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IN THE SUPREME COURT OF WASHINGTON

CERTIFICATION FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON IN

SANDRA C. THORNELL,
on behalf of herself and all others similarly situated,
Plaintiff,

v.

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

Filed 
Washington State Supreme Court
SEP 18 2015 
Ronald R. Carpenter
Clerk

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It has 300,000 direct members, and it indirectly represents the interests of more than three million businesses, state and local chambers of commerce, and professional organizations of every size. The Chamber represents businesses in every industry sector and from every part of the country, including Washington. It routinely advocates the interests of the business community in courts across the country by filing *amicus curiae* briefs, including many briefs before this Court. *See, e.g., Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014); *Schnall v. AT&T Wireless, Inc.*, 171 Wn.2d 260, 259 P.3d 129 (2011).

INTRODUCTION

The presumption that statutes do not apply extraterritorially benefits both businesses and consumers by providing predictability to all parties to a transaction. It allows businesses to organize their affairs with some certainty as to their potential exposure to liability. It avoids the potential for conflicting commands. And it treats all business from different States similarly, rather than placing additional exposure uniquely on Washington companies.

Those benefits will be lost if this Court disregards that presumption and holds that the Washington Consumer Protection Act (“CPA”) applies extraterritorially. Businesses with some connection to Washington will have greater difficulty in predicting the law that will apply to their actions, and they may also face the impossible prospect of complying with multiple conflicting sets of laws. The outcome will fall particularly hard on businesses that have chosen Washington as their headquarters. If Washington-headquartered businesses are held to both the CPA and the consumer protection law of the State where a particular consumer resides, they will face greater exposure than their out-of-state competitors. And if out-of-state businesses face liability under the CPA simply by partnering with Washington companies, they can be expected to partner with Washington companies less often.

To avoid those consequences, this Court should answer “no” to both certified questions. It should make clear that the CPA protects Washington residents, and that out-of-state customers are protected by the laws of the States in which they reside.

STATEMENT OF THE CASE

Amicus adopts Defendants’ statement of the case to the extent relevant to this *amicus* brief.

ARGUMENT

The text and history of the CPA compel the conclusion that the statute does not create a cause of action for a plaintiff residing outside Washington to sue a Washington defendant for allegedly deceptive acts. That conclusion is further supported by ordinary choice-of-law principles and by the constitutional limitations on the extraterritorial application of state laws.

Those considerations, well briefed by the Defendants, are sufficient to resolve this case. Should this Court find it necessary to look further, however, *amicus* submits this brief to explain that the policies underlying the CPA counsel against applying the statute in the circumstances of this case. The Legislature has instructed that the CPA reflects a balance between the potentially competing objectives of “protect[ing] the public and foster[ing] fair and honest competition” and ensuring that “acts or practices which are reasonable in relation to the development and preservation of business” continue to be permitted. RCW 19.86.920. Applying the CPA to cases brought by non-resident plaintiffs against Washington defendants would do nothing to “protect the public” of Washington, and it would significantly undermine “the development and preservation of business” in the State.

A. Extraterritorial application of the CPA would create uncertainty for businesses seeking to conform their conduct to the law

This Court has recognized the importance of “certainty and predictability of result” in the law governing commercial transactions. *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 700, 167 P.3d 1112 (2007) (quoting *Restatement (Second) of Contracts* § 187 cmt. e); see *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (noting that “parties . . . rely on this court to provide clear rules of law”). The United States Supreme Court has also observed that “[p]redictability is valuable to corporations making business and investment decisions.” *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010). Businesses have a strong interest in complying with the law not only because of the intrinsic value of doing so, but also because of the high costs—both monetary and reputational—of violating the law. Yet to comply with the law, businesses must know what the law is.

Under the rule proposed by Defendants, it is easy to determine whether the CPA applies to a particular transaction: Washington law applies whenever the consumer is a Washington resident. That rule is clear and simple to apply, and it has the added virtue of being consistent with the approach taken by many other States. See, e.g., *Elyazidi v. SunTrust Bank*, 780 F.3d 227, 237 (4th Cir. 2015) (construing Maryland law); *Avery*

v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 853, 216 Ill. 2d 100 (2005); *Goshen v. Mut. Life Ins. Co. of New York*, 774 N.E.2d 1190, 1196, 746 N.Y.S.2d 858, 98 N.Y.2d 314 (2002).

By contrast, when States apply laws like the CPA extraterritorially, predictability declines. Businesses—and consumers—can no longer rely simply on the consumer protection laws of the State in which the consumer resides. Instead, they must determine whether the laws of other States may apply. To be sure, one could imagine a clear rule that the CPA applies to all transactions everywhere in the world, regardless of the residence of the parties. But such a rule would be entirely unrealistic, and Plaintiff does not advocate it. Instead, any plausible rule of extraterritorial application will require some assessment of the degree of connection between the parties and the transaction and the State of Washington. That assessment will raise complex choice-of-law questions, making it difficult to predict the applicable law in advance and making it expensive to litigate the question after the fact.

The parties' briefing in this case demonstrates the point. Over 30 pages are consumed debating whether section 145 or 148 of the *Restatement (Second) of Conflicts* applies, followed by extended discussions of the multi-factor tests under each section. (Defs.' Br. 22-30; Pl.'s Br. 23-32; Defs.' Reply Br. 10-20.) If the CPA applies

extraterritorially, businesses will have to consider those complicated questions—with uncertain answers—when structuring their affairs. The theory advocated by Plaintiff would require a state-by-state and case-by-case analysis, considering facts as specific as whether a collection letter instructed a customer to pay in Illinois or in Texas. Such case-specific analysis will cause substantial uncertainty.

The uncertainty facing businesses will not be limited to cases involving what Plaintiff describes as “abusive” practices that are clearly contrary to Washington law. Pl.’s Br. 14. Instead, it will exist even if Washington has not clearly forbidden a particular practice. So long as such a practice has been authorized by another State, consumers in that State will prefer to litigate under Washington law, where there is at least a chance of prevailing. Businesses will therefore be faced with the cost of litigating the question even if Washington courts ultimately decide that such a practice is authorized under the CPA.

This case provides an example of how such uncertainty will manifest itself. Defendant State Farm is an Illinois-based company. It affiliates with many different collection agencies when it needs to collect debts. That it happened to use Seattle Service Bureau to collect a Texas debt from a Texas resident under a Texas insurance contract should not reasonably have led State Farm to believe that Texas law would no longer

govern. And it is not difficult to imagine scenarios that would place companies in an even more uncertain position. For example, suppose that Defendant Seattle Service Bureau had retained an Oklahoma-based process server to deliver the collection notice to Plaintiff. Under Plaintiff's theory, her case could be governed by the law of up to four different States: Texas, Illinois, Washington, and Oklahoma. Predicting which States' laws will apply—and determining the content of each State's law that applies—becomes more challenging as each new law is introduced. The result is the type of uncertainty that fails to provide businesses with notice of how they should act to comply with the law and that offends the “[e]lementary notions of fairness enshrined in our constitutional jurisprudence [that] dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

Certainty is important to the law, and extraterritorial application undermines it. In order to allow businesses and consumers to know the law that will govern their relationships, this Court should hold that the CPA applies only to Washington consumers.

B. Extraterritorial application will lead to conflicting commands

In addition to causing uncertainty, applying the CPA extraterritorially will result in the imposition of inconsistent obligations on

parties doing business in other States, raising serious practical and constitutional concerns.

1. The CPA incorporates specific consumer protection rules governing a wide range of businesses. The statute governs title insurance, *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 39 P.3d 984 (2002), collect calls, *Judd v. AT&T*, 152 Wn.2d 195, 95 P.3d 337 (2004), and mobile home parks, *Ethridge v. Hwang*, 105 Wn. App. 447, 20 P.3d 958 (2001). In Washington, failing to allow wireless customers to opt out of a reverse phone number search service can result in liability under the CPA. RCW 19.250.040. Companies making small loans must give customers a specific written warning or face potential CPA liability. RCW 31.45.085, .190. Businesses selling timeshares must comply with a host of statutes and regulations, the violation of which constitutes an unfair and deceptive trade practice under the CPA. RCW 64.36.170. And Washington, like every other State, has lemon laws that govern the sale of new or used cars. *See* RCW Ch. 19.118.

Other States, of course, have their own rules for those and many other businesses. *See, e.g.*, NAIC Title Insurance Task Force, *Survey of State Insurance Laws Regarding Title Data & Title Matters* (2010) (surveying state title insurance laws); National Conference of State Legislatures, *Payday Lending State Statutes* (Jan. 14, 2015), <http://>

www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx (surveying state lending laws). And not all of those laws are identical to Washington's.

In addition, a violation of a regulation may serve as a predicate for liability under the CPA. *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 219, 135 P.3d 499 (2006). Thus, if the CPA applies to transactions taking place outside Washington, any conflict between Washington regulations and the regulations of another State may also give rise to inconsistent commands.

It is no response to say that businesses may simply have different procedures, warnings, or labels for products and services sold in different States. Under Plaintiff's theory, a Washington company may face liability whenever it fails to comply with Washington law, even where, as here, its conduct complies with the law of the State where its consumer resides. A Washington company that is out of compliance with Washington law could therefore be liable even if it complies with the law of the State where its customer resides. And as explained below, that will create a disincentive for businesses to locate in Washington rather than in the States where their customers reside.

Plaintiff contends that, in the circumstances of this case, "Texas has no comparable interest in applying Texas law" and that "applying

Washington law furthers Texas's interest in protecting consumers far more effectively than applying nonexistent Texas law protections." Pl.'s Br. 29. That argument simply assumes that every State has an interest in providing the maximum possible level of legal "protections" to its consumers. In reality, every State must make a judgment about how to balance that interest against other considerations, such as lowering the cost to consumers of obtaining goods and services (recognizing that, in many cases, the added cost of more robust legal liability for businesses is reflected in higher prices for consumers). It disrespects the choices made by other States to impose Washington law on them.

Moreover, Plaintiff's argument overlooks the fact that the differences among state laws are not simply a matter of more consumer protection or less consumer protection. Instead, States may have different—and sometimes incompatible—policies about how to protect consumers, such as by requiring different kinds of warnings or disclosures. Applying the CPA to transactions occurring in other States will result in conflicts that Plaintiff's theory offers no way to resolve.

2. In addition, as Defendants have explained, extraterritorial application of the CPA raises serious constitutional concerns. Defs.' Br. 30-38. Those concerns are heightened because of the potential for inconsistent legal obligations raised by extraterritorial application. The

United States Supreme Court has held that “[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside the State’s borders, whether or not the commerce has effects within the State.” *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). That is so, in part, because “the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Healy v. The Beer Inst.*, 491 U.S. 324, 336-37, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989).

Commands from different States that are in tension with one another can be sufficient to render them invalid, even if it is technically possible to comply with both. In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959), for example, the Supreme Court struck down an Illinois law requiring particular mud flaps on trucks. It justified its decision in part because an Arkansas regulation outlawed those flaps. It was technically possible to comply with both laws, as truckers could install one set of flaps in Illinois and another set when they reached Arkansas. But, the Court observed, it would be time-consuming and costly to replace the flaps. That type of conflict was sufficient to render the Illinois statute invalid.

Even the *potential* for conflicting commands counsels against extraterritoriality. The Ninth Circuit, for example, has rejected Nevada's attempt to regulate the NCAA, which governs college athletics nationwide, because allowing a State to do so involved the possibility of conflicting commands. *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993). In striking down Nevada's statute, the court considered the possibility of three States each requiring different standards of proof for NCAA rule infractions. *Id.* at 639. The NCAA could not comply with all three, meaning that it could not "accomplish its fundamental goals" of ensuring that universities across the country play by the same rules. *Id.* "Nor would it do to say that it need only comply with the most stringent burden of persuasion (beyond a reasonable doubt), for a state with a less stringent standard might well consider its standard a maximum as well as a minimum." *Id.* at 639-40. In the court's view, "[t]he serious risk of inconsistent obligations wrought by the extraterritorial effect of the [s]tatute demonstrate[d] why" the statute was invalid. *Id.* at 640.

As another example, the Seventh Circuit struck down a Wisconsin statute that prohibited the disposal of waste in Wisconsin unless the community from which it came adhered to Wisconsin's recycling and waste disposal regulations. *Nat'l Solid Waste Mgmt. Assoc. v. Meyer*, 63 F.3d 652 (7th Cir. 1995). Among the problems the court identified was the

possibility that other States adopting similar rules could lead to conflicts; “if Wisconsin can insist on interstate [garbage] haulers doing things the Wisconsin way in order to obtain access to the Wisconsin market, other states can insist on similar or different prerequisites to their markets.” *Id.* at 662. The possibility of similar conflicts here suggests that extraterritorial application of the CPA would raise serious constitutional concerns.

C. Extraterritorial application will place Washington businesses at a disadvantage when competing for customers outside the State or when seeking to partner with other businesses

Plaintiff argues that the CPA should be applied extraterritorially because “Washington debt collectors . . . who engage in abusive debt collection practices place law abiding debt collectors in Washington at a competitive disadvantage.” Pl.’s Br. 14. In fact, if the CPA applies to Washington companies whenever they interact with out-of-state consumers, Washington companies will be placed at a significant competitive disadvantage compared to businesses in other States.

This case provides a good illustration of the effect of applying the CPA extraterritorially. Plaintiff brought suit in Washington only because her claim would fail in Texas—had a Texas collection agency sent the notice at issue, there is no dispute that it would not face liability. Yet if the CPA applies extraterritorially, plaintiffs will effectively have two

consumer protection regimes to choose from. They will naturally choose whichever exposes the Washington company to greater liability. The upshot is that Washington companies dealing with consumers across the country will face greater liability than companies based elsewhere.

That would be an unfortunate result for any State, but it would be especially troubling for Washington. This State is home to companies interacting with consumers across the country, including the nation's largest software company and its largest online retailer. They and the many other companies that call Washington home face fierce competition. To allow them to compete fairly with businesses in other States, this Court should adhere to the CPA's text and the presumption against extraterritoriality.

Plaintiff's rule would harm not only Washington businesses dealing directly with consumers but also Washington businesses seeking to partner with businesses in other States. Plaintiff seeks to hold State Farm, an Illinois company, liable under Washington's CPA only because it partnered with a Washington company to collect a debt in Texas. If that theory prevails, out-of-state companies would expose themselves to liability under the CPA simply by choosing to partner with Washington companies.

That result would harm the many local companies that partner with out-of-state companies—from component-part suppliers to software companies to advertising agencies and many more. Those Washington companies could expect to see fewer opportunities for work outside the State and more pressure to indemnify their partners, thereby increasing their own costs and placing them on an unequal footing with their competitors who do not operate in Washington.

CONCLUSION

This Court should answer both certified questions in the negative.

DATED: September 4, 2015 Respectfully submitted,

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

DATED: September 4, 2015, at Seattle, Washington.

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Dear Clerk,

Please accept for filing in *Thornell v. Seattle Service Bureau, Inc., et al.*, Case No. 91393-5, the following two documents, attached to this email:

1. Motion of the Chamber of Commerce of the United States of America for Leave to File Brief of Amicus Curiae
2. Brief of Amicus Curiae the Chamber of Commerce of the United States of America

Thank you.

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