at 920. This Court disagreed and affirmed the trial court's decision to approve the settlement, correctly observing that, on an appeal from a class settlement, it was not appropriate for the Court of Appeals to review the merits of the trial court's earlier decisions; review should be confined to whether the settlement was fair and reasonable on the law and facts known at the time the settlement was reached. *Pickett II*, 145 Wn.2d at 147.

<sup>7</sup> In any event this Court may affirm the decision of the Court of Appeals, without adopting all of its reasoning. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104, 1107 (1998).

requested, and the Court rejected, a “per se” rule that “mere payment of an invoice” established causation under the CPA. *Id.* at 83-84, ¶ 56.

The Court of Appeals in *Schnall* did not embrace the broad reading of *Pickett* that the plaintiff advocated in *Indoor Billboard*. Consistent with *Indoor Billboard*, the Court of Appeals interpreted *Pickett I* only to say that reliance was not the only way to prove causation. *Schnall*, 139 Wn. App. at 289-90, ¶ 13 (stating that *Pickett* held that “causation and injury could be proven by means other than reliance”). As discussed above, this rule of law was confirmed in *Indoor Billboard*. *See also id.* (“The Supreme Court did not reverse this substantive ruling.”).<sup>8</sup> The court held only that, on the facts of this case, causation could be proven by means other than reliance. *Id.* at 292, ¶ 17. This is consistent with this Court’s observation in *Indoor Billboard* that proximate cause is a factual question that calls for different evidence in different circumstances, and that “[p]ayment of an invoice may or may not be sufficient to

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<sup>8</sup> As set forth in Plaintiffs’ Answer to the Chamber of Commerce’s Memorandum in support of granting review, many other states have reached the same conclusion under their consumer protection statutes. Appendix C.

establish a causal connection” but payment of the invoice “may be considered with all other relevant evidence on the issue of proximate cause.” *Indoor Billboard*, 162 Wn.2d at 84, ¶ 56.<sup>9</sup> The Court of Appeals’ decision is consistent with *Indoor Billboard* and should be affirmed.

**E. Requiring Proof of a Subjective State of Mind Would Virtually Eliminate Consumer Class Actions, Contrary to the Intent of Both the CPA and Rule 23.**

The Court of Appeals’ decision is also compelled by the strong public policies underlying both the CPA and Civil Rule 23. Well-established precedent holds that courts must liberally construe the CPA’s terms in favor of consumers, *Indoor Billboard*, 162 Wn.2d at 74, ¶ 30, and that consumers must have access to the class action procedure in order to advance the goals of consumer protection. *Scott v. Cingular Wireless*, 161 P.3d at 853-54. As the Attorney General pointed out in its brief to the court below, the CPA was enacted to protect the public, and has never been a vehicle for purely private disputes. Appendix D. The legislature added the private right of action in order to encourage private suits to vindicate its

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<sup>9</sup> Notably, while the Court was aware of *Schnall* at the time it issued its decision in *Indoor Billboard*, it did not cite or mention it.

public objectives, and the private consumer action “is a vital feature” of the effective enforcement of the law. *Id.*; *see also Scott*, 160 Wn.2d at 851-54. As this Court observed in a pre-*Hangman Ridge* case, embracing a liberal standard of proof of “inducement,” the precursor to causation:

A contrary conclusion would exclude from the operation of the [CPA] conduct which clearly should be subject to the express legislative purpose of protecting the public from unfair, deceptive and fraudulent acts or practices. In particular, the act is designed to protect the public from those who would repeatedly indulge in unfair or deceptive practices, [as alleged here]. In order that this purpose be served, the act is to be construed liberally. RCW 19.86.920.  
*Courts should not readily find an absence of inducement to act in cases where evidence is presented of a pattern of deceptive practices.*

*Eastlake v. Hess*, 102 Wn.2d 30, 51-52, 686 P.2d 465 (1984)  
(emphasis added).

This case, like most consumer class actions, involves a widespread practice alleged to have harmed thousands, if not millions, of consumers, but in individually small amounts of money. Such a case could not realistically be brought except as a class action. *See Scott*, 160 Wn.2d at 855, ¶ 18. Indeed, the Defendant’s argument that proving a causal link requires proof of each

consumer's state of mind should be seen for what it is: another attempt by certain industries to exculpate themselves "from any wrong where the cost of pursuit outweighs the potential amount of recovery." *Id.* (noting that class action waiver in wireless services contract had effect of exculpation for small but widespread wrongdoing). To hold as the trial court did that each putative class member must prove he subjectively relied upon a defendant's unfair or deceptive act or practice in order to establish causation would mean that such claims could almost never be certified for class adjudication, a result that is plainly contrary to legislative intent and this Court's precedent. The Court of Appeals correctly concluded that the trial court erred in denying class certification of the Plaintiffs' CPA claims.

**F. The Court of Appeals Correctly Affirmed the Trial Court's Choice of Law Analysis and Correctly Reversed the Denial of Certification of Plaintiffs' Breach of Contract Claims.**

The Court of Appeals affirmed the trial court's application of Washington's choice of law rules to the Plaintiffs' CPA claim because all of Defendant's customers' claims have a significant relationship with Washington, where Defendant was headquartered

and made all pertinent business decisions, and Washington has a strong interest in holding Washington corporations accountable for violations of Washington law. *Schnall*, 139 Wn. App. at 294, ¶ 21. This issue was fully briefed below, and because the Court specifically requested supplemental briefing only on the *Indoor Billboard* issues discussed above, Plaintiffs refer the Court to their prior briefing, attached as Appendix E, at 20-23. *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 497, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (holding that one state's substantive law may apply to claims of out-of-state class members where there are significant contacts with the forum state).

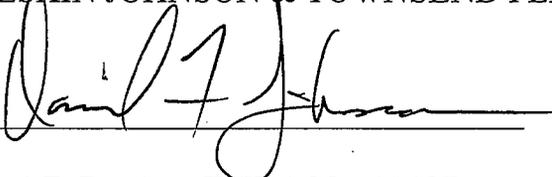
The Court of Appeals correctly reversed the trial court's denial of the Plaintiffs' breach of contract claims because those claims will turn principally on the interpretation of a single provision in a standard form contract Defendant used with all class members, thus meeting the predominance and superiority requirements of CR 23(b)(3). *Schnall*, 139 Wn. App. at 299-300, ¶¶ 27-28. Again, those issues were fully briefed below and Plaintiffs refer the Court to that briefing. *See Appendix E* at 23-39.

### III. CONCLUSION

For the reasons stated above and in the Plaintiffs' previous briefs, the Court should affirm the Court of Appeals decision in this case and remand for further proceedings.

DATED this 29<sup>th</sup> day of May, 2008.

BRESKIN JOHNSON & TOWNSEND PLLC

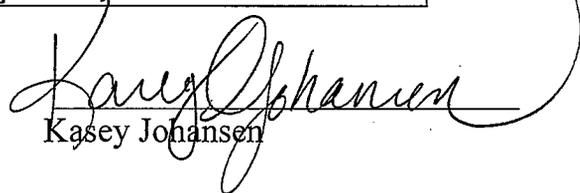
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Attorneys for Respondents

### CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Michael E. Kipling KIPLING LAW GROUP PLLC 3601 Fremont Ave North Suite 414 Seattle, WA 98103	<input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> <b>via legal messenger</b> <input type="checkbox"/> via E-Mail <input type="checkbox"/> via facsimile
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Shannon E. Smith Office of the Attorney General 800 5 <sup>th</sup> Avenue, Suite 2000 Seattle, WA 98104-3188	<input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> <b>via legal messenger</b> <input type="checkbox"/> via E-Mail <input type="checkbox"/> via facsimile

  
Kasey Johansen

## APPENDICES

- A. Excerpts of Comments of Attorney General to Federal Communications Commission (July 24, 2005)
- B. Excerpts of Brief of Integra Telecom of Washington, Inc. in *Indoor Billboard, Inc. v. Integra Telecom of Washington, Inc.*
- C. Excerpts of Answer of Respondents. to Amicus Curiae Memorandum of Chamber of Commerce in *Schnall v. AT&T Wireless Services, Inc.*
- D. Excerpts of Brief of Attorney General in *Schnall v. AT&T Wireless Services, Inc.*
- E. Excerpts of Reply of Appellants in *Schnall v. AT&T Wireless Services, Inc.*

# **APPENDIX A**

Before The  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of:	)	
	)	CC Docket No. 98-170
Truth-in-Billing and Billing Format	)	
	)	CG Docket No. 04-208
National Association of State Utility	)	
Consumer Advocates' Petition for	)	
Declaratory Ruling Regarding Truth-in-	)	(FCC 05-55)Title
Billing: Further Notice of Proposed	)	
Rulemaking.	)	

**COMMENTS OF  
ATTORNEYS GENERAL  
OF THE  
UNDERSIGNED STATES**

Through the:

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL  
750 First Street, NW, Suite 1100  
Washington, D.C. 20002

June 24<sup>th</sup>, 2005

## I. Introduction

The undersigned Attorneys General submit these comments in response to the Federal Communications Commission's, ("FCC" or "Commission") *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, ("TIB Order 2").<sup>1</sup>

The Attorneys General recommend first that, in moving to clarify its Truth-in-Billing regulations with respect to all telecommunications carriers, and including CMRS carriers,<sup>2</sup> the Commission do so in a manner that protects consumers and strengthens competition. In this regard, the Attorneys General urge that the Commission allow only two broad categories of charges on telecommunications bills – (1) price, and (2) taxes and regulatory fees. In these Comments, the term "price" refers to the recurring cost for telecommunications services including any applicable per unit cost, and "taxes and regulatory fees" refers to taxes and fees that federal, state, or local authorities require carriers to collect from consumers and remit to the appropriate governmental entities in association with the sale of telecommunications service.

The Attorneys General further urge the Commission to prohibit carriers from imposing a third type of charge on telecommunications bills referred to hereafter as "carrier add-on charges." This refers to charges which are determined by the carrier, and are not taxes or regulatory fees expressly mandated by federal, state or local authorities. The Attorneys General submit that the practice of adding line items to consumers' bills for carrier add-on charges is causing widespread confusion in the marketplace and frustrating the goal of fair competition since it is virtually impossible for consumers to compare prices among providers. Such prohibition will benefit consumers, who will better understand how their bills relate to disclosed prices, taxes and regulatory fees. This approach will enhance consumer welfare and encourage trust between consumers and their carriers by reducing confusion; making billing mistakes and fraud easier to detect; and giving more clarity to real price terms, thereby facilitating marketplace competition. There is no constitutional impediment to such an order.

Second, if the Commission elects to allow carrier add-on charges as line items that so many consumers have found confusing, it should require that those line items be clearly defined, accurately stated, and separated from taxes and regulatory fees on consumer bills. In this scenario, the Attorneys General alternatively recommend that the Commission allow three categories of charges on consumer bills: (1) price; (2) taxes and regulatory fees; and (3) carrier add-on charges. If these carrier add-on charges are allowed, the Attorneys General support the Commission's proposal that they be grouped together but separated from taxes and regulatory fees. The Attorneys General urge the Commission to require carriers to disclose that these charges are discretionary on the part of the carriers and prohibit carriers from using misleading words and phrases such as "regulatory assessment" to describe these line items.

Third, any point of sale disclosure requirements and related enforcement regime adopted by the Commission should complement, not displace, traditional state regulatory and police authority in these areas. The Attorneys General, as in other areas in which

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<sup>1</sup> *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, FCC 05-55, 2005 WL 645905 (rel. March 18, 2005).

<sup>2</sup> "CMRS" refers to Commercial Mobile Radio Service, as defined in 47 C.F.R. § 20.9(10) and generally describes what is known colloquially as wireless, mobile and cellular telephone service not connecting directly to the consumer through a wireline.

state authority to regulate industry and protect consumers overlaps with federal authority, encourage the development of cooperative enforcement action with the Commission in this area.

Fourth, and most importantly from the Attorneys' General perspective, the preemption of state regulatory and enforcement authority contemplated by the Commission is contrary to Congress' intent and beyond the Commission's jurisdiction. As telecommunications markets were opened to competition, Congress envisioned more, not less, state involvement in consumer protection. Federal preemption of state law falls into three categories (express, field, and conflict preemption) none of which apply in this situation. Further, the Commission's attempt to preempt state involvement in the area of billing disclosures departs from historic federal/state cooperation regarding consumer protection matters and undermines the States' ability to protect its own consumers and to foster fair competition. The Commission may establish additional standards that protect consumers, but it has been given neither a mandate to supplant the States' role, nor the resources to step into the ensuing breach.

## II. Background and Basis for the Concerns of the Attorneys General

In 1999, the FCC addressed growing consumer and marketplace confusion related to carrier abuses in billing for telecommunications services by releasing its *Truth-in-Billing Order*, (“*TIB Order 1*”).<sup>3</sup> In that order, the Commission adopted “broad, binding principles to promote truth-in-billing rather than mandate detailed rules that would rigidly govern the details or format of carrier billing practices.” *Id.* at ¶ 9. In general, the principles require that telephone bills: (1) be clearly organized, identify the service provider, and highlight any new providers; (2) contain full and non-misleading descriptions of charges; and (3) contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about or contest charges on the bill. *Id.* at ¶ 2. The details of compliance with these requirements were left to the carriers. CMRS providers were partly exempt from the truth-in-billing regulations.<sup>4</sup>

This approach was intended in part to foster competition. What ensued, however, was a proliferation of deceptive practices in telecommunications billing, particularly in the wireless industry that, in turn, became the source of widespread dissatisfaction among its customers. Telecommunications services now have a regular place on the Federal Trade Commission's, (“FTC”) top ten list of consumer fraud-related complaints, joining the ranks of work-at-home schemes, foreign money offers, sweepstakes and lotteries.<sup>5</sup>

Attorneys General serve as chief law enforcement officers of their respective states and generally receive and respond to consumer complaints of many industries, including a variety of industries that are also regulated by other state agencies and subject to federal law enforcement and regulation as well. Telecommunications remain a top consumer protection issue for state Attorneys General Offices. For the past five years, the National Association of Attorneys General's (“NAAG”) survey of top consumer complaints received in state Attorney General offices shows that telecommunications-

<sup>3</sup> *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, FCC 99-72, 14 FCC Rcd 7492 (rel. May 11, 1999).

<sup>4</sup> In later adjustments to the *Truth-in-Billing Order*, the FCC determined that: (1) bundled services offered by different carriers as a single package may be listed on a telephone bill as a single offering; and (2) carriers are prohibited from including administrative costs in a line item designed to recover the carrier's federal universal service contribution. See *TIB Order 2*, *supra* note 1, at ¶¶ 6 and 9.

<sup>5</sup> Federal Trade Commission, *FTC Releases Top 100 Consumer Complaint Categories for 2004* (Feb. 1, 2005), at <http://www.ftc.gov/opa/2005/02/top102005.htm> (June 16, 2005).

related complaints have been in the top four of all consumer complaints. The number of telecommunications complaints rank comparably with those complaints related to automobiles, home improvement scams, Internet goods and services, and telemarketing fraud.

Much of the volume of these complaints has been about wireless billing practices and inadequate disclosures to consumers. A sample of these problems and state concerns are described by the Commission in *TIB Order 2*, at ¶ 24 and n. 65-66. A further sampling of states reveals that the complaint numbers on these issues is substantial. For example, in California, the Public Utilities Commission received approximately 130,000 total telecommunications-related complaints between 2000 and 2004 (more than 30,000 such complaints were made in 2004 alone), with CMRS-related complaints growing to nearly a third of that number.<sup>6</sup> In Texas, the Attorney General received more than 2,000 complaints about CMRS providers in 2003 and 2004. In 2004, the Illinois Attorney General received approximately 848 wireless complaints and Oregon received approximately 300 complaints regarding the billing and disclosure practices of wireless carriers. The total number of reported complaints is a sign of much more consumer dissatisfaction since only a small percentage of consumers actually complain to any government agency.<sup>7</sup>

These consumer complaints allow state enforcement authorities to identify emerging patterns of abuse, such as, learning of misleading or even false disclosures to consumers regarding coverage areas. Consumer complaints to states authorities have also triggered enforcement action by Attorneys General and regulators for failures to disclose even estimates of line item surcharges, which often significantly increase the cost of a calling plan for consumers; failures to disclose the existence of line item surcharges altogether; and failures to disclose "automatic" changes in a consumer's calling plan, or to notify consumers that such changes have occurred.<sup>8</sup>

At the heart of much consumer confusion and related complaints is the carriers' practice of incorporating carrier add-on charges as line items to the bills of CMRS consumers to mask the true price of the services that they provide. Often, when the consumer is first introduced to a CMRS carrier's service, through representations in carrier promotion or at the point of sale, that carrier states a monthly price for service but fails to clearly state the additional carrier add-on charges, which the carrier knows it will include in the consumer's monthly bill, and fails to correctly represent those charges as part of the total price. These carrier add-on charges represent efforts by carriers to

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<sup>6</sup> Consumer Affairs Branch, PUC, *Consumer Complaint Statistics* (provided March 10, 2004).

<sup>7</sup> See Christopher A. Baker and Kellie K. Kim-Sung, *Understanding Consumer Concerns About the Quality of Wireless Telephone Service*, Policy and Research for Professionals in Aging ¶ 8 (July 2003), at <http://www.aarp.org/research/utilities/phone/Articles/aresearch-iimport-187-DD89.html>; See also Arthur Best, *WHEN CONSUMERS COMPLAIN* 118 (Columbia University Press 1981).

<sup>8</sup> See Assurances of Voluntary Compliance between Attys' General of 32 States and Verizon Wireless, Cingular Wireless and Sprint PCS; ¶¶ 24-25 at 9, *In the Matter of Sprint Spectrum, LP*, No. 04C16625, *In the Matter of Cingular Wireless, LLC*, No. 04C16626, *In the Matter of Cellco P'ship, dba Verizon Wireless*, No. 04C16627, Marion County Cir. Ct., Or. (July 21, 2004); Order for Penalties and Restitution in *Investigation on Comm'n's Own Motion into Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless*, Investigation 02-06-003 (Sept. 23, 2004); Stipulated Judgment in *Cal. v. Airtouch Cellular, a Cellco P'ship*, No. 308655, S.F. Superior Ct. (2002); Assurance of Voluntary Compliance and Amended Assurance of Voluntary Compliance *In the Matter of AT&T Corp.*, No. 03C11619, Marion County Cir. Ct., Or. (2004); and Assurance of Voluntary Compliance *In the Matter of Quest Corp.*, No. 02C11205, Marion County Cir. Ct., Or.

recover part of the cost of doing business even while offering consumers a lower “price” for their services.

In addition, the carriers’ bills often use misleading terms to describe these carrier add-on charges. Phrases such as “regulatory assessment” imply to consumers that these line item charges are governmental fees which carriers are required to impose upon customers – akin to the line item charges for taxes which customers are accustomed to paying on many goods and services. These phrases are also misleading: a consumer examining a lengthy and fragmented bill is not clearly informed that it is the carrier who has elected to generate additional revenue with carrier add-on charges appearing as line items. The practice of adding on various and frequently variable carrier add-on charges is pervasive in the industry and the end result has been to frustrate the goal of fair competition, because consumers are unable to compare prices for service plans among CMRS providers. Frequently, despite their diligent efforts, it is only when consumers receive their bills that they discover the total price to be paid. The problem is exacerbated by the fact that most carriers require initial contract periods of one, and often, two years and those contracts often impose substantial penalties on consumers for early termination.

The record reflects that strong, specific, enforceable consumer protections are needed to prevent further abuse in the telecommunications industry. Reliance on competition alone as a deterrent against consumer abuse over billing practices is insufficient, as demonstrated by the decade of abuse that followed the deregulation of the long-distance telecommunications industry. Overreaching and abuse in telecommunications generally were so widespread as to spawn new vocabulary, such as “slamming,” describing the transfer of one’s long distance service to another carrier without one’s knowledge or consent, and “cramming,” using telecommunications bills to charge for unauthorized products and services. Now, deceptive billing has become another major reason for consumers’ distrust of telecommunications carriers.

In response to the particular problem of the proliferation on bills of misleading line item carrier add-on charges, the National Association of State Utility Consumer Advocates, (“NASUCA”) filed a petition with the Commission last year, requesting a declaratory ruling by the Commission to clarify that wireline and wireless carriers are prohibited from imposing line-item fees or surcharges on customers’ bills unless those charges are expressly mandated or authorized by local, state or federal law. In *TIB Order 2*, the Commission helpfully eliminated its then-standing exemption for CMRS service from certain requirements set forth in *TIB Order 1*. Of grave concern to the States, however, the Commission further determined that “state regulations requiring or prohibiting the use of line items for CMRS constitute rate regulation and are preempted” by federal law.<sup>9</sup> The FCC also “tentatively concludes” in its proposal that it should reverse its prior holding recognizing that states may enact and enforce telecommunications carrier-specific truth-in-billing rules more protective of consumers than federal regulations that are not inconsistent with federal regulation. The Commission, however, noted that its proposed actions were not intended to limit states’ ability to enforce their own generally applicable consumer protection laws.<sup>10</sup>

As the chief law enforcement officers for our respective states, with well established track records for acting in the public interest to protect consumers from deception in the telecommunications marketplace, the Attorneys General welcome the Commission’s recognition of problems in billing issues, particularly among CMRS

<sup>9</sup> *TIB Order 2*, *supra* note 1, at ¶ 1.

<sup>10</sup> *TIB Order 2*, *supra* note 1, at ¶ 2.

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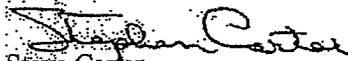
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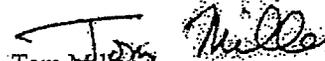
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Steve Levins, Executive Director  
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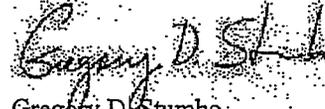
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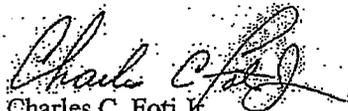
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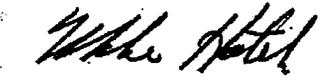
  
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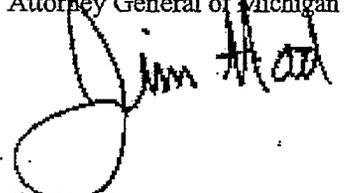
  
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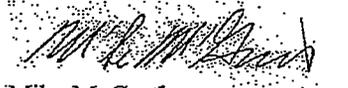
  
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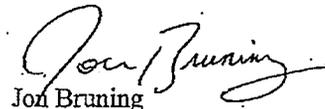
  
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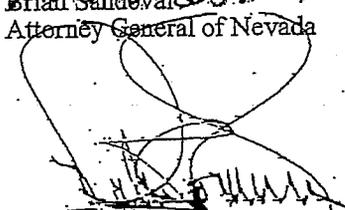
  
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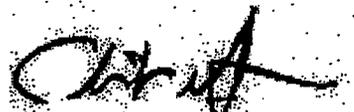
  
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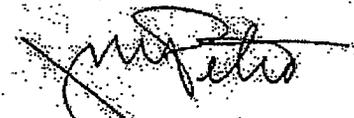
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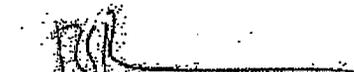
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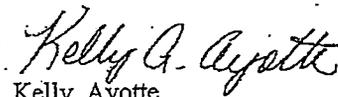
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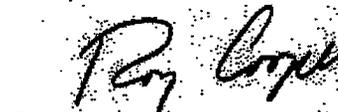
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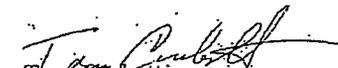
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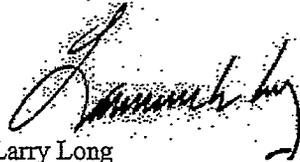
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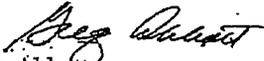
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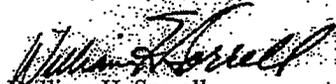
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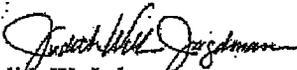
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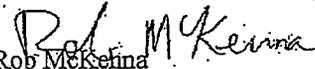
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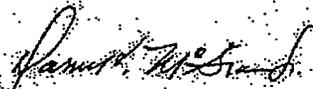
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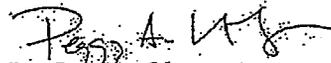
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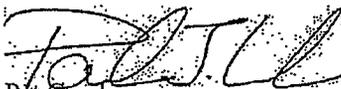
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# **APPENDIX B**

No. 58490-1-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**INDOOR BILLBOARD/WASHINGTON, INC.,  
individually and on behalf of a class of persons and/or entities  
similarly situated,**

**Appellant/Cross-Respondent,**

v.

**INTEGRA TELECOM OF WASHINGTON, INC.,**

**Respondent/Cross-Appellant.**

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**BRIEF OF RESPONDENT/CROSS-APPELLANT**

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*Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 327-28, 617 P.2d 415 (1980) (concluding that causation element of CPA claim was not established if unfair trade practice did not cause any injury).

**a. Indoor Billboard is required to prove that it actually relied on a misrepresentation made by Integra to establish causation**

Recognizing that it cannot prove that Indoor Billboard actually relied on any misrepresentation made by Integra in deciding to purchase or pay for Integra's services, Indoor Billboard asks the Court to dispense completely with this requirement. Instead, Indoor Billboard contends that the Court should conclude that causation is established by the mere fact that Indoor Billboard paid Integra's PICC surcharge. Indoor Billboard's argument relies exclusively on this Court's decision in *Pickett*, which the Supreme Court reversed. Indoor Billboard's argument misreads the *Robinson*<sup>5</sup> decision and exaggerates the precedential value and applicability of the reversed Court of Appeals' decision in *Pickett*. Valid precedent requires Indoor Billboard to prove that it actually relied on a misrepresentation made by Integra to establish causation.

In *Robinson*, the Court held that the plaintiffs did not establish causation because they had "failed to show a causal relationship between

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<sup>5</sup> Indoor Billboard's contention that the decision in *Robinson* is limited to CPA claims based on a "hidden charge" theory is wrong. (Appellant Br. at 37-38.) The principles articulated in the *Robinson* decision have a broader applicability and are instructive in this case.

the [allegedly unfair or deceptive practice] and their claimed injury. A plaintiff establishes the causation element of a CPA claim if he or she shows the trier of fact that he or she relied upon a misrepresentation of fact." *Robinson*, 106 Wn. App. at 119. The Court of Appeals' 2001 decision in *Robinson*, which is consistent with the decision in *Nuttall v. Dowell*, 31 Wn. App. 98 (1982), establishes that the actual reliance requirement survives *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986), contrary to Indoor Billboard's argument. (See Appellant Br. at 41-44.)

*Robinson* was also issued after this Court's 2000 decision in *Pickett*, thus negating Indoor Billboard's ability to rely on that decision, even if it had not been reversed. This Court's *Pickett* decision is not controlling because it was reversed by the Washington Supreme Court. Even if it were controlling, the facts in *Pickett* are distinguishable from the facts of this case.

In *Pickett*, the "port charges and taxes" at issue were disclosed in a marketing brochure distributed to customers. 101 Wn. App. at 906. Additionally, each customer signed a cruise contract that described the "port charges and taxes" as a direct pass-through of the "governmental charges, taxes and fees" assessed on the defendant. *Id.* at 916-17. The evidence in *Pickett* was that the "port charges and taxes" actually charged

by the defendant included more than just the charges and taxes assessed on the defendant by governmental authorities. *Id.* at 917. The Court of Appeals would have allowed a class to be certified by finding that causation "inheres in the fact that the plaintiffs purchased cruise tickets," *id.* at 920, without requiring individual class members to prove that they actually relied on a misrepresentation. The issue before the Supreme Court in *Pickett* was whether the appellate court properly addressed the merits of the trial court's denial of class certification in the context of determining whether the class settlement was reasonable. In concluding that this Court erred in considering the merits of the trial court's denial of class certification (including, of course, the Court's decision regarding causation under the CPA), the Supreme Court did not overrule *Nuttall* and questioned the authorities cited by this Court as support for lowering the threshold to establish causation. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 191, 197, 35 P.3d 351 (2001).

Although Indoor Billboard notes the Supreme Court decision in *Pickett*, Indoor Billboard largely ignores the Supreme Court's analysis. (Appellant Br. at 43.) In reversing the Court of Appeals decision in *Pickett*, the Supreme Court specifically questioned the holding by the Court of Appeals that "[i]njury and causation are established if the plaintiff loses money because of unlawful conduct." 145 Wn.2d at 197.

The Supreme Court expressed its doubt about that "principle" and explained that the cases cited by the Court of Appeals do not actually stand for that principle. *Id.* The Supreme Court explained that in *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997), the first case cited by this Court in *Pickett*, the plaintiff relied on an unfair act in signing a real estate agreement and then lost money as a result of signing the agreement. *Pickett*, 145 Wn.2d at 197. In other words, the plaintiff in *Edmonds* proved actual reliance on the unfair act. The Supreme Court noted that the second case cited by the Court in *Pickett*, *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), never reached the question of causation. *Pickett*, 145 Wn.2d at 197. Ultimately, the Supreme Court concluded that the posture of the appeal did not require resolution of whether causation requires actual reliance, but cast no doubt on the validity of *Nuttall*.

With respect to an individual CPA claim, such as Indoor Billboard's claim, Washington courts have consistently required that a plaintiff establish actual reliance on the allegedly unfair or deceptive act or practice. Indoor Billboard must do the same.

**b. Indoor Billboard cannot establish actual reliance**

In this case, there is no causal link between Integra's allegedly unfair or deceptive trade practice, assessing a PICC surcharge, and Indoor

# APPENDIX C

No. 80572-5

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

---

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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.<sup>3</sup>

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

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<sup>3</sup> 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.

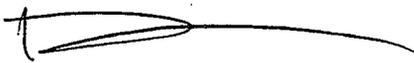
or practices does not require proof that a plaintiff relied on the representation”); *Weigand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 812-13 (Minn. 2004) (“a private consumer fraud class action [in Minnesota] does not necessarily require the justifiable reliance standard of common law fraud”); *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 29<sup>th</sup> day of October, 2007.

BRESKIN JOHNSON & TOWNSEND PLLC

By 

David E. Breskin, WSBA No. 10607  
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# **APPENDIX D**

NO. 57523-6-I

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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MARTIN SCHNALL, a New Jersey resident; NATHAN RIENSCHKE, a Washington resident; and KELLY LEMONS, a California resident; individually and on behalf of all the members of the class of persons similarly situated,

Appellants

v.

AT&T WIRELESS SERVICES, INC.,

Respondent.

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

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Fees.”<sup>10</sup> The UCC is not a government mandated charge, but instead is an element of AWS’s overhead.<sup>11</sup> The Plaintiffs paid AWS’s UCC.<sup>12</sup>

The Plaintiffs sued AWS for breach of contract and violation of the CPA, on their behalf and on behalf of all others similarly situated.<sup>13</sup> The trial court denied the Plaintiffs’ motion to certify the class.<sup>14</sup> With respect to the Plaintiffs’ CPA claim, the trial court determined that each individual plaintiff was required to prove that he or she relied on AWS’s representations (or omissions) regarding the UCC in choosing to purchase service from AWS.<sup>15</sup> The trial court determined that the proof of reliance “must necessarily be individual for each potential class member. The result is that individual issues would predominate over class issues and a class action would be unmanageable.”<sup>16</sup> The Plaintiffs appeal.

#### IV. ARGUMENT IN SUPPORT OF REVERSING

##### A. Private Consumer Actions, and Consumer Class Actions, Under the CPA Further an Important Public Interest.

The CPA’s purpose “is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair

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<sup>10</sup> CP 88.

<sup>11</sup> CP 88.

<sup>12</sup> CP 34.

<sup>13</sup> CP 185-195.

<sup>14</sup> CP 412-22.

<sup>15</sup> CP 421-22.

<sup>16</sup> CP 422.

and honest competition.”<sup>17</sup> Washington courts shall liberally construe the CPA to serve its beneficial purposes.<sup>18</sup>

When the CPA was enacted in 1961, the Attorney General had sole authority to enforce its provisions.<sup>19</sup> In 1971, the Legislature responded to the need for additional enforcement capabilities by providing for “a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA.”<sup>20</sup> The Washington Supreme Court has held that the purpose of the private right of action is “to enlist the aid of private individuals to assist in the enforcement of the [CPA].”<sup>21</sup> In order to prevail in a private right of action under the CPA, consumers must show that the acts or practices complained of affect the public interest.<sup>22</sup> Thus, the CPA is not a vehicle for resolving purely private disputes.<sup>23</sup> When consumers bring a private CPA action, they represent the public interest.

The Supreme Court has held that a private consumer may obtain injunctive relief in addition to recovering damages in a private CPA action, even if the injunction would not directly affect the consumer’s

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<sup>17</sup> RCW 19.86.920; see also *Fisher v. World Wide Trophy*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976)(purpose of the CPA is to protect the public by prohibiting and eliminating injurious acts or practices).

<sup>18</sup> RCW 19.86.920.

<sup>19</sup> See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986).

<sup>20</sup> *Id.* at 784.

<sup>21</sup> *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976).

<sup>22</sup> *Hangman Ridge*, 105 Wn.2d at 788.

<sup>23</sup> *Id.* at 790.

private interests.<sup>24</sup> The court also held that allowing private consumers to enjoin future violations of the CPA served the public interest by preventing fraudulent practices from continuing unchecked.<sup>25</sup>

The private consumer action is a vital feature of the CPA. Therefore, Washington courts should refrain from interpreting the CPA in ways that would impair Washington consumers' ability to bring private CPA actions because doing so would undermine the dual enforcement scheme the Legislature intended and the efficacy of the CPA as a means to foster a fair and honest market place.

Where properly certified, consumer class actions under the CPA promote judicial economy because they resolve individual claims in a single action and they avoid repetitious and possibly inconsistent results.<sup>26</sup> Class actions also improve access to justice because they "establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits."<sup>27</sup> Where, as here, consumers have small or nominal individual damages, a class action may be their only effective redress.<sup>28</sup> Otherwise, consumers "might not

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<sup>24</sup> *Hockley v. Hargitt*, 82 Wn.2d 337, 349-50, 510 P.2d 1123 (1973).

<sup>25</sup> *Id.* at 350.

<sup>26</sup> *See Darling v. Champion Home Builders Co.*, 96 Wn.2d 706, 638 P.2d 1249 (1982).

<sup>27</sup> *Id.* (citing 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE § 1754, at 543 (1972)).

<sup>28</sup> *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980).

consider it worth the candle” to pursue their claims.<sup>29</sup>

**B. Consumers Are Not Required to Prove Actual Reliance to Satisfy the Causation Element of a Private CPA Action.**

The CPA provides for private actions in RCW 19.86.090, which allows any person whose property or business is injured by an unfair or deceptive practice in violation of RCW 19.86.020 to bring a civil action for damages or injunctive relief. In *Hangman Ridge*, the Washington Supreme Court interpreted RCW 19.86.020 and 19.86.090 to require that consumers must establish five elements in order to prevail on a private CPA claim.<sup>30</sup> The five elements are: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that affects the public interest; (4) injures the plaintiff or property; and (5) a causal link between the unfair or deceptive act and the injury suffered.<sup>31</sup>

In this case, the plaintiffs must prove a causal link between AWS’s alleged deceptive acts (*e.g.* false advertisement as to price; inducing consumers to purchase service at a rate it would not honor; labeling the UCC as a tax that consumers were obligated to pay; failure to disclose the UCC) and the consumers’ alleged injury (*e.g.* paying money disguised as a government fee or tax when no such fee or tax was owed).<sup>32</sup> The trial

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<sup>29</sup> *Id.* at 338.

<sup>30</sup> 105 Wn.2d at 784-85.

<sup>31</sup> *Id.*

<sup>32</sup> CP 191-93.

# **APPENDIX E**

NO. 57523-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MARTIN SCHNALL, a New Jersey resident; NATHAN RIENSCHKE,  
a Washington resident; and KELLY LEMONS, a California  
resident; individually and on behalf of all the members of the class  
of persons similarly situated,

Appellants,

v.

AT&T WIRELESS SERVICES, INC.,

Respondent.

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DIVISION ONE  
SEP 28 2008

**APPELLANTS' REPLY BRIEF AND  
RESPONSE TO CROSS-APPEAL**

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causation is an individual issue.

**B. AWS's Cross-Appeal Should Be Denied Because the Trial Court Correctly Applied the "Most Significant Relationship" Test and Determined the Washington CPA Applied.**

The trial court held that the Washington CPA is properly applied to the claims of all members of the nationwide class. CP 420, 421. AWS "cross-appeals" this ruling based on a choice of law provision in its contract. That provision does not, by its own terms, apply to statutory or pre-contract claims such as Plaintiffs' CPA claims: "**This agreement** is subject to applicable federal laws, federal or state tariffs, if any, and the laws of the state associated with the [consumer's] phone number." See CP 3508 (emphasis added). The trial court specifically concluded this language does not cover Plaintiffs' CPA claims:

The choice of law provision contained in the contracts is inapplicable to the consumer protection claims both because the claims arise from statute rather than the contract and because temporally, many of the consumer claims arise before the parties have entered into a contract.

CP 420 (emphasis in original). AWS fails to offer any reason why this conclusion is incorrect, and it must therefore be accepted.

Even if the contractual choice of law did cover Plaintiffs' claims, AWS admits it is only one factor in the choice of law analysis. Brief of Resp. at 39. The trial court carefully performed that analysis and correctly found that Washington law applies to all

Plaintiffs' claims. Its conclusion was based upon (1) the well-established principle that the law of the state with the "most significant relationship" to the issues in the case applies, and (2) an undisputed factual record that all of the practices at issue in this case, including all of the marketing materials, service agreements, bills, and billing and disclosure decisions, emanated from AWS's headquarters in Redmond, Washington. CP 420, 421.

AWS relies heavily on *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981), which it calls "a very similar case" to this one. Brief of Resp. at 41. *Kammerer* could hardly be more different; the plaintiffs were California residents who claimed the defendant, a Washington corporation, had fraudulently induced them to enter a licensing agreement permitting defendant to manufacture oil drilling equipment covered by plaintiffs' patents. *Id.* at 418. The agreement was negotiated in California, the defendants' fraudulent statements were made in California, and the damage was sustained in California. *Id.* at 423. The Court applied the "most significant relationship" test and found that California had sufficient contacts to the case to permit a Washington court to award punitive damages under the law of California. *Id.*

This case, by contrast, did not involve any negotiations. The contract and all of the allegedly deceptive and unfair practices were created and disseminated from the State of Washington. The State of Washington has an undeniable interest in prohibiting unfair and

deceptive trade practices by corporations based in Washington. As the trial court observed, the CPA was intended to be construed and applied broadly, and not limited to the State's borders. CP 420 (quoting RCW 19.86.920). AWS offers no competing interest by any other state, nor any truly significant contact between the Plaintiffs' claims and another state. The mere fact that the plaintiffs lived in and purchased the phone service in another state is unimportant where the claims do not concern the phone service or the plaintiff's residence but rather the defendant's marketing and billing practices, all of which occurred here.

AWS appears to concede that the "general principle" for choice of law analysis, set forth in the Restatement (Second) of Conflict of Law § 145, supports the trial court's conclusion that Washington has the most significant relationship to Plaintiffs' claims. See CP 421. AWS argues, instead, that § 148 states a different rule for "fraud and misrepresentation" cases, and that this rule rather than the general rule applies here. Section 148 does not state a different rule, it merely elaborates the general rule that the law of the State with the most significant contacts is the proper law to apply. See *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 520, 618 P.2d 1330 (1980) (turning to § 145 after quoting § 148).<sup>21</sup>

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<sup>21</sup> In *Kammerer*, the Supreme Court did not even mention the Restatement but simply analyzed the relationships each state had to the conflict. 96 Wn.2d at 422-423.

Section 148 specifically applies where the defendant's misrepresentations "are made" in the same state in which the plaintiff relies and suffers damage as a result. That is not the case here, as AWS's acts and omissions were all undertaken in Washington. CP 420, 421. Section 148 is not helpful here because it concerns common law fraud claims, where the plaintiff's reliance and damage are significant elements of the claim. A statutory consumer class action focuses on the unfair or deceptive practices of the defendant, which affect large groups of consumers but may cause an insignificant amount of damage in each instance. As set forth above, Plaintiffs' "reliance" is not an issue, and even if it were, it would be proven through evidence about the materiality of defendants' practices, not anything peculiar to the individual plaintiff.

**C. The Trial Court Should Have Certified Plaintiffs' Breach of Contract Claims.**

**1. Contract Interpretation Will Involve A Single Sentence in a Single Contract with A Single Result for All Class Members.**

The parties agree that Plaintiffs' principal breach of contract claim requires interpretation of a single provision in AWS's standardized consumer contract (the "Terms & Conditions of Service" or the "Subscriber Agreement"). The parties agree that this provision did not materially change during the class period.

Brief of Resp. at 7.<sup>22</sup> The issue presented is whether that language permits AWS to charge the UCC. The language reads as follows:

You are responsible for paying all charges to your account, including but not limited to . . . any taxes, surcharges, fees, assessments, or recoveries imposed on you or us as a result of use of the Service.

Brief of Resp. at 7 (citing CP 763). AWS contends the UCC "clearly is included" in this language because it belongs in one or more of the categories listed ("tax, surcharge, charge and/or fee"). *Id.* at 7-8. Plaintiffs contend this language clearly does not cover the UCC because the UCC is not, in fact, "imposed on you [the consumer] or us [AWS] as a result of use of the service." See CP 74 (AWS admission that the UCC was not dependent on consumer's use of service). This dispute clearly presents a "common question" that will determine the contractual rights of all class members, and should have been certified for class adjudication.

Despite its position that the contract "clearly" authorized it to charge the UCC, AWS asserts that "extrinsic evidence" will be necessary to interpret the disputed contract provision. AWS relies

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<sup>22</sup> AWS does not argue on appeal that other, unidentified "rate plan materials" or other advertising or promotional documents were "incorporated by reference" in the consumer contract, and therefore abandons that argument. See Brief of Resp. at 16-28; see also *Smillow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32 (1st Cir. 2003) (certifying class on breach of standard, form consumer contracts, despite a variety of rate plans and usage patterns). The AWS contract also contained an integration clause that specifically superseded any inconsistent or additional terms. See CP 402.

on *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990), for the proposition that extrinsic evidence, particularly the post-contract conduct of particular class-members, will be relevant and admissible to show the meaning of the language at issue. Brief of Resp. at 22-24. In other words, despite its "clear" coverage, the meaning of the language AWS foisted on millions of consumers could vary from one consumer to the next based on the "context" of each customer's purchase of wireless services.

AWS studiously ignores the fact that the contracts at issue here were not discussed with, negotiated by, or even read by the plaintiff class members. As AWS's corporate representative on marketing practices flatly admitted, "most customers tell us they don't read material of that kind very often" because it is "full of small mouse type and trivia type." CP 70; see also CP 577, 361. The named plaintiffs testified they did not even recall seeing AWS's Subscriber Agreement. CP 368, 373-74, 377-78. Therefore, the question whether the contract's language permitted AWS to charge plaintiffs the UCC cannot possibly turn on what the plaintiffs intended by that language, because they had no knowledge it even existed.

The Restatement (Second) of Contracts, which Washington courts routinely consult, provides express rules for interpreting such contracts:

**"Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing."**

Restatement (Second) of Contracts § 211(2) (1981). As the comments to § 211 explain, this rule is tailor-made for this case because AWS "makes regular use of a standardized form of agreement [and] does not ordinarily expect [its] customers to understand or even read the standard terms." *Id.*, cmt. *b.* Accordingly, "courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it." *Id.*, cmt. *e.* Thus, the interpretation of AWS's contract language regarding the UCC will be decided based upon the "average" consumer's "reasonable expectations," not on the supposed "intent" of any specific plaintiff class member. Contract interpretation is thus a common question, not an individual one, and the trial court's conclusion to the contrary was erroneous.

Surprisingly, AWS does not even address § 211. It offhandedly asserts that Washington's "context rule" has been applied to "standardized agreements," but cites two cases that do not say that, and which involved contracts that were discussed, negotiated and signed by the parties.<sup>23</sup> These cases are outside

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<sup>23</sup> *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 338, 352, 103 P.2d 773 (2004) (arbitration agreement explained to and signed by employee); *Western Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 491, 496-

the scope of § 211 and have no bearing on its application. Washington courts have routinely adopted contract interpretation rules from the Restatement, and this Court has specifically cited § 211 with approval. *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn. App. 819, 829, 970 P.2d 803 (1999). Many other states have adopted § 211, and it should be applied in this case.<sup>24</sup>

AWS's chief example of so-called "extrinsic evidence" demonstrates its irrelevance to the interpretation of this contract. AWS says that "evidence of subsequent performance" by consumers is "particularly compelling" on the question of what the disputed language was "intended" to mean at the time the consumer contracted with AWS. Brief of Resp. at 23. As AWS admits, *Berg* only holds that subsequent conduct "may" be relevant to discerning the parties' intent. Brief of Resp. at 22 (quoting 115 Wn.2d at 668). It is absurd on its face that a consumer who never saw, read, or negotiated a sentence printed in "mouse type" in the back of a phone pamphlet would by his subsequent conduct somehow demonstrate the intended meaning of that sentence. See *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*,

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98, 7 P.3d 861 (2000) (design and construction contracts discussed and negotiated between multiple parties).

<sup>24</sup> See *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 274 (W. Va. 2002); *Allen v. Prudential Property & Cas. Ins. Co.*, 839 P.2d 798, 808 (Utah 1992); *Lauvetz v. Alaska Sales & Serv.*, 828 P.2d 162, 165 (Alaska 1992); *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 117 (Haw. 1986); *Darner Motor Sales, Inc.*, 682 P.2d 388, 398-99 (Ariz. 1984).

682 P.2d 388, 399 (Ariz. 1984):

To apply the old rule and interpret such contracts according to the imagined intent of the parties is to perpetuate a fiction which can do no more than bring the law into ridicule.

*Berg* does not trump ER 401's basic relevance requirement, and context is simply not relevant to this contract.<sup>25</sup>

The only evidence of "subsequent conduct" offered by AWS for purposes of contract interpretation is that plaintiffs paid the UCC without protest after seeing it on their bills. This is true of all class members, and therefore presents a common question of fact and law for the entire class. See *Smillow*, 323 F.3d at 39 (waiver defense based on customer's receipt of monthly invoices presents common question of fact and law). Indeed, AWS admits that four out of the five named plaintiffs behaved exactly the same as one another, i.e., they "paid [the UCC] without questioning" it. *Id.*<sup>26</sup>

AWS says the fifth plaintiff, Martin Schnall, "may be the

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<sup>25</sup> Indeed, the evidence is that AWS's common practice for all consumers is that the contract is provided in the box with the phone, received after the consumer has purchased the service. CP 358, 361. AWS presented no evidence that, despite this, any consumer saw, much less read, the contract before purchasing the service. On the facts of this case, there simply is no individualized "extrinsic" evidence of contractual intent, and it was error for the trial court to deny certification on assertions that such extrinsic evidence might exist where the record shows it does not.

<sup>26</sup> Of course, plaintiffs contend that the reason they paid the UCC is because they did not know what it was, and thought it was a tax, and that a reasonable consumer would not have refused to pay it even if they had understood what it was because that would have required switching carriers after the fact, giving up their phone number, and paying a \$150-175 early termination fee. See CP 532.

exception that proves the rule." Although he also paid the UCC on his bill "without protest" for many months, he did call AWS just before he canceled his service to ask about the UCC, though the parties dispute "whether he was satisfied when he learned what it entailed." *Id.*<sup>27</sup> But regardless of what Mr. Schnall was told about the UCC or whether he was "satisfied" with what he was told, it cannot possibly be relevant to the contract's meaning. "Disclosure of a contract's terms, to be meaningful, must occur before contract formation, not after the parties have become contractually bound." *Nelson*, 120 Wn.2d at 391. One cannot use subsequent conduct to determine what a consumer "intended" a contract's language to mean at the time entered into it if he never saw, read, or negotiated that language.

AWS misleadingly argues that the Plaintiffs have relied on extrinsic evidence to prove the contract's meaning. AWS cites a statement of Plaintiffs' counsel (made in an oral argument on a summary judgment motion that is not part of this appeal) concerning not the terms of the contract but which corporate entity was a party to the contract. RP (4/25/03) at 5. In contrast to the issue presented here, i.e., the meaning of the substantive terms of

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<sup>27</sup> AWS has no evidence that it properly informed Mr. Schnall what the UCC was (see CP 521), and its own survey of customer service representatives states that customers like Mr. Schnall who called to inquire about the UCC were routinely misinformed that it was, in fact, a tax, "and not an AWS initiative." CP 540.

the agreement, that motion concerned whether the corporate defendant "AT&T Wireless Services, Inc.," was a party to its own consumer contracts, despite its effort to substitute some other, unnamed regional affiliate. As the trial court observed on that issue, "I suspect if you went out and surveyed AT&T Wireless customers across the country, somewhere in excess of 90 percent of them would think they actually had a contract with AT&T, not whoever the local subsidiary is." RP (11/22/02) at 9-10. The fact that a consumer's understanding about who he or she is contracting with may be relevant to that issue does not mean the consumer's understanding of substantive terms he did not read is relevant to their meaning.<sup>28</sup>

**2. The "Choice of Law" Provision Does Not Raise Individual Issues.**

As indicated in Plaintiffs' opening brief, the "choice of law" provision in AWS's Subscriber Agreement is vague at best.<sup>29</sup> It does not specify any state's law by name and does not exclude

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<sup>28</sup> AWS also says that Plaintiffs rely on extrinsic evidence by citing AWS's survey of customer call centers for the proposition that AWS representatives routinely misinform inquiring customers what the UCC is. Brief of Resp. at 26 (referencing CP 540. This evidence is relevant to Plaintiffs' CPA claims and to rebut AWS's defenses. It has never been offered for the purpose of interpreting the meaning of the contract's terms.

<sup>29</sup> AWS suggests that Mr. Schnall's agreement is not representative of other class members' because it does not specify a specific state's laws. Brief of Resp. at 17. However, this is true of most if not all of AWS's contracts. See, e.g., CP 402. It is the agreement AWS relies upon, which specifies a particular state's laws, which is the anomaly. See CP 3508, 3522.

application of Washington law. As set forth in Section B above, Washington has the most significant relationship with and greatest interest in the subject matter of this dispute, and the law of Washington should apply to all class members' claims.

Regardless, there are no material differences in the law of contracts affecting this case. AWS, like the trial court, identifies three issues upon which alleged differences in states' laws would create substantial individual issues sufficient to predominate over common issues: (1) the admissibility of extrinsic evidence; (2) the applicability of the "voluntary payment" defense, and (3) the enforceability of AWS's mandatory arbitration clause. These issues do not present substantial individual questions.<sup>30</sup>

**a. The applicable law on extrinsic evidence does not vary from state to state.**

As noted, extrinsic evidence of, for example, subsequent conduct, is totally irrelevant to the meaning of a standardized agreement that is not even intended to be read by consumers. There is a Restatement rule directly on point which calls for an objective "average person" standard of interpretation, which many states have expressly adopted.<sup>31</sup> Both parties in this case asked

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<sup>30</sup> AWS suggests there are potentially 50 states' laws at issue, but this is incorrect; it operated in approximately 20 or 25 states during the class period. See CP 107-08 (showing local and regional affiliates on whose account AWS made USF payments).

<sup>31</sup> See *supra* footnote 24.

the trial court to interpret the contract as a matter of law, based on the language of the agreement, not on the "context" of any specific consumer's interaction with AWS. See Brief of Resp. at 24.

Even so, there is no material difference in the laws of different states concerning the admissibility of extrinsic evidence. While AWS argues that New York law allows extrinsic evidence in narrower circumstances than Washington law, it admits those circumstances are present here, so the difference is immaterial. See Brief of Resp. at 22, 24-25. The question whether extrinsic evidence will be admitted in this case depends not on what state's law applies but on the relevance of such evidence in the context of this kind of a case, and it will be resolved the same for the whole class.

**b. The "voluntary payment doctrine" does not differ from state to state.**

AWS also asserts that its affirmative defense of "voluntary payment" differs materially from state to state.<sup>32</sup> Again, there is no material distinction. The cases AWS cites states the doctrine in literally almost identical terms:

- *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1329-30 (Ill. App. 1995): "money voluntarily paid under a claim of right to the payment, and with knowledge of the

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<sup>32</sup> As discussed below, the doctrine has no application in the context of this case in any event.

facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal."

- *Hassen v. Mediaone of Greater Fla., Inc.*, 751 So.2d 1289, 1290 (Fla. App. 2000): "It does not matter that the payment may have been made upon a mistaken belief as to the enforceability of the demand, or liability under the law, as long as payment is made with knowledge of the factual circumstances."<sup>33</sup>
- *Gimbel Bros. v. Brooks Shopping Ctrs.*, 499 N.Y.S.2d 435, 438-39 (N.Y. App. 1986): "The traditional rule is that a voluntary payment made with full knowledge of the facts cannot be recovered because it was made

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<sup>33</sup> A more complete statement of the law is stated in cases cited in *Hassen*:

It has been held that money voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party, at the time of payment, was ignorant, or mistook the law, as to his liability. The illegality of the demand paid constitutes of itself no ground for relief, but there must be, in addition, some compulsion or coercion attending its assertion which controls the conduct of the party making the payment. To constitute such compulsion or coercion as will render payment involuntary, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money.

*Hall v. Humana Hospital Daytona Beach*, 686 So.2d 653, 657 n. 7 (Fla. App. 1996) (quoting *Jefferson County v. Hawkins*, 2 So. 362, 365 (Fla.1887)).

pursuant to a mistake of law."<sup>34</sup>

- *Speckert v. Bunker Hill Ariz. Mining Co.*, 6 Wn.2d 39, 52, 106 P.2d 602 (1940): "It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance."

This "universal" rule, to the extent it can even be applied in the context of this case, does not present any conflict of law that gives rise to individual questions.

**c. AWS's arbitration clause is unconscionable under Washington law, and cannot be revived for absent class members.**

AWS also contends its arbitration provision creates individual issues that preclude class certification. AWS has already moved to compel the named plaintiffs to arbitrate their claims and the trial court declared AWS's arbitration provision unconscionable under Washington law, primarily because it precludes class actions. CP 424.<sup>35</sup> AWS's alternative proposition, for which it cites no

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<sup>34</sup> This case suggests New York has modified the rule to some degree to permit some mistakes of law within the traditional exception for ignorance of the facts. *Id.* This difference would not be material here because Plaintiffs allege ignorance of the facts, not the law.

<sup>35</sup> Other courts have reached the same result. See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

authority, that a class cannot be certified, and absent class members cannot enjoy the benefits of the named plaintiffs' efforts, because the same arbitration provisions that are unenforceable against the named Plaintiffs could be enforceable against the absent class members—if they were to sue AWS—is absurd and contrary to the very purposes of arbitration and of class actions. See Opening Brief at 48-49.

To the extent that AWS's unconscionable arbitration clause is enforceable under some other state's laws, then to apply that state's laws to AWS's contract would violate the public policy of this state. This, as AWS recognizes, offers an independent basis to apply Washington law to the Plaintiffs' claims. Brief of Resp. at 17 ("The trial court found correctly that Washington courts will enforce a choice-of-law provision in a contract as long as application of the chosen law does not violate any fundamental policy of the forum state.").<sup>36</sup> AWS, a Washington corporation, has inserted an unconscionable arbitration provision in its contracts, and cannot be allowed to use it as a basis to avoid scrutiny of its practices in Washington courts.

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<sup>36</sup> Washington courts will not enforce a forum selection clause if it is deemed unfair and unreasonable. *Exum v. Vantage Press, Inc.*, 17 Wn. App. 477, 478-799, 563 P.2d 1314 (1977). The Court of Appeals has refused to enforce a forum selection clause where it would deprive consumers of the right to bring a class action under the CPA. *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 937, 106 P.3d 841, review granted, 155 Wn.2d 1024, 126 P.3d 820 (2005).

**d. The trial court should have at least certified statewide classes on the contract claims.**

Even if there were material differences in the applicable state contract laws which created significant individual issues, there was no reason not to certify subclasses of plaintiffs from each of the named Plaintiffs' home states. AWS contends Plaintiffs failed to suggest this alternative to the trial court. Brief of Resp. at 49. This is mistaken: Plaintiffs specifically requested this alternative and the trial court rejected it without comment. CP 563, 593. As the Plaintiffs pointed out to the trial court, if each customer's breach of contract claim must be decided under the law of his or her home state, then the law of each of the named individual Plaintiffs will have to be applied at trial, whether the claims are certified as a class or not. Thus, certification of state subclasses would not make the trial any less manageable, nor introduce any additional individual issues. There is literally no practical basis not to certify statewide subclasses on the Plaintiffs' breach of contract claims.

**3. AWS's Affirmative Defenses Raise No Individual Evidentiary Issues.**

Finally, AWS suggests that its two "affirmative defenses," voluntary payment and "the arbitration issue," raise substantial individual issues even under Washington law, therefore justifying the trial court's conclusion that individual issues would

predominate.<sup>37</sup>

The court in *Smillow v. Southwestern Bell* addressed a similar argument in a very similar case. Plaintiffs brought breach of contract and consumer fraud claims against Southwestern Bell, doing business as Cellular One, for its practice of charging for incoming calls, which plaintiffs contended was not permitted by Cellular One's standard form contract. 323 F.3d at 35. Customer invoices showed that customers were being charged for incoming calls, and Cellular One argued, just as AWS argues, that plaintiffs' voluntary payment of those charges constituted a waiver of claims. *Id.* The Court noted that both the factual and legal bases for this defense presented common, not individual, issues. "All class members received a user guide and monthly invoices showing that defendant charged the class members for the incoming calls." *Id.* at 39. The same is true here: all class members received the same

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<sup>37</sup> As a threshold matter, the voluntary payment doctrine does not properly apply to this case. It is well established that the defense does not apply unless (a) the plaintiff had "full knowledge of all the facts" at the time he made payment and (b) his payment was not coerced. See *Speckert*, 6 Wn.2d at 52; see also *supra*, subsection 2.b. None of the named plaintiffs knew what the UCC was when they paid it, and there is no evidence that any other class member did either. See *supra* footnotes 1-4. Plaintiffs expressly allege AWS's presentation of the UCC made it look like a tax rather than a discretionary charge imposed by AWS. See CP 193 ¶ 5.14; CP 325-26. Even if there were evidence that Plaintiffs later learned what the UCC was, subsequent payments cannot be considered "voluntary" because to have canceled service in order to avoid paying the UCC would have required switching carriers, changing phone numbers, and paying an early termination fee. See *Nelson*, 120 Wn.2d at 391 ("Disclosure of a contract's terms, to be meaningful, must occur before the contract formation, not after the parties have become contractually bound.").

information about the UCC from AWS's invoices, and whether subsequent payment of the UCC constitutes a "voluntary payment" is a common question classwide.

The *Smillow* court also pointed out that even "in the unlikely event" that individual determinations prove necessary, it would not necessarily sufficiently outweigh the common issues. *Id.*

Instead, where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses. After all, Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.

*Id.* (citing cases, citations omitted); accord *Sitton*, 116 Wn. App. at 254-56 (courts should certify class actions for significant common questions, even if individual questions exist). *Smillow* also aptly noted, "There is even less reason to decertify a class where the possible existence of individual [] issues is a matter of conjecture." 323 F.3d at 39 (citing *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298-99 (1st Cir. 2000) ("We are unwilling to fault a district court for not permitting arguments woven entirely out of gossamer strands of speculation and surmise to tip the decisional scales in a class certification ruling.")). Again, the defendants have no specific evidence to support an individualized defense of voluntary payment, and instead rely on common facts such as receipt of

AWS invoices. See Brief of Resp. at 9, 23, 44.<sup>38</sup> It has failed to offer more than conjecture to support a finding that individual issues would predominate.

AWS also suggests that the trial court's finding that the named Plaintiffs' arbitration clauses were unconscionable may not apply to all class members, even under Washington law. It cites unpublished decisions from trial courts for the proposition that "more recent versions" of its arbitration clause have been sustained. Brief of Resp. at 45. As noted, it cannot matter whether absent class members would be compelled to arbitrate because they did not bring claims against AWS and would instead rely on the named Plaintiffs to serve as representatives.<sup>39</sup>

In addition, putting aside the rule against citing unpublished decisions, the decisions AWS cites are dated well after the class period (March 1998 to February 2003) on the Plaintiffs' breach of contract claim, and would not be applicable in any event.

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<sup>38</sup> Again, any suggestion that Mr. Schnall's inquiry about the UCC just before he canceled service somehow supports a "voluntary payment" defense is nonsense; AWS admits Mr. Schnall called about the UCC to find out what it was, and it is not disputed that he did not pay any UCC charges thereafter, so this evidence is irrelevant. See Brief of Resp. at 23, 44.

<sup>39</sup> See *supra* subsection 2.c. No one would really prefer hundreds, thousands, or potentially even millions of individual arbitrations to a single class action on the very same issues, and the law should not support such a result. See *e.g.*, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7<sup>th</sup> Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.").