

No. 91393-5

SUPREME COURT OF THE STATE OF WASHINGTON

SANDRA C. THORNELL,

Received
Washington State Supreme Court

Respondent,

v.

SEP 23 2015
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Ronald R. Carpenter
Clerk

SEATTLE SERVICE BUREAU, INC., d/b/a NATIONAL SERVICE
BUREAU, INC., and STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellants.

AMENDED BRIEF OF AMICUS CURIAE
UNITED POLICYHOLDERS

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ORIGINAL

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I. INTRODUCTION

United Policyholders (“UP”) submits this brief as amicus curiae to provide a short history and context for the Washington Consumer Protection Act and the business of insurance.

The Washington Consumer Protection Act was enacted to protect individual consumers from unfair conduct by businesses much larger and more powerful than they—conduct identical to State Farm Insurance (“State Farm”) and Seattle Service Bureau’s (“Seattle Service”) debt collection practices at issue in this case. Washington State courts are particularly attentive to the Act’s provisions in cases involving the insurance industry—an industry where unequal bargaining power and contracts of adhesion are a hallmark of the insurer/insured relationship—and in cases like the one at bar, where deceptive conduct by Washington-based corporations is affecting people all over the country.

Washington State has a proud history of protecting citizens against unfair business practices. The bullying tactics at issue here cannot be permitted to continue, lest our state become “a harbor for [insurance companies] engaging in unscrupulous practices out of state.” *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 287 (2011) (dissent). United Policyholders urges this Court to continue protecting the lawful rights of

consumers by recognizing the proper scope and application of the Washington Consumer Protection Act.

II. STATEMENT OF THE CASE

Amici adopt the statement of the Plaintiff.

III. ARGUMENT

A. Washington's Consumer Protection Laws Have Always Protected the Rights of Consumers.

When the Washington legislature enacted the WCPA in 1961,¹ it recognized that average consumers are vulnerable to businesses' sophisticated techniques directed at them, and thus consumers are entitled to statutory protections.² In fact, the WCPA "declare[s] that the purpose of this act is to ... *protect the public* and foster fair and honest competition." RCW 19.86.920. The legislative intent to protect

¹ By 1970, the WCPA was amended to include a private cause of action. *See* 1970 Wash. Sess. Laws 202 (codified at RCW § 19.86.090).

² Washington courts have consistently emphasized that the purpose of the WCPA is to protect consumers as members of the general public. *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1097 (W.D. Wash. 2013) ("The purpose of the CPA is to protect consumers from harmful practices[.]"); *Peterson v. Kitsap Cmty. Fed. Credit Union*, 171 Wn. App. 404, 424-25 (2012) (recognizing the purpose is to protect the public from deceptive business practices and thus should be liberally construed); *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 547-48 (2000) ("The Washington Legislature passed the Consumer Protection Act for a laudable purpose: to protect Washington citizens from unfair and deceptive trade and commercial practices."). Indeed, given the opportunity to dispense with the public interest requirement, the Washington Supreme Court chose not to do so. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 788 (1986).

consumers from unfair business tactics is evident in virtually every section of the WCPA.³

The legislature also made clear that the WCPA should apply broadly to maximize its effectiveness: “in deciding whether conduct restrains or monopolizes trade or commerce, . . . determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end, this act shall be liberally construed that its beneficial purposes may be served.” 1961 Wash. Sess. Laws Ch. 216 at § 20 (codified at RCW 19.86.920). That is, “[t]he CPA targets *all* unfair trade practices *either originating from Washington businesses or harming Washington citizens.*” *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 553 (W.D. Wash. 2008) (emphasis added).

Accordingly, based on the statutory language and subsequent case law interpreting it, the WCPA should not be “limited by the state boundaries:” instead, the WCPA protects the public from *all* unfair and fraudulent practices that are used by Washington businesses *or* that harm

³ *See, e.g.*, 1961 Wash. Sess. Laws Ch. 216 at § 5 (codified at RCW 19.86.040) (prohibiting behavior that would lessen competition or tend to create a monopoly); § 6 (codified at RCW 19.86.060) (prohibiting acquisitions that would less competition); § 7 (codified at RCW 19.86.070) (prohibiting labor of a human being as a commodity); §§ 8-16 (codified at RCW 19.86.080 – 19.86.115) (empowering the Attorney General’s Office to enforce the WCPA).

Washington consumers. RCW 19.86.920; *Kelley*, 251 F.R.D. at 553; *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 280 (1972) (rejecting the argument that the WCPA should be limited to only intrastate commerce for the same reason).

B. The Washington State Consumer Protection Act Should be Applied Broadly to Protect Insurance Consumers in Particular.

Broad application of the WCPA is particularly important in the context of insurance transactions due to the inherent vulnerability of insurance consumers that underlies the quasi-fiduciary status of insurers, the broad impact of the insurance industry, and the potential for non-Washington insurance companies to engage in unethical behavior through Washington-based agents in efforts to skirt the WCPA.

1. The insurance industry maintains a markedly unequal power balance between insurance companies and policyholders.

The power imbalance between consumers and businesses is particularly apparent in the insurance industry as insurance companies are both wealthy and politically powerful.⁴ When the business of insurance

⁴ "It is a booming business: the insurance industry's net premiums totaled \$1.2 trillion in 2008. Global insurance premiums in 2009 were \$4.1 trillion, with the U.S. representing \$1.14 trillion of that number. Insurance companies have the power to influence regulation and influence state legislatures through their ability to hire lobbyists, make campaign contributions, and generally flex their muscles, but the question remains as to what protections are available for insureds?" Constance A.

enters the courtroom, the power struggle is even further magnified:

“[i]nsurance companies[’] litigation abilities, when combined with policyholders’ financial vulnerability and strict enforcement of contract law, virtually guarantee an insurance company victory against an aggrieved policyholder. Exploiting policyholders’ financial vulnerability can be a lucrative business. An insurance company is a financial colossus with unmatched resources and expertise in insurance coverage litigation.”

Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Ins.*

Policyholders’ Objectively Reasonable Expectations of Ins. Coverage, 5

Conn. Ins. L.J. 335, 382 (1998).

In addition to its financial and political power, the insurance industry relies on adhesion contracts, which contribute to the power imbalance. “Insurance contracts are generally not the result of the typical bargaining and negotiating processes between roughly equal parties that is the hallmark of freedom of contract.” 16 Williston on Contracts § 49:15 (4th ed.). Instead, insurance companies have unilateral control over their policies and frequently offer a pre-packaged form, creating a true take-it-or-leave-it situation. This Court has recognized that insurance companies are highly advantaged in this way: “The industry knows how to protect

Anastopoulos, *Bad Faith: Building A House of Straw, Sticks, or Bricks*, 42 U. Mem. L. Rev. 687, 690-91 (2012) (internal citations omitted).

itself and it knows how to write exclusions and conditions.” *Panorama Vill. Condo. Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 141 (2001) (quoting *Boeing Co. v. Aetna Cas. & Surety Co.*, 113 Wn.2d 869, 887 (1990)).⁵

2. The insurance industry affects almost every citizen in the State of Washington.

Washington has specifically recognized that the state has a uniquely strong interest in protecting the public from companies in the insurance industry under the WCPA⁶ for the additional reasons that insurance has such a broad impact. Insurance is considered a necessary part of life’s daily operations; people who seek to drive a vehicle, operate

⁵ See also *United Guar. Mortg. Index. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1175 n.14 (C.D. Cal. 2009) (“not even ‘line-by-line’ negotiation by the parties changes the rule [that ambiguities are resolved against the insurer] if the negotiated lines are ‘adopted verbatim from standard form policies’ used by the insurer”); *Allen v. Prudential Ins. Co.*, 67 Wn.2d 845, 854 (1966) (“insurance companies do not stand upon the same level footing as do individuals in making contracts with each other, and ... an insurance company should not be allowed by its conduct to mislead an insured to his disadvantage” (internal quotation marks omitted)).

⁶ See RCW 48.01.030 (“The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rest[] the duty of preserving inviolate the integrity of insurance.”); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359 (1978) (noting for the first time that “RCW 48.01.030 is a clear declaration that there is a public interest in the business of insurance and that it is to be conducted in good faith and free from deception” and marrying RCW 48.01.030 to the WCPA).

businesses, or obtain a home loan, are legally required to purchase insurance. Because of its broad public impact, the insurance business is highly regulated in Washington⁷ and Washington courts have developed strict guidelines that require interpreting insurance policies in favor of the insured.⁸ Indeed, the United States Supreme Court has repeatedly acknowledged the public interest at stake in protecting policyholders from insurance companies.⁹ As “Supreme Court Justice Hugo Black stated

⁷ WAC Title 284; RCW 48.01, *et seq.*

Further, Courts across the country have recognized that there is a strong state interest in protecting consumers from insurance companies. Jeffrey E. Thomas, *Ins. Law Between Bus. Law & Consumer Law*, 58 Am. J. Comp. L. 353, 353 (2010) (describing each of the fifty states’ “comprehensive and robust system of insurance regulation through statutes, administrative regulations, and common law rules”).

⁸ See *Capitol Specialty Ins. Corp. v. Beach Eatery & Surf Bar, LLC*, 36 F. Supp. 3d 1026, 1033 (E.D. Wash. 2014) (citing Washington common law cases for proposition that courts resolve ambiguity in insurance policies in favor of the insured); *Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 756 (2010) (*end banc*) (“ambiguity must be construed against the insurer and in favor of the insured”); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733 (1992) (ambiguity as to exclusionary language must be construed against insurance company); *George v. Farmers Ins. Co. of Wash.*, 106 Wn. App. 430, 439 (2001) (insurance policies “should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance. . . . Ambiguous insurance clauses should be construed against the drafter[.]”).

⁹ *Cal. State Auto Ass’n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946); *Robertson v. Cal.*, 328 U.S. 440, 447 (1946); *Osborn v. Olin*, 310 U.S. 53, 65 (1940) (“Government has always had a special relation to

[seventy years ago], ‘Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.’” Constance A. Anastopoulos, *Bad Faith: Building A House of Straw, Sticks, or Bricks*, 42 U. Mem. L. Rev. 687, 690-91 (2012) (internal citations omitted) (quoting *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 540 (1944)).

This Court recently applied the WCPA to not just insurance companies but also “deceptive insurance subrogation collection activities” because of “the broad legislative mandate that the business of insurance is vital to the public interest, the public policies favoring honest debt collection, and *the statutory mandate to liberally construe the CPA in order to protect the public from inventive attempts to engage in unfair and deceptive business practices.*” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 55 (Wash. 2009) (emphasis added).¹⁰

insurance.”); *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931).

¹⁰ In *Panag*, the plaintiff brought a class action against the other motorists’ insurance company, Farmer’s Insurance Company of Washington (“Farmer’s”), under the WCPA. 166 Wn.2d at 34. Farmer’s retained a collection agency that sent the plaintiff letters titled “FORMAL COLLECTION NOTICE” and similar misleading notices threatening collection, suspension of driver’s license, and litigation costs. *Id.* at 35. The Supreme Court held that “[t]he deceptive use of traditional debt collect methods to induce someone to remand payment of an alleged debt

3. Given the protections of the WCPA, Washington State should not become a safe harbor for abusive insurance practices.

Additionally, if the WCPA is not recognized in law to protect consumers from bad actors like State Farm and Seattle Service, then Washington State may quickly become a haven for companies engaging in deceptive and fraudulent practices. Under an unduly narrow read of the WCPA, insurance and other industries based outside of the State of Washington and across the country will simply retain subrogation collection companies like Seattle Service to engage in hostile and dishonest techniques to the detriment and harm of consumers nationwide, knowing that the Washington courts will protect them. “If a Washington business is acting in an unfair or dishonest way nationwide, Washington has a strong interest to address the full, nationwide effects of that behavior; Washington should not become a harbor for businesses engaging in unscrupulous practices out of state.” *Schnall v. AT&T Wireless, Inc.*, 171 Wn.2d 260, 287 (2011) (Sanders, J. dissent) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785 (1986)).¹¹ Indeed, the District Court for the Western District of

is precisely the kind of ‘inventive’ unfair and deceptive activity the CPA was intended to reach.” *Id.* at 49. *See also* Pl.’s Responsive Br. at 14-17 (describing and applying *Panag*).

¹¹ *See also* Pl.’s Responsive Br. at 13.

Washington has acknowledged that out-of-state plaintiffs can bring claims against Washington companies under the WCPA on this very basis:

“Although Plaintiff is a resident of North Carolina, Plaintiff is not prohibited from asserting CPA claims against Washington corporations as a non-resident [because] . . . Washington State has a strong interest in enforcing its laws against its businesses, lest the state ‘become a harbor for business engaging in unscrupulous practices out of state.’” *Rajagopalan v. NoteWorld, LLC*, 2012 WL 727075, at *5 (W.D. Wash. Mar. 6, 2012) (quoting *Schnall*, 171 Wn.2d at 287 (Sanders, J. dissent)) (finding arbitration clause that impaired plaintiff’s right to sue defendant under WCPA as unconscionable); see *Peterson v. Graoch Assocs. No. 111 Ltd. P’ship*, 2012 WL 254264, at *2 (W.D. Wash. Jan. 26, 2012) (“Upon review of the cases, the Court also finds that the CPA recognizes claims asserted by non-resident consumers against Washington corporate entities.... Therefore Defendants’ motion to dismiss Plaintiffs’ CPA claim is denied.”). This reasoning applies directly here.

C. Defendants’ Conduct Directly and Indirectly Affects Washington State Insurance Consumers.

This is not a case where neither party has a link to Washington. Seattle Service Bureau is a Washington corporation.¹² In the increasingly

¹² Compl., Dkt. No. 1, ¶ 1.

aggressive and urgent letters—misleadingly styled as demand letters for collection of a debt—Seattle Service stated that State Farm assigned the case to Seattle Service’s “office” located in Bothell, Washington. The plaintiff received multiple letters from Seattle Service stating that she owed over \$9,000.¹³ In reality, the plaintiff was not indebted to State Farm for any amount.¹⁴ A Washington corporation instructed the plaintiff to issue payment to it and provided a Washington address for remittance of such payment. To hold that the WCPA does not apply against such blatantly unfair and aggressively deceptive conduct by a Washington corporation is to erode the purpose of the statute.

IV. CONCLUSION

Creating blanket immunity for Washington businesses under the WCPA where an out-of-state plaintiff suffers direct injury would be a radical departure from the stated purpose of the statute and well-established precedent. The plain scope of the WCPA extends protection to those harmed by the conduct of Washington businesses irrespective of the state in which the injured consumer is domiciled.

For these reasons, UP urges this Court to hold that (1) the WCPA provides for a cause of action for a non-Washington plaintiff to sue a

¹³ See Pl.’s Responsive Br. at 4-9.

¹⁴ Pl.’s Responsive Br. at 8.

Washington corporation for deceptive conduct, and (2) the WCPA provides for a cause of action for a non-Washington plaintiff to sue a non-Washington corporation for the deceptive conduct of its Washington conduct.

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