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No. 91393-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA C. THORNELL,

Respondent,

v.

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

Appellants.

Filed
Washington State Supreme Court

SEP 18 2015

Ronald R. Carpenter
Clerk

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTRODUCTION

The certified questions in this case ask whether the Washington Consumer Protection Act (WCPA) can be invoked by plaintiffs who are not Washington consumers. But an equally important question lurks just beneath the surface: should the Washington courts allow themselves to become a locus of nationwide class-action litigation? There is only one reasonable explanation for why the plaintiff, a resident of Texas, chose the Washington courts as her venue for a claim arising out of a Texas automobile accident. Her attorneys were attracted by the broad scope of the WCPA and foresee a lucrative payday if they can convince the trial court to certify a nationwide class action against the two corporate defendants in Washington—despite the absence of any meaningful connection between her claim and the forum, and even though the connections among the claim, the forum, and one of the defendants are virtually nonexistent.

Amicus curiae Washington Legal Foundation (WLF) respectfully submits that the answer to the beneath-the-surface question is “no,” Washington courts should not endorse counsel’s efforts to transform the WCPA into a class-action lawsuit magnet. The principal reasons for rejecting an extraterritorial interpretation of the WCPA are that the language and history of the statute both indicate that the Washington

legislature adopted it to protect Washington consumers, not consumers nationwide. But federalism concerns also counsel against extending the WCPA to consumers outside of Washington. Each State is entitled to adopt laws governing the protection of consumers located within its borders, and barring unusual circumstances, each is entitled to expect other States not to seek to supplant those laws by the extraterritorial application of their own consumer protection statutes.

Those federalism concerns are embodied in the Restatement (Second) Conflicts of Laws (1971). Section 148 of the Restatement, the section most relevant to the consumer fraud claims being asserted in this case, states that—in determining which State’s laws should govern a fraud claim—one should look principally to the State in which the plaintiff alleges she received the alleged misrepresentations and was injured. Interpreting the WCPA as extending a cause of action to plaintiffs who are neither Washington residents nor Washington consumers—and thereby attracting opportunistic counsel who seek a forum for a nationwide class action—cuts against the federalism concerns embodied in the Restatement.

Federal constitutional concerns also counsel against extraterritorial application of the WCPA. Claims filed by non-Washington consumers

who were injured in other States will often bear, at most, only a tangential relationship to the State of Washington. That is certainly true with respect to the claims filed in this case. The Due Process Clause of the Fourteenth Amendment prohibits a State from applying its law to a claim unless the State has significant contact—or a significant aggregation of contacts—with the claim. If the Court were to conclude that the WCPA applies extraterritorially, Washington courts would find themselves repeatedly faced with the task of determining whether the Due Process Clause permits application of the WCPA to claims being asserted by nonresident consumers whose claims lack significant contacts with the State of Washington. One can reasonably surmise that the Washington legislature did not intend to create such a constitutional thicket, or impose such a burdensome cost on the Washington courts, when it adopted the WCPA.

INTERESTS OF AMICUS CURIAE

WLF is a public-interest law firm and policy center headquartered in Washington, D.C., with supporters in all 50 States, including many in the State of Washington. WLF's primary mission is the defense and promotion of free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF believes that principles of comity require governments at both the state and national level to avoid invoking their own laws to resolve legal claims that arise in another jurisdiction and that are of greater interest to the other jurisdiction. To that end, WLF regularly appears in federal and state court proceedings to support the presumption that statutes are not intended to apply extraterritorially unless the legislature clearly expresses a contrary intent. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013); *Morrison v. Nat'l Australian Bank, Ltd*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010).

WLF also has opposed certification of nationwide class actions in which relevant laws differ considerably from State to State and the plaintiffs seek to overcome the resulting “predominance” difficulties by asserting that the laws of a single State should be applied to the claims of class members from all 50 States. *See, e.g., Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), *vacated and remanded*, 544 U.S. 1012, 125 S.Ct. 1968, 161 L.Ed.2d 845 (2005); *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003), *cert. denied*, 542 U.S. 937, 124 S. Ct. 3907, 159 L.Ed.2d 812 (2004).

WLF is concerned that if the Court rules that the WCPA creates a

cause of action for out-of-state consumers, Washington will become a magnet for nationwide class-action claims, and that lawsuits spawned by such a holding would interfere with the right of other States to govern consumer transactions occurring within their borders. This would also create a heavy burden on the Washington court system.

WLF agrees with Appellants that the plain meaning of the WCPA requires a holding that it cannot be invoked by out-of-state plaintiffs. WLF's brief focuses on two points: (1) the limited interpretation of the WCPA espoused by Appellants is confirmed by choice-of-law rules adopted by this Court; and (2) applying the WCPA to nonresident consumers would raise serious constitutional issues because the Due Process Clause restricts the right of Washington courts to apply the WCPA to consumer transactions that lack significant contacts with the State.

STATEMENT OF THE CASE

The WCPA states that all “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” are “unlawful.” RCW 19.86.020. It defines “trade” and “commerce” as including “the sale of assets or services, and any commerce directly or indirectly *affecting the people of the state of*

Washington.” RCW 19.86.010 (emphasis added). The statute initially provided for enforcement solely by the Washington Attorney General. RCW 19.86.080. The legislature later amended the statute to create enforcement by means of a private cause of action. RCW 19.86.090 (stating that “[a]ny person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both.”). The statute grants the trial court authority, in its discretion, to treble the award of damages, with the increase capped at \$25,000. *Ibid.*

This lawsuit arises in the aftermath of an automobile collision in Texas involving the son of Respondent Sandra Thornell and a driver insured by State Farm Mutual Automobile Insurance Co., which is incorporated and headquartered in Illinois. Thornell filed suit against State Farm and the company to which it assigned its insurance subrogation claim, Appellant Seattle Service Bureau (SSB), alleging that letters sent by SSB to Thornell in Texas were misleading. She alleges that her receipt of the letters in Texas injured her.

State Farm and SSB moved to dismiss the complaint for failure to state a claim. They argued that the WCPA does not apply to claims made

by plaintiffs who are not Washington consumers, particularly when those claims are asserted against non-Washington corporations.

The U.S. District Court for the Western District of Washington declined to decide the choice-of-law issue “at this stage of the proceedings,” concluding that the record was insufficiently developed to allow the court to make factual findings regarding the relative significance of Texas contacts and Washington contacts. Slip op. at 7-8. The court further held that the extraterritorial application of the WCPA had not been decided by the Washington courts. Accordingly, it granted State Farm’s alternative request to certify to this Court two questions regarding the scope of the WCPA:

- (1) Does the Washington Consumer Protection Act create a cause of action for a plaintiff residing outside Washington to sue a Washington corporate defendant for allegedly deceptive acts?
- (2) Does the Washington Consumer Protection Act create a cause of action for an out-of-state defendant for the allegedly deceptive acts of its in-state agent?

Certification Order at 4.

ARGUMENT

I. FEDERALISM CONCERNS REINFORCE THE CONSUMER PROTECTION ACT'S PLAIN MEANING: IT PROTECTS WASHINGTON CONSUMERS, NOT CONSUMERS IN OTHER STATES

WLF concurs with State Farm and SSB that the plain meaning of the WCPA's statutory language requires that the certified questions be answered "no," the WCPA does *not* create a cause of action for nonresident consumers whose only injury occurred outside the State—without regard to whether the defendant is based in Washington. The WCPA's restrictive definition of "commerce" is sufficient by itself to dictate that result. By limiting the definition to "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington," RCW 19.86.010, the statute makes clear that the "consumers" to be protected by the "Consumer Protection Act" are limited to those with ties to Washington.¹

¹ A well-known canon of statutory construction, *ejusdem generis*, reinforces State Farm's and SSB's interpretation of the statute. That canon counsels, "Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S.Ct. 1074, 2015, 191 L.Ed.2d 64 (2015). RCW 19.86.010 incorporates three activities that "directly or indirectly affect[] the people of the state of Washington" into its definition of commerce: (1) the sale of assets; (2) the sale of services;

WLF writes separately to note that federalism concerns—the notion that every governmental body within the United States should respect the prerogatives of other governmental bodies, including other state governments—reinforce the conclusion that the WCPA was never intended to apply to nonresident consumers whose only alleged injuries occurred outside of Washington. By declining to apply the WCPA

or (3) commerce. The first two listed activities (the sale of assets directly or indirectly affecting the people of the State and the sale of services directly or indirectly affecting the people of the State) both refer to activities directed at those who consume goods or services. Thornell urges the Court to read the third activity (commerce directly or indirectly affecting the people of the State) very broadly, so as to include any activity involving a Washington company (such as SSB). *Ejusdem generis* counsels against giving the third activity such a broad reading, a reading that would be inconsistent with the name of the “Consumer Protection Act.” Because the first two listed activities are focused on commercial dealings that directly or indirectly affect those who consume goods or services in Washington, the *ejusdem generis* canon counsels that the legislature intended the third listed activity to have a similar focus.

Thornell posits that even if State Farm’s and SSB’s activities did not affect Washington consumers, it could have an impact on a hypothetical Washington business that might seek to compete with SSB in pursuing subrogation claims against Texas drivers. Thornell Br. 14. As shown above, that reading of “commerce directly or indirectly affecting the people of the state of Washington” is inconsistent with the *ejusdem generis* canon. Moreover, Thornell has not plausibly explained how her hypothetical company might have been injured. Indeed, it is Thornell’s expansive definition of the WCPA that is most likely to injure them; for one thing, out-of-state insurers are less likely to retain Washington-based companies to assist with non-Washington subrogation work if doing so may expose them to WCPA litigation.

extraterritorially, Washington would demonstrate its respect for the rights of other States to exercise the same degree of supervision over consumer transactions within their own borders that Washington expects other States to demonstrate regarding consumer transactions within this State.

A. Texas and Other States Share Washington’s Strong Interest in Regulating Consumer Transactions Involving Their Own Consumers

Washington is not alone in adopting legislation to protect consumers by regulating transactions between businesses and the consuming public. Indeed, both Congress and the legislatures of all or nearly all 50 States—including Texas—have adopted such laws. *See, e.g.*, TEX. BUS. CODE ANN. § 17.44 (stating that Texas’s Deceptive Trade Practices Act is designed “to protect consumers against false, misleading, and deceptive businesses practices, unconscionable actions, and breaches of warranty, and to provide efficient and economical procedures to secure such protection.”).

Moreover, each of these state laws has focused particular attention on in-state business transactions involving resident consumers. Washington is typical of other States in that respect. Indeed, this Court has repeatedly sought to ensure that *Washington* consumers receive the full benefits of the WCPA and that other States’ consumer-protection laws

are not permitted to diminish those rights.

Thus, in *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008), the Court invalidated a choice-of-law provision in a Washington-based telephone service contract as “unconscionable” because the effect of the provision (which required application of New York law) was to deny Washington consumers rights guaranteed them under the WCPA.² The Court held that “Washington’s interest in protecting large classes of its consumers materially outweighs New York’s limited interest in this matter.” *Id.* at 386.

The Court made clear that the result would have been different if the plaintiffs had been, for example, New York consumers rather than Washington consumers—even though the defendant (AT&T) maintained a substantial presence in Washington. It stated, “We generally enforce contract choice of law provisions.” *Id.* at 384. It explained that it was

² The Court explained that the WCPA “evidences a strong public policy in favor of class actions for small consumers.” *McKee*, 164 Wn.2d at 384. The New York choice-of-law provision would have prevented the Washington consumers from going forward with a class action because New York law (unlike Washington law) permitted waiver of class-based relief. The Court declared the choice-of-law provision unconscionable and thus unenforceable against “Washington citizens asserting small-dollar Consumer Protection Act claims” because it conflicted with “Washington’s fundamental public policy.” *Id.* at 386.

refusing to enforce the choice-of-law provision in this case only because the provision violated “Washington’s fundamental public policy” of ensuring that “Washington consumers” have access to class actions for “small dollar Consumer Protection Act claims.” *Id.* at 386.

Given its recognition of Washington’s right to regulate transactions involving Washington consumers without interference from the laws of other States, the Court undoubtedly appreciates that another State is similarly entitled to the exclusive right to establish rules governing commercial transactions within its jurisdiction and involving its own residents. This mutual acceptance of comity respecting the consumer protection laws of other States provides additional support for the plain meaning of the WCPA—that it does not apply extraterritorially.

Thornell does not contest State Farm’s evidence that, had she filed suit in Texas courts, they would have applied Texas law, not Washington law, to her claims alleging injury in Texas to a Texas plaintiff. State Farm Br. at 28. Moreover, she concedes that her claims against State Farm and SSB fail to state a claim under Texas law. Thornell Br. at 23. Respect for the right of Texas to apply its consumer protection policies to alleged injuries incurred in Texas by a consumer residing in Texas—including policies less expansive than Washington’s—counsels strongly against

applying Washington law to Thornell's claims.

The Texas Supreme Court has explicitly recognized that, in light of federalism concerns, it is reluctant to regulate business transactions that occur in other States, and that *other States should be similarly reluctant to regulate business transactions that occur in Texas*. In *Coca-Cola Co. v. Harmar Bottling Co.*, 50 Tex.Sup.Ct.J. 21, 218 S.W.3d 671 (2007), the court held that the plaintiffs' complaints of anti-competitive injury occurring in neighboring States were not actionable under Texas antitrust laws in the absence of evidence of adverse effects on Texas commerce. In explaining its decision not to provide a cause of action for out-of-state injuries, the court explained, "A principle of federalism is that '[n]o State can legislate except with reference to its own jurisdiction.'" 218 S.W.3d at 680 (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 26 L.Ed. 845 (1881)).

The court added:

It is an especially sensitive matter for a jurisdiction to extend its laws governing economic competition beyond its borders. Such laws necessarily reflect fundamental policy choices that the people of one jurisdiction should not impose on the people of another. . . . [W]ithin our federal system one may ask: why should Texas law supplant Arkansas, Louisiana, or Oklahoma law about how best to protect consumers from anti-competitive conduct and injury in those states? Or to put the shoe on the other foot, *why should another state's law supplant Texas law about how best to protect consumers from anti-competitive conduct in Texas?* There is no good answer.

Id. at 680-81 (emphasis added).

Consumer protection laws similarly “reflect fundamental policy choices” that each State makes regarding how best to regulate transactions involving its consumers. Thornell asserts that Texas has no interest in denying a cause of action to a Texas resident against an out-of-state defendant that has caused injury to the resident within Texas, that it should be happy if its residents are able through forum shopping to find a jurisdiction willing to award them damages. Thornell Br. at 29. That assertion is demonstrably incorrect. If Texas had wanted to create a cause of action for Texas citizens who receive allegedly misleading demand letters from out-of-state companies, it could easily have included such a provision in the Texas Deceptive Trade Practices Act. The fact that it has not done so speaks for itself.

Texas consumer protection law represents that State’s considered judgment regarding how best to regulate consumer transactions involving its residents. Among the relevant considerations that go into drafting such laws: to what extent can the State expose out-of-state companies to potential legal liability before they may become reluctant to conduct business within the State? Texas would be understandably offended if other States were to second-guess that determination, thereby increasing

the cost for companies to conduct business in the State and making the extent of legal redress available to Texas residents dependent on their willingness to forum shop.

B. The Restatement Reflects States' Understanding that the State with the Greatest Interest in Regulating a Consumer Transaction Is the State in Which the Consumer Resides and Suffers Injury

The federalism concerns expressed above are embodied in the Restatement (Second) Conflicts of Laws (1971), which, this Court has held, governs conflict-of-law issues in Washington. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976). The most relevant provision of the Restatement is § 148, which sets forth criteria to be applied in determining which State has the most significant relationship with a tort claim sounding in fraud and misrepresentation. Section 148 indicates that in most cases, the law of the plaintiff's residence should be applied. *See* Restatement § 148 cmt i, § 148(2) cmt i ("The domicil[e], residence and place of business of the plaintiff are more important than similar contacts on the part of the defendant," because "a financial loss will usually be of greatest concern to the state with which the person

suffering the loss has the closest relationship.”).³

Because this case is at the pleadings stage, the federal district court chose not to undertake a detailed examination of the Restatement’s criteria for the purpose of making a definitive choice-of-law determination on the facts of this case. Nonetheless, the guidance provided by Washington’s choice-of-law rules (which make clear that the law of the plaintiff’s domicile should in most instances be applied to fraud claims filed under consumer protection statutes) affirmatively supports the conclusion that the WCPA does not apply extraterritorially.

³ Thornell urges the Court to look to § 145 of the Restatement (the provision that provides general guidance for addressing conflict-of-law issues arising in connection with tort claims), rather than to § 148. She argues that § 148 is inapplicable because one of the factors on which it focuses (“the place where the plaintiff acted in reliance on the representations”) is irrelevant in an action brought under the WCPA, which does not require the plaintiff to establish reliance. Thornell Br. 25. That argument is without merit. In determining the Restatement section on which its choice-of-law analysis should focus, this Court has generally applied the section it finds “more helpful,” regardless whether every factor listed in that section is directly applicable to the case at hand. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 968, 331 P.3d 29 (2014). Thus, the Court turned to § 148 in *FutureSelect* even though it determined that one of the factors cited in that section (the location of the “tangible thing” at issue) was “inapplicable because this transaction did not involve a tangible thing.” *Id.* at 969 n.16. Based on § 148, the Court concluded that Washington’s interest in protecting Washington consumers from fraud by applying forum law outweighed New York’s interests in applying its law in order to regulate the out-of-state conduct of New York-based securities sellers. *Id.* at 970.

II. APPLYING THE ACT EXTRATERRITORIALLY WILL CREATE SERIOUS DUE PROCESS CONCERNS

The Due Process Clause of the Fourteenth Amendment imposes significant restrictions on a state court's authority to apply forum law to claims lacking significant contacts with the State. Any WCPA claim filed by an out-of-state plaintiff with respect to injuries suffered in his/her home state will, by definition, be one in which the contacts between the claim and the forum are somewhat limited. Accordingly, if the WCPA is determined to apply extraterritorially and if (as can be expected) the plaintiffs' bar responds by filing numerous nationwide class actions under the WCPA in Washington's courts, the constitutionality of those lawsuits will be subject to serious question. It is highly unlikely that the Washington legislature intended to create such a constitutional thicket, or to impose such large administrative burdens on Washington courts, when it adopted the WCPA.

We note initially that the U.S. Supreme Court has recently imposed stricter limits on the authority of state courts to exercise personal jurisdiction over corporations that operate nationwide. The Court has now made clear that state courts may not exercise *general* jurisdiction over such corporations simply because the firm maintains substantial and continuous

business operations within the State. Rather, except in unusual circumstances, due process permits a state court's exercise of general (that is, all-purpose) jurisdiction only if: (1) the corporation is incorporated in the State; or (2) it maintains its principal place of business there. *Daimler AG v. Bauman*, 134 S.Ct. 746, 761, 187 L.Ed.2d 624 (2014). Otherwise, a corporation may only be haled into court based on *specific* jurisdiction, which requires an examination of the relationship among the defendant, the forum, and the cause of action.

Although State Farm is not incorporated in Washington and does not maintain its principal place of business there, it has not challenged the Washington courts' authority to exercise personal jurisdiction in this case. But the Supreme Court has made clear that even if the parties' contacts with the forum are sufficient to justify the exercise of personal jurisdiction, the Due Process Clause may nonetheless bar the state court from applying forum law to the claim. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), held that for a State's substantive law to be selected in a constitutionally permissible manner, the State "must have a significant contact or significant aggregation of contacts to the claims asserted" by every class member. 472 U.S. at 822. The Court held that although Kansas satisfied due process standards for exercising

personal jurisdiction over each of the parties, it had violated due process by applying Kansas law to the claims of many of the absent class members.

Ibid.

If the Court determines that the WCPA applies extraterritorially, it will likely be faced with numerous cases such as this one—in which an out-of-state corporation is the target of a WCPA claim filed by a nonresident plaintiff, and the contacts between the claim and the State of Washington are highly tangential. State Farm, for example, has a highly plausible argument, as a citizen of Illinois being sued on a claim arising in connection with a Texas insurance policy and on the basis of injuries suffered in Texas, that the *Shutts* due process standards are not met—even if SSB’s actions are attributed to State Farm. All of the above counsels against a ruling that the WCPA applies extraterritorially.

CONCLUSION

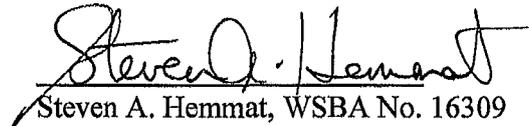
Amicus curiae Washington Legal Foundation respectfully requests that the Court answer both of the certified questions in the negative. The Washington Consumer Protection Act does not allow a claim for an out-of-state plaintiff against a Washington corporate defendant based on deception and injury that occurred out of state. Even more clearly, the Act does not allow such a claim against an out-of-state defendant. Those answers are

dictated by the plain meaning of the statute, and they are reinforced by federalism and choice-of-law principles as well as by due process limitations on the power of a State to apply its own law to controversies arising in other States.

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CERTIFICATE OF SERVICE

I, Steven A. Hemmat, declare as follows:

(1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within cause of action.

(2) By the end of the business day on September 4, 2015, I caused to be served upon counsel or record at the addresses and in the manner described below, the Motion of the Washington Legal Foundation for Leave to File an *Amicus Curiae* Brief, as well as its proposed brief.

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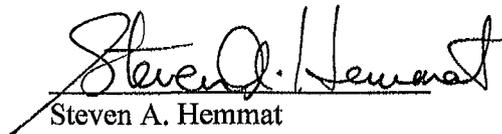
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of September, 2015.


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Subject: RE: Thornell v. Seattle Service Bureau, Inc., No. 91393-5

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From: steve.hemmat@gmail.com [mailto:steve.hemmat@gmail.com] **On Behalf Of** steve@hemmatlaw.com
Sent: Friday, September 04, 2015 2:16 PM
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Subject: Thornell v. Seattle Service Bureau, Inc., No. 91393-5

The attached Motion for Leave to File Brief as Amicus Curiae and the Amicus Brief of the Washington Legal Foundation is being submitted via this email in PDF format (see attachments).

The case name is *Thornell v. Seattle Service Bureau, Inc., d/b/a National Service Bureau, Inc., and State Farm Mutual Insurance Automobile Insurance Company*

The case number is 91393-5

My name as the submitting attorney is Steven A. Hemmat, WSBA 16309, email: steve@hemmatlaw.com.

Counsel for plaintiff and defendants have been copied on this email.

Thank you for your immediate attention to this matter.

Steven A. Hemmat
(206) 682-5200

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