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Washington State Supreme Court

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Supreme Court No. 91393-5

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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CERTIFICATION FROM THE WESTERN DISTRICT OF  
WASHINGTON, UNITED STATES DISTRICT COURT

IN

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

Plaintiff,

v.

SEATTLE SERV. BUREAU, INC. d/b/a NATIONAL SERV.  
BUREAU, INC. and STATE FARM MUT. AUTO INS. CO.,

Defendants.

United States District Court Western District of Washington Case  
No. C14-1601-MJP

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DEFENDANT SEATTLE SERV. BUREAU, INC. d/b/a  
NATIONAL SERV. BUREAU, INC.'s OPENING BRIEF

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ORIGINAL

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## A. INTRODUCTION

The certified questions from the United States District Court for the Western District of Washington present questions about the extraterritorial application of the Washington Consumer Protection Act, RCW 19.86.010 et seq. (“WCPA”): (1) Does the WCPA create a cause of action for a plaintiff residing outside Washington to sue a Washington corporate defendant for allegedly deceptive acts? and (2) Does the WCPA create a cause of action for an out-of-state plaintiff to sue an out-of-state defendant for the allegedly deceptive acts of its in-state agent? (“Order Certifying Questions to Washington Supreme Court”,( A-3)).

Since Seattle Serv. Bureau, Inc. (“SSB”) is a Washington corporate defendant, only the first question certified to this Court applies to SSB. SSB and State Farm agree that the WCPA does not create a cause of action for a plaintiff residing outside Washington to sue SSB, or any Washington corporate defendant for allegedly deceptive acts that occurred outside of Washington state.

Accordingly, the first question certified by the US District Court should be answered “no”.

As to the second question certified to this Court, SSB joins State Farm’s position that the WCPA does not create a cause of action for an

out-of-state plaintiff to sue an out-of-state defendant for allegedly deceptive acts of its in-state agent.

**B. CERTIFIED QUESTIONS**

The United States District Court certified the following questions of state law for this Court's consideration:

(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 plaintiff to sue an out-of-state defendant for allegedly deceptive acts of its in-state agent?

**C. STATEMENT OF THE CASE**

SSB is a Washington Corporation. ((A-1), Dkt. # 2, p. 5, ¶ 3).

State Farm's principal place of business is Illinois. (Dkt. # 2, p. 5, ¶ 4).

Plaintiff is a resident of the State of Texas (Dkt. # 2, p. 5, ¶ 2).

Plaintiff's son was involved in a motor vehicle accident in San Antonio, Texas with a motorist insured by State Farm. (Dkt. # 2, p. 5, ¶¶ 6-7).

As a result of the accident, State Farm paid for damages or repairs to the State Farm insured vehicle. (Dkt. # 2, p. 6, ¶ 8).

SSB mailed to Texas three demand letters, addressed to Plaintiff, and her son, for the claim assigned to SSB by State Farm. (Dkt. # 2, p. 6-7, ¶¶ 9-12).

Plaintiff filed a Class Action Complaint in King County, State of Washington against SSB and State Farm claiming the letters violated the WCPA. ("Dkt. # 2). Plaintiff also made a claim for unjust enrichment.

State Farm removed the Class Action Complaint to the US District Court for the Western District of Washington.

In the US District Court, State Farm and SSB filed Motions to Dismiss and Motions to Strike Plaintiff's Class Action Complaint (Dkt. # 9 and 12), claiming the WCPA does not apply to claims made by Plaintiff who is not a Washington citizen.

The US District Court dismissed Plaintiff's claims for unjust enrichment, and certified questions to the Washington Supreme Court. (Dkt. # 41-42 (A-2 and A-3)).

#### **D. ARGUMENT**

- 1. A plaintiff residing outside Washington state cannot state a claim against a Washington corporate defendant for allegedly deceptive acts that occurred outside of Washington state.**

The WCPA does not create a cause of action for a plaintiff residing outside Washington to sue SSB, or any Washington corporate defendant

for allegedly deceptive acts occurring outside the State of Washington because (1) Plaintiff cannot satisfy the trade/commerce element of a WCPA action as SSB's actions do not include any commerce that directly or indirectly affects the people of the State of Washington; and (2) Washington law does not apply.

To prevail in a private action brought under the WCPA, the Plaintiff must establish that: (1) the defendant has engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) the Plaintiff has suffered injury in his or her business or property, and (5) a causal link exists between the unfair or deceptive act and the injury suffered. *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288, 296 (1997)..

“Trade” and “commerce” include “any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010 (2).

An action by a plaintiff residing outside of the State of Washington for conduct occurring outside of the State of Washington, and for purported damage occurring outside the State of Washington does not affect the people of the State of Washington.

Plaintiff and the harm allegedly suffered by Plaintiff have no connection to Washington because (1) Plaintiff is a resident of Texas Dkt.

# 2, p. 5, ¶ 2).; (2) The accident between Plaintiff's son and State Farm's insured occurred in Texas Dkt. # 2, p. 5, ¶ 6).; (3) The SSB letters were addressed to and sent to Plaintiff and her son in Texas Dkt. # 2, p. 6-7, ¶¶ 9-13).; and (4) Any harm Plaintiff suffered occurred in Texas (Dkt. # 2, p. 9, ¶¶ 20-21).

Under these facts, Plaintiff cannot prove trade or commerce affecting the people of the State of Washington. As a result, an out-of-state Plaintiff cannot satisfy the required elements of a WCPA claim for conduct occurring outside the State of Washington.

Therefore, the WCPA does not create a cause of action for a plaintiff residing outside Washington to sue a Washington corporate defendant for allegedly deceptive acts.

**2. Washington law does not apply to Plaintiff's claims.**

Washington law does not apply to Plaintiff's claims.

In order to answer question one, and show that the WCPA does not create a cause of action for a plaintiff residing outside Washington to sue SSB, or any Washington corporate defendant for allegedly deceptive acts that occurred outside of Washington state because Washington law does not apply, it is necessary to refer to certain choice-of-law principles in order to interpret the application of the WCPA to an out-of-state plaintiff.

However, the answer to the question certified is not a choice-of-law analysis. Plaintiff asserts that Washington law applies in her Complaint. Plaintiff does not assert any other State's law applies. Therefore, Plaintiff has made the choice of law that Plaintiff argues applies—Washington law. In fact, Washington law does not apply.

Under Texas law, Plaintiff cannot state a claim for violation of the Texas Consumer Protection Act since Plaintiff is not a consumer. Tex. Bus. & Com. Code Ann. § 17.45 (4).. See also Tex. Bus. & Com. Code Ann. § 17.46 (a).

Plaintiff's Action under the WCPA is based on *Panag v. Farmers Ins. Co. of Wn.*, 166 Wn.2d 27, 204 P.3d 885 (2009). As a result, there is a conflict in the law between Washington and Texas when the application of a Consumer Protection Act is concerned.

In these situations, this Court determines which state has the most significant relationship to the action. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 967, 331 P.3d 29, 36 (2014).

To determine the jurisdiction with the most significant relationship to the dispute, the court considers (1) the place where plaintiff acted in reliance on the representation; (2) the place where the plaintiff received the representations; (3) the place where the defendant made the

representations; (4) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (5) the place where a tangible thing, which is the subject of the transaction between the parties, was situated at the time; and (6) the place where the plaintiff is to render performance under a contract that he has been induced to enter by the false representations of the defendant. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d at 969.

The answers to the considerations are as follows: (1) Texas is the place where Plaintiff acted in reliance on the representation (Dkt. # 2, p. 5 ¶ 2 and p. 6-7, ¶¶ 9-12); (2) Texas is the place where Plaintiff received the representations (Dkt. # 2, p. 5 ¶ 2 and p. 6-7, ¶¶ 9-12); (3) Texas is the place where SSB made the representations (SSB is located in Washington but the letters were sent to Texas so the representations were made in Texas when the letters were opened by Plaintiff.) (Dkt. # 2, p. 5 ¶ 2 and p. 6-7, ¶¶ 9-12); (4) Plaintiff resides in Texas and SSB is a Washington corporation (Dkt. # 2, p. 5 ¶¶ 2 and 3); (5) Texas is the place where the subject of the transaction between the parties occurred. The accident occurred in Texas. (Dkt. # 2, p. 5 ¶¶ 6-7); and (6) is not applicable because there is no contract.

Texas has the most significant relationship under the *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, *supra*, factors such

that Washington law does not apply to a plaintiff residing outside Washington to sue a Washington corporate defendant for allegedly deceptive acts that occurred outside the state of Washington.

In the only case applying these principles to the WCPA, the US District Court for the Western District of Washington found the home states of the consumers have the most significant relationships such that the consumers' home states law applies, and not Washington law. *Coe v. Phillips Oral Healthcare Inc.*, No. C13-518, 2014 US Dist. LEXIS 146469 (W.D. Wash. Decided Oct. 10, 2014 and Filed Oct. 14, 2014).

The answer by this Court to the first question certified should be the same—the WCPA does not create a cause of action for a plaintiff residing outside Washington to sue a Washington corporate defendant for allegedly deceptive acts that occurred outside of the state of Washington.

This Court should find that the home state of a plaintiff has the most significant relationship in a Consumer Protection Act claim such that Washington law does not apply.

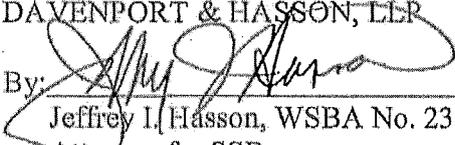
**E. CONCLUSION**

For the reasons outlined above, SSB respectfully requests that this Court answer the first question posed by the District Court, "No", and conclude that the WCPA does not create a cause of action for a plaintiff residing outside the state of Washington to sue SSB, or any Washington corporate defendant for allegedly deceptive acts occurring outside the State of Washington.

Dated this 14<sup>th</sup> day of April, 2015.

Respectfully submitted,

DAVENPORT & HASSON, LLP

By: 

Jeffrey I. Hasson, WSBA No. 23741  
Attorney for SSB

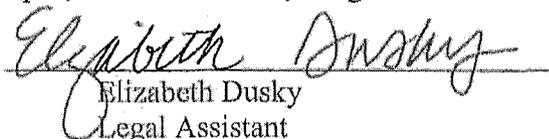
F. DECLARATION OF SERVICE

I, Elizabeth Dusky, declare that on this 14<sup>th</sup> day of April, 2015, I placed in the mails of the United State Postal Service an original and one copy of **Defendant Seattle Serv. Bureau, Inc. d/b/a National Serv. Bureau, Inc.'s Opening Brief, including Appendix**, addressed to the Supreme Court, Temple of Justice, PO Box 40929, Olympia, WA 98504-0929, and served upon the parties indicated below by Mail and Email:

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

Dated this 14<sup>th</sup> day of April, 2015 at Portland, Oregon.

A handwritten signature in cursive script, reading "Elizabeth Dusky", written over a horizontal line.

Elizabeth Dusky  
Legal Assistant  
Davenport & Hasson, LLP

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Rec'd 4/14/15

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**Sent:** Tuesday, April 14, 2015 3:52 PM  
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**Subject:** Case # 91393-5 - Sandra C. Thornell v. Seattle Service Bureau, Inc., et al.

Attached is Seattle Service Bureau's Opening Brief to be filed in the above matter.

The appendix is in separate mailing since the total pages of the brief and appendix exceeded 50 pages. The original brief is also in the mailing to the Court.

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**G. APPENDIX**

Class Action Complaint for Violation of the Washington Consumer  
Protection Act, RCW § 19.86.010 et seq. (Dkt. # 2, p. 4-15)..... A-1

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CASE NUMBER: 14-2-25641-0 SEA

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7 THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
8 IN AND FOR KING COUNTY

9  
10 SANDRA C. THORNELL, on behalf of  
herself and all others similarly situated,

11 Plaintiff,

12 v.

13 SEATTLE SERV. BUREAU, INC. d/b/a  
14 NATIONAL SERV. BUREAU, INC., and  
STATE FARM MUT. AUTO. INS. CO.

15 Defendants.  
16

CLASS ACTION

Case No.: \_\_\_\_\_

CLASS ACTION COMPLAINT FOR  
VIOLATION OF THE WASHINGTON  
CONSUMER PROTECTION ACT, RCW  
§ 19.86.010, ET SEQ.

**JURY TRIAL DEMANDED**

17  
18  
19 Plaintiff makes the following allegations upon information and belief, predicated  
20 upon the investigation undertaken by and under the supervision of Plaintiff's counsel.  
21 Facts alleged concerning Plaintiff and her counsel are based upon personal knowledge.  
22 Plaintiff believes that further substantial evidentiary support will exist for the allegations  
23 set forth below after a reasonable opportunity for discovery.

24 Plaintiff Sandra C. Thornell, on behalf of herself, and on behalf of all others  
25 similarly situated, by and through her attorney, complains against Defendants as follows:  
26

1 **NATURE OF THE CASE**

2 1. This matter is brought as a class action pursuant to Washington Superior  
3 Court Civil Rule 23 on behalf of all persons defined below as the "Class," asserting claims  
4 against Seattle Service Bureau, Inc. d/b/a National Service Bureau, Inc. (and any other  
5 assumed names that Seattle Service Bureau, Inc. uses) and State Farm Automobile  
6 Insurance Company, for violations of the Washington Consumer Protection Act ("CPA"),  
7 RCW § 19.86.010, *et seq.* Plaintiff seeks, *inter alia*, damages and injunctive relief.

8 **PARTIES**

9 2. Plaintiff Sandra C. Thornell is a resident of San Antonio, Bexar County,  
10 Texas.

11 3. Defendant Seattle Service Bureau, Inc. does business under the registered  
12 trade name National Service Bureau, Inc. ("Seattle Service Bureau") and is a domestic for-  
13 profit corporation with its principal place of business in Bothell, King County,  
14 Washington.

15 4. Defendant State Farm Automobile Insurance Company ("State Farm") is  
16 the largest automobile insurer in the United States, with operations in all 50 states and the  
17 District of Columbia. State Farm is a for-profit mutual insurance company with its  
18 principal place of business in Bloomington, Illinois.

19 **JURISDICTION AND VENUE**

20 5. This Court has jurisdiction over the claims alleged herein pursuant to RCW  
21 § 2.08.010 and/or § 19.86.090. Venue is proper in King County pursuant to RCW §  
22 4.12.020 and/or RCW § 4.12.025.

23 **FACTUAL ALLEGATIONS**

24 6. On or about July 16, 2012, Plaintiff Thornell's son Andrew Thornell was  
25 involved in a two-vehicle automobile accident in San Antonio, Texas. As a result of the  
26 accident, the two automobiles involved sustained damage.

A-1 Page 3

CLASS ACTION COMPLAINT FOR VIOLATION OF THE WASHINGTON  
CONSUMER PROTECTION ACT, RCW § 19.86.010, ET SEQ.

1 7. At the time of the accident, State Farm provided automobile insurance  
2 coverage applicable to the other vehicle (the "State Farm Insured" vehicle).

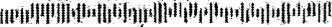
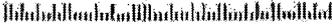
3 8. Subsequent to the accident, State Farm allegedly paid some amount for  
4 damages and/or repairs made to the State Farm Insured vehicle.

5 9. By letter dated May 20, 2013, Seattle Service Bureau, identifying itself as a  
6 debt collector attempting to collect a debt, sent Plaintiff and her son a demand letter  
7 seeking to collect a "CLAIM AMOUNT DUE: \$9,126.18". The demand letter went on to  
8 say that State Farm "has assigned this claim to our office to pursue collections against  
9 you." The "our office" is identified in the demand letter as "National Service Bureau, Inc.  
10 Bonded Collection Service." The letter from Seattle Service Bureau states at top center:

11 NOTICE OF INSURANCE CLAIM, YOU OWE \$9126.18  
12 IMMEDIATE ATTENTION REQUIRED

13 9. The initial letter also contained this "detach and return" payment slip:

14 PLEASE DETACH AND RETURN LOWER PORTION IN THE ENCLOSED ENVELOPE

P. O. Box 3259, Dept. 94367 Oaks, PA 19456			IF PAYING BY VISA, MASTERCARD OR AMERICAN EXPRESS, FILL OUT BELOW <input type="checkbox"/> VISA <input type="checkbox"/> MASTERCARD <input type="checkbox"/> AMERICAN EXPRESS CARD NO. _____ EXPIRES _____ NAME _____		
			PAY ONLINE AT <a href="http://payments.nsbl.net">http://payments.nsbl.net</a> NSB ID #: 2100205 Total Amount Due: \$9126.18		
			National Service Bureau, Inc. P. O. Box 717 Bothell, WA 98041-0717 		
			94366-3F1-R		

19  
20  
21  
22  
23  
24 10. Seattle Service Bureau sent Plaintiff a second demand letter on or about  
25 June 19, 2013, self-described as a "5-DAY NOTICE" (bold lettering in all capitals and  
26

1 underlined in original) again claiming a "**BALANCE DUE: \$9,126.18**" (bold lettering in  
2 all capitals and underlined in original).

3 11. Seattle Service Bureau sent Plaintiff a third demand letter on or about July  
4 19, 2013, this time self-described in the caption as a "**FINAL NOTICE AMOUNT DUE**  
5 **OF \$9,126.18 MUST BE PAID BY 07/29/13**" (bold and all capitalization in original).  
6 The letter stated that "In order to prevent additional collection activity from our office,  
7 please send your payment directly to National Service Bureau, Inc. Claim#:53-164L-427  
8 or you may pay the claim online at <http://payments.nsbj.net>. Payment should be for  
9 \$9,126.18."

10 12. This "**FINAL NOTICE**" (herein "**FINAL NOTICE**") letter also said it was  
11 from a debt collector attempting to collect a debt, and was signed by "**JUDY NELSON,**  
12 **Collection Specialist**", and identified the "creditor" as State Farm Insurance Co, The  
13 **FINAL NOTICE** letter also contain the detach and return payment slip:

14 PLEASE DETACH AND RETURN LOWER PORTION IN THE ENCLOSED ENVELOPE

15 P. O. Box 1257, Dept: 74367  
Oaks, PA 19456

16 

17 

18 Pay online at <http://payments.nsbj.net>  
NSB ID #: 2199206  
Total Amount Due: \$9126.18

19  94366-7

20  THORNELL, ANDRES  
THORNELL, SANDRA  
3235 BURNESS ST  
SAN ANTONIO TX 78221-2411

21 National Service Bureau, Inc.  
P.O. Box 747  
Bothell, WA 98043-0747

22  94366-674-7

23 

24 13. The alleged \$9,126.14 debt that State Farm, through Seattle Service Bureau,  
25 asserts as the "**AMOUNT DUE**," however, was merely an unliquidated claim.

26 14. Indeed, at the time of the collection notices referenced above no potential

1 claim of State Farm, or its insured, had been reduced to a judgment.

2 15. In sum, at the time of the collection notices referenced above, Plaintiff was  
3 not indebted to State Farm for any amount of money whatsoever.

4 16. Even so, the collection notices referenced above were designed to appear as  
5 a typical collection or "dunning" letter. For example, the trade name of "NSB National  
6 Service Bureau," was prominently displayed on the letters at the top in oversized,  
7 capitalized print; all of the letters stated that they were from a debt collector attempting to  
8 collect a debt; the initial letter stated that the debt collector provided statutory disclosures  
9 required by the Fair Debt Collection Practice Act, 15 USC 1601, et. seq., for "initial  
10 letters." Two of the letters contained "detach and return" slips and "pay online"  
11 directions, similar to many ordinary invoices for services, e.g. utility bills, medical bills,  
12 etc. as well as many typical collection letter forms. The last letter was signed by a  
13 "Collection Specialist" and the letter threaten "additional collection activity" if the alleged  
14 debt is not paid as demanded. By all appearances, the collection notices referenced above  
15 were typical collection agency dunning letters that a consumer would receive in  
16 connection with an actual "debt" owed as a result of a consumer credit transaction.

17 17. As Defendants well knew, however, the claimed "AMOUNT DUE" was  
18 not a "debt" subject to "collection."

19 18. In fact, at the time that Defendants began their self-described "collection"  
20 activity, State Farm possessed, at best, a potential, unliquidated claim based on a  
21 subrogated interest from its insured.

22 19. The collection notices referenced above included a threat of possible loss of  
23 driver's license "any request for claim verification may not prevent possible suspension of  
24 your driver's license and removal of your vehicle license plate registration . . . legal action  
25 and/or license suspension . . . if payment or other arrangements" were not made with  
26 regard to the purported "AMOUNT DUE".

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CLASS ACTION COMPLAINT FOR VIOLATION OF THE WASHINGTON  
CONSUMER PROTECTION ACT, RCW § 19.86.010, ET SEQ.

HAMPTON DECLARATION RE  
STATE COURT RECORDS- 8 of 30



1 and on behalf of all others similarly situated (the "Class").

2 27. The Class is comprised of the following:

3 All persons against whom Defendants have utilized collection agencies  
4 and/or debt collection-type practices in seeking to recover amounts to  
5 which Defendants claim entitlement as a result of a subrogated interest  
6 arising from the payment of a casualty claim, where the alleged amount  
7 due has not been reduced to judgment.

8 Excluded from the Class are Defendants, any entity in which any  
9 Defendant has a controlling interest, and the legal representatives, officers,  
10 directors, agents, successors-in-interest and assigns of any excluded  
11 person or entity.

12 28. The members of the Class are so numerous that the joinder of all members  
13 is impracticable. While the exact number of Class members is unknown to Plaintiff at this  
14 time, the Class can be ascertained through appropriate discovery. Plaintiff believes Class  
15 members number at least in the hundreds, if not thousands, and the disposition of the  
16 claims asserted herein through a class action, rather than numerous individual actions, will  
17 benefit the parties and the Court.

18 29. Questions of law and fact are common to the Class, including, but not  
19 limited to, the following:

20 a. Whether Defendants' conduct, as alleged herein, constitutes  
21 deceptive, unlawful or unfair business practices in violation of the  
22 Washington Consumer Protection Act, RCW § 19.86.010, *et seq.*;

23 b. Whether Defendants' conduct, as alleged herein, has occurred in  
24 trade or commerce;

25 c. Whether Defendants' conduct, as alleged herein, impacts the public  
26 interest;

d. Whether Plaintiff and the Class are entitled to an award of  
damages and, if so, the proper method of measuring such damages;

e. Whether Plaintiff and the Class are entitled to treble damages  
pursuant to RCW § 19.86.090;

1 f. Whether Plaintiff and the Class are entitled to attorneys' fees  
2 pursuant to RCW § 19.86.090; and

3 g. Whether Plaintiff and the Class are entitled to injunctive relief or  
4 other equitable relief and, if so, the nature and scope of any such relief.

5 30. Plaintiff's claims are typical of the claims of the members of the Class in  
6 that Plaintiff and the Class have all sustained damages resulting from Defendants'  
7 deceptive, unlawful and/or unfair business practices.

8 31. Plaintiff will fairly and adequately protect the interests of the members of  
9 the Class. Plaintiff is committed to the vigorous prosecution of this action, and Plaintiff's  
10 interests do not conflict with the interests of the other members of the Class. Moreover,  
11 Plaintiff has retained competent counsel experienced in complex class action litigation.

12 32. This action may be maintained as a class action because, in addition to  
13 satisfying the requirements of CR 23(a), questions of law and fact common to the Class  
14 predominate over any questions affecting only individual Class members, and a class  
15 action is superior to other available methods for the fair and efficient adjudication of this  
16 controversy.

17 33. A class action is superior to individual actions because the number of Class  
18 members is believed to be large and concentrating the litigation of the claims in a single  
19 forum is desirable for all parties and the Court. Because the damages suffered by  
20 individual Class members may be relatively modest, the expense and burden of individual  
21 litigation would make it economically unreasonable for Class members to individually  
22 redress the wrongs alleged. Plaintiff foresees no difficulty in the management of this  
23 matter sufficient to preclude its maintenance as a class action.

24 34. This action may also be maintained as a class action because, in addition to  
25 satisfying the requirements of CR 23(a), Defendants have acted or refused to act on  
26 grounds generally applicable to the Class, thereby making appropriate final injunctive

1 relief or corresponding declaratory relief with respect to the Class as a whole.

2 **COUNT ONE**

3 (Violation of the Washington Consumer Protection Act)

4 35. Plaintiff hereby incorporates by reference each of the preceding allegations  
5 as though fully set forth herein.

6 36. This cause of action is brought pursuant to the Washington Consumer  
7 Protection Act, RCW § 19.86.010, *et seq.*

8 37. At the time that State Farm retained Seattle Service Bureau to pursue  
9 collection activity against Plaintiff, both State Farm and Seattle Service Bureau knew that  
10 there did not exist a liquidated amount of indebtedness lawfully owing from Plaintiff to  
11 State Farm.

12 38. In fact, as a result of being the insurer for one of the vehicles involved in  
13 the July 16, 2012 automobile accident, State Farm had, at best, a subrogation interest in the  
14 possible claims of its insured. Indeed, as a result of the automobile accident, State Farm's  
15 own insured had, at best, a possible claim against Plaintiff.

16 39. At the time that State Farm retained Defendant Seattle Service Bureau to  
17 pursue collection activity against Plaintiff, State Farm and Seattle Service Bureau each  
18 knew that there was nothing more than a possible claim that could be asserted, but which  
19 would need to be proven in a court of law before anything was actually owed by Plaintiff.

20 40. Nevertheless, Seattle Service Bureau represented the purported amount  
21 "AMOUNT DUE" to the Plaintiff as a debt being pursued, and subject to collection, by a  
22 debt collector through the debt collection process.

23 41. Seattle Service Bureau presented the claim as a debt being pursued by a  
24 debt collector in order to intimidate and coerce Plaintiff into paying, playing on the fears  
25 engendered by the prospect of debt collection activity (*e.g.*, potential negative impact on  
26 Plaintiff's credit rating, prospect of incurring interest, attorney's and collection fees).

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1 of the Class have paid money to either Defendant as a result of their unfair, deceptive, and  
2 unlawful "debt collection" activities.

3 50. As a result, Plaintiff and the Class are entitled to recover such damages  
4 and/or restitution from the Defendants, in an amount to be proven at trial.

5 **PRAYER FOR RELIEF**

6 Plaintiff, on behalf of herself and all others similarly situated requests of this Court  
7 the following relief:

8 a. An order certifying the proposed Plaintiff Class herein, and  
9 appointing Plaintiff and her counsel of record to represent the Class;

10 b. An order declaring that the conduct and actions of  
11 Defendants complained of herein are unlawful, and in violation of the  
Washington Consumer Protection Act, RCW § 19.86.010, *et seq.*;

12 c. An order declaring that the Defendants have been unjustly  
13 enriched as a result of their unlawful conduct, as complained of herein;

14 d. An order that permanently enjoins Defendants, and their  
15 agents, from further violating the Washington Consumer Protection Act,  
RCW § 19.86.010, *et seq.*, in the manner set forth herein;

16 e. An award of damages to Plaintiff and the Class, including  
17 actual damages and/or damages or restitution for and to the extent of  
Defendants' unjust enrichment, all in an amount as is proven at trial;

18 f. An award of treble damages, pursuant to RCW § 19.86.090;

19 g. An award of prejudgment interest and costs of suit,  
20 including expert witness fees;

21 h. An award of attorneys' fees and expenses, pursuant to RCW  
22 § 19.86.090; and

23 i. Such other and further legal and equitable relief as this  
24 Court may deem proper.

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DATED: September , 2014

Respectfully submitted,

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Order on Motion to Dismiss and Motion to Strike (Dkt. # 41)..... A-2

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SANDRA THORNELL,

Plaintiff,

v.

SEATTLE SERV. BUREAU, INC., and  
STATE FARM MUT. AUTO INS. CO.,

Defendants.

CASE NO. C14-1601 MJP

ORDER ON MOTION TO DISMISS  
AND MOTION TO STRIKE

THIS MATTER comes before the Court on Defendant State Farm Mutual Automobile Insurance Company's ("State Farm's") Motion to Dismiss and Motion to Strike (Dkt. No. 9) and Defendant Seattle Service Bureau's ("SSB's") Joinder in State Farm's Motion to Dismiss and Motion to Strike (Dkt. No. 12). Having reviewed the motions, Plaintiff's Response (Dkt. No. 18), Defendants' Replies (Dkt. Nos. 201, 22), and all related papers, the Court hereby GRANTS the Motions in part and DENIES them in part. In a separate order, the Court will certify questions to the Washington Supreme Court and stay the remainder of the case.

A-2 Page 2

1 **Background**

2 Plaintiff Sandra Thornell, a resident of Texas, brings this putative class action alleging  
3 unjust enrichment and Washington Consumer Protection Act violations against State Farm, an  
4 Illinois corporation, and Seattle Service Bureau, a Washington corporation. (See Dkt. No. 1, Ex.  
5 A at 3.) According to the Complaint, the violations stem from an allegedly deceptive practice by  
6 State Farm of referring unliquidated subrogation claims to SSB, which then sends debt collection  
7 letters demanding a specified sum to persons against whom the claims could be brought. (See id.  
8 at 3–7.)

9 Plaintiff further alleges she enrolled in a credit monitoring program at her expense and  
10 sought and retained counsel as a result of the debt collection letters she received from SSB on  
11 behalf of State Farm. (Id. at 7.) She does not allege that she remitted payments to SSB or State  
12 Farm in response to the letters.

13 **Analysis**

14 I. Legal Standard

15 The Federal Rules require a plaintiff to plead “a short and plain statement of the claim  
16 showing that [she] is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “To survive a motion to dismiss,  
17 a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that  
18 is plausible on its face.’ ” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.  
19 Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual  
20 content that allows the court to draw the reasonable inference that the defendant is liable for the  
21 conduct alleged.” Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 545). In determining  
22 plausibility, the Court accepts all facts in the Complaint as true. Barker v. Riverside Cnty. Office

1 of Educ., 584 F.3d 821, 824 (9th Cir. 2009). The Court need not accept as true any legal  
2 conclusions put forth by the plaintiff, Iqbal, 556 U.S. at 678.

3 II. Vicarious Liability by State Farm

4 Defendant State Farm first asserts it is not directly or vicariously liable for the actions of  
5 SSB. (Dkt. No. 9 at 6–9.) Plaintiff argues State Farm is liable for the content of the letters sent by  
6 Seattle Service Bureau because SSB was State Farm’s agent, SSB acted in concert with State  
7 Farm, and/or State Farm ratified the conduct of SSB. (Dkt. No. 18 at 9–11.)

8 According to the state court Complaint, SSB sent the demand letters. (Dkt. No. 1-1 at 4–  
9 5.) In the letters, SSB allegedly stated that “State Farm ‘has assigned this claim to our office to  
10 pursue collections against you.’” (Id. at 4.) However, in the letter labeled “FINAL NOTICE,”  
11 State Farm was identified as the “creditor.” (Id. at 5.) The Complaint also describes the activities  
12 of the two entities as joint actions. (See, e.g., id. at 5 (“[A]t the time that Defendants began their  
13 self-described ‘collection’ activity, State Farm possessed, at best, a potential, unliquidated claim  
14 based on a subrogated interest from its insured.”).)

15 State Farm notes Washington courts have not automatically inferred an agency  
16 relationship between insurers and debt collectors, drawing a distinction between responsibility  
17 for the deceptive form of collection letters and the mere fact that an insurer deputized a debt  
18 collector to attempt to collect on or settle subrogated claims. At the summary judgment stage of a  
19 similar lawsuit, the Washington Court of Appeals held that “the practice of referring a  
20 subrogation interest to a debt collector does not by itself have the capacity to deceive a  
21 substantial portion of the public. [The collector] could have sent out [non-deceptive] letters like  
22 [the insurer’s].” Stephens v. Omni Ins. Co., 138 Wn.App. 151, 182 (2007), aff’d on other  
23 grounds by Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27 (2009). Defendant therefore urges  
24

1 the Court to hold that a complaint alleging referral without more does not state facts sufficient to  
2 withstand motion to dismiss. (See Dkt. No. 9 at 7.)

3 State Farm relies on the description of the relationship between SSB and State Farm  
4 contained within the letters quoted in the Complaint, but the letters' characterization of the  
5 relationship as one of potentially arms'-length "assignment" (see Dkt. No. 1, Ex. A at 4) is not  
6 inherently persuasive, since the letters themselves are alleged to be deceptive. In light of  
7 Defendant's comparison of this factual scenario with that described in Stephens, a more rational  
8 inference is that State Farm "referred an unliquidated subrogation claim" to SSB instead of  
9 assigning or selling the claim in exchange for money up front and washing its hands of later  
10 collection efforts. (See Dkt. No. 21 at 4.) An inference of a continuing relationship is also  
11 supported by a declaration submitted by State Farm in support of federal jurisdiction: a State  
12 Farm employee states that "Within the last four years, Defendant Seattle Service Bureau [...] ]  
13 has collected and remitted at least \$6,352,194 to State Farm in connection with approximately  
14 26,273 uninsured claims assigned throughout the 50 states." (Fuchs Decl., Dkt. No. 3 at 2.) That  
15 employee also describes his duties as including "the vendor management program involving  
16 referrals of subrogation claims to collection agencies." (Id. at 1.) (Consideration of this extrinsic  
17 evidence is more appropriate to the jurisdictional question than the sufficiency of the complaint,  
18 but since the evidence cannot be reasonably questioned by State Farm, who offered it, it would  
19 be artificial to draw a conclusion contradicting it during the analysis of the motion to dismiss.  
20 See Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 n.5 (9th Cir. 2003).)

21 Through the Complaint's allegations that State Farm and Seattle Service Bureau acted in  
22 concert, Plaintiff plausibly alleges an agency relationship between State Farm and its vendor. In

1 accordance with Stephens, additional evidence to support these allegations will be necessary to  
2 demonstrate agency at the summary judgment stage.

3 III. Extraterritoriality

4 Defendant State Farm argues the Washington Consumer Protection Act does not apply to  
5 claims made by plaintiffs who are not Washington citizens, particularly against non-Washington  
6 corporations. (Dkt. No. 9 at 8–13.) Defendant Seattle Service Bureau “incorporates the  
7 arguments made by State Farm on this topic” (Dkt. No. 12 at 3) and further argues that Texas  
8 law should control. (Dkt. No. 22 at 1.) Here, Plaintiff is from Texas and State Farm is an Illinois  
9 corporation. However, Seattle Service Bureau is a Washington corporation.

10 A. State Farm

11 The Washington Supreme Court opinion cited by State Farm in support of its argument  
12 that the WCPA cannot be applied extraterritorially was later withdrawn by the Supreme Court.  
13 See Schnall v. AT&T Wireless Servs. Inc., 168 Wn.2d 125, 142 (2010) (“Schnall I”), opinion  
14 withdrawn upon reconsideration by Schnall v. AT&T Wireless Servs. Inc., 171 Wn.2d 260  
15 (2011) (“Schnall II”). In addition, the superseding opinion contains the dissenting opinion of  
16 three justices who would have specifically held that claims against Washington corporations are  
17 cognizable under the WCPA, while the majority declined to reach the issue. See Schnall II, 171  
18 Wn.2d 260, 287 (opinion of Sanders, J.). The dissenting justices thought it was important that  
19 “[a]t least one party [in the case] is native to Washington in every transaction here.” Id.

20 Plaintiff points out that in the wake of Schnall II, several judges in this District have held  
21 that the WCPA has extraterritorial application to claims by out-of-state plaintiffs against  
22 Washington corporations based on the understood state of the law prior to Schnall I. (Dkt. No. 18  
23 at 17.) See, e.g., Keithly v. Intelius Inc., NA-2009-1485RSL, 2011 WL 2790471, \*1 (W.D. Wash.

1 May 17, 2011); Rajagopalan v. NoteWorld, LLC, No. C11-05574BHS, 2012 WL 727075, \*5 &  
2 n.6 (W.D. Wash. Mar. 6, 2012); Peterson v. Graech Assocs. No. 111 Ltd. Partnership, No. C11-  
3 5069BHS, 2012 WL 254264, \*2 (W.D. Wash. Jan. 26, 2012). This case, however, relates to an  
4 Illinois defendant and its alleged Washington agent. No case specifically holds that the WCPA  
5 applies to a foreign plaintiff's suit against a foreign corporation, even one that hired a  
6 Washington vendor to pursue the conduct at issue.

7 State Farm also asks in the alternative that the extraterritoriality question be certified to  
8 the Washington Supreme Court. Certification of the question of the WCPA's application to out-  
9 of-state plaintiffs, out-of-state defendants, or both, is appropriate in this context. See Red Lion  
10 Hotels Franchising, Inc. v. MAK, LLC, 663 F.3d 1080, 1091 (9th Cir. 2011) (describing the  
11 extraterritorial reach of the WCPA as an open question); Keystone Land & Dev. Co. v. Xerox  
12 Co., 353 F.3d 1093, 1097 (9th Cir. 2003) (holding that where the availability of a claim has not  
13 been decided by the Washington Supreme Court and where the answer to a certified question  
14 would have fair-reaching effects on those who contract in, or are subject to, Washington law,  
15 certification is appropriate). An order certifying questions will follow. Because the primary  
16 question at issue here concerns statutory interpretation, the Court does not reach the due process  
17 question as applied to State Farm.

18 B. Seattle Service Bureau

19 SSB, a Washington corporation, joins State Farm's brief on extraterritoriality and  
20 expands on the choice-of-law argument in its reply. (Dkt. No. 12 at 3; Dkt. No. 22 at 2-3.) In its  
21 Motion, State Farm cites Allstate Ins. Co. v. Hague regarding the constitutional choice of law  
22 standard: "[F]or a State's substantive law to be selected [and applied to a particular case] in a  
23 constitutionally permissible manner, that State must have a significant contact or significant  
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1 aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor  
2 fundamentally unfair.” 449 U.S. 302, 312–13 (1981). Plaintiff argues the state of Washington has  
3 a significant contact with the allegedly deceptive conduct of SSB where SSB is a Washington  
4 corporation, the letters were presumably composed in Washington, and the letters asked that  
5 payments be remitted to a post office box in Washington. (Dkt. No. 18 at 13.) The Court agrees  
6 that these contacts are sufficiently significant to apply Washington law at this stage of the  
7 proceedings, but the open question about extraterritorial application to an out-of-state plaintiff  
8 remains.

9 SSB also points to the choice-of-law rules applicable in this Court to argue Texas law  
10 should apply here. (See Dkt. No. 22 at 2.) A federal court sitting in diversity applies the choice-  
11 of-law rules of its forum state. Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist.  
12 of Tex., 14 S.Ct. 568, 582 (2013). Washington uses a two-step approach to choice-of-law  
13 questions. Kelley v. Microsoft Corp., 251 F.R.D. 544, 550 (W.D.Wash.2008). First, courts  
14 determine whether an actual conflict between Washington and other applicable state law exists.  
15 Id. A conflict exists when the various states’ laws could produce different outcomes on the same  
16 legal issue. Id. In the absence of a conflict, Washington law applies. Id. If a conflict exists, courts  
17 then determine the forum that has the “most significant relationship” to the action to determine  
18 the applicable law. Id.

19 Assuming without deciding that a conflict exists because the question has not been  
20 briefed in any detail, the Court concludes that the final choice-of-law analysis depends on factual  
21 issues and declines to decide the issue at this stage in the proceeding. See Southwell v. Widing  
22 Transp., 101 Wn.2d 200, 207–08 (1984) (“An unsubstantiated claim by a plaintiff [. . .] does not  
23

1 provide a sufficient factual basis for this court to evaluate the significance of all the contacts with  
2 concerned jurisdictions.”).

3 For the same reasons discussed in the State Farm section, the Court will certify to the  
4 Washington Supreme Court the question of the extraterritorial application of the WCPA to the  
5 factual scenarios involving SSB.

6 IV. Unjust Enrichment

7 State Farm and SSB argue Plaintiff's unjust enrichment claim fails because Plaintiff  
8 cannot allege she conferred any benefit on State Farm (or SSB). (See Dkt. No. 9 at 13; Dkt. No.  
9 12 at 3.) Here, Plaintiff does not allege she made a payment in response to the SSB letters, but  
10 simply alleges that she purchased a credit monitoring program and consulted with legal counsel.  
11 (Dkt. No. 2 at 9.) Plaintiff counters that State Farm and SSB benefitted from their deceptive  
12 letters regardless of whether Plaintiff herself contributed to that benefit. (Dkt. No. 18 at 19.)

13 Under Washington law, unjust enrichment occurs when there is “a benefit conferred upon  
14 the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and  
15 the acceptance or retention by the defendant of the benefit under such circumstances as to make  
16 it inequitable for the defendant to retain the benefit without the payment of its value.” Young v.  
17 Young, 164 Wn.2d 477, 484 (2008). Under Illinois law, which Plaintiff raises in its Response  
18 with reference to State Farm (an Illinois corporation), “[t]o state a cause of action based on the  
19 theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a  
20 benefit to the plaintiff's detriment, and that the defendant's retention of that benefit violates  
21 fundamental principles of justice, equity, and good conscience.” Firemen's Annuity & Benefit  
22 Fund of City of Chicago v. Municipal Employess', Officers', & Officials' Annuity & Benefit  
23 Fund of Chicago, 579 N.E.2d 1003, 1007 (Ill. App. Ct. 1991). However, unjust enrichment is not  
24

1 available as a separate claim under Illinois law; it is merely a remedy for other causes of action.  
2 Chicago Title Ins. Co. v. Teachers' Retirement System of State of Ill., 7 N.E.3d 19, 24 (Ill. App.  
3 2014).

4 State Farm is correct that whatever benefit it allegedly retained was not conferred "by the  
5 plaintiff" here; the same is true of SSB. Contrary to Plaintiff's argument, the benefits conferred  
6 by absent class members are not relevant prior to class certification. Plaintiff's Complaint fails to  
7 adequately allege the first element of an unjust enrichment claim under Washington law.  
8 Assuming Illinois law could apply here, the claim is equally nonviable, both because unjust  
9 enrichment is not a separate claim and because Plaintiff has not adequately alleged State Farm  
10 benefited "to the plaintiff's detriment." The unjust enrichment claim is dismissed.

11 V. Injunctive and Declaratory Relief

12 Defendant State Farm argues Plaintiff's requests for injunctive and declaratory relief  
13 must be dismissed because Plaintiff's injuries are adequately addressed by monetary relief. The  
14 WCPA permits an injured person to "bring a civil action in superior court to enjoin further  
15 violations, to recover the actual damages sustained by him or her, or both, together with the costs  
16 of the suit, including a reasonable attorney's fee." RCW 19.86.90 (emphasis added). Meanwhile,  
17 the Declaratory Judgment Act provides that "[i]n a case of actual controversy within its  
18 jurisdiction [ . . . ] any court of the United States [ . . . ] may declare the rights and other legal  
19 relations of any interested party seeking such declaration, whether or not further relief is or could  
20 be sought." 28 U.S.C. § 2201(a).

21 Defendant State Farm states the general standard for injunctive relief, citing Kucera v.  
22 State Dep't of Transp., 140 Wn. 2d 200, 209 (2000), but in that case a trial court was deciding  
23 whether to issue a preliminary injunction, ~~and whether~~ the plaintiff had stated a claim for  
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1 injunctive relief. The parties have cited no cases in this District or Circuit or under the  
2 Washington Consumer Protection Act where courts have dismissed equitable remedies on the  
3 basis that the plaintiff had an adequate remedy at law, and the Court declines to decide the issue  
4 at this stage in the proceeding.

5 **VI. Class Allegations**

6 Finally, Defendants asks that Plaintiff's class allegation be struck under Federal Rule of  
7 Civil Procedure 12(f). (Dkt. No. 9 at 16.) Certain district courts in this Circuit but outside this  
8 District have permitted class allegations to be struck at the pleadings stage. See, e.g., Sanders v.  
9 Apple Inc., 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009). Federal Rule of Civil Procedure  
10 23(c)(1)(D) also provides that in a class action, a court may "require that the pleadings be  
11 amended to eliminate allegations about representation of absent persons and that the action  
12 proceed accordingly." However, most courts decline to strike class allegations prior to a class  
13 certification motion and an opportunity to conduct discovery. See Cruz v. Sky Chefs, No. C-12-  
14 02705 DMR, 2013 WL 1892337, \*6 (N.D. Cal. May 6, 2013) (compiling cases). In the context  
15 of this case, where the propriety of a WCPA claim by a non-Washington Plaintiff against both  
16 Washington and non-Washington Defendants has not yet been decided, the motion to strike is  
17 denied as premature.

18 **Conclusion**

19 The Motions to Dismiss Plaintiff's unjust enrichment claim are GRANTED and the  
20 Motions to Strike class allegations and the Motion to Dismiss Plaintiff's request for injunctive  
21 and declaratory relief are DENIED. Defendants' request to certify questions regarding the  
22 extraterritorial application of the WCPA is GRANTED; certified questions will follow in a  
23 separate order.

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The clerk is ordered to provide copies of this order to all counsel.

Dated this 6th day of March, 2015.



Marsha J. Pechman  
Chief United States District Judge

Order Certifying Questions to Washington Supreme Court (Dkt. # 42) A-3

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SANDRA THORNELL,

Plaintiff,

v.

SEATTLE SERV. BUREAU, INC. and  
STATE FARM AUTO. INS. CO.,

Defendants.

CASE NO. C14-1601 MJP

ORDER CERTIFYING QUESTIONS  
TO WASHINGTON SUPREME  
COURT

THIS MATTER comes before the Court on Defendant State Farm Automobile Insurance Company's ("State Farm's) request in the alternative to certify the question of the Washington Consumer Protection Act's extraterritorial application to the Defendants in this case. (Dkt. No. 9 at 13.)

**Background**

The Plaintiff in this putative class action is a Texas resident. (Dkt. No. 1, Ex. A at 3.) According to the Complaint, the Plaintiff received allegedly deceptive debt collection letters from Defendant Seattle Service Bureau ("SSB"), a corporation with its principal place of

1 business in Washington, pursuant to the referral of unliquidated subrogation claims to SSB by  
2 State Farm, a corporation with its principal place of business in Illinois. (See id.) Plaintiff argues  
3 these letters constitute Consumer Protection Act violations by both SSB and State Farm. She  
4 alleges she incurred damages by signing up for a credit monitoring service and retaining counsel.  
5 (Id. at 9.)

6 The Court denied a Motion to Dismiss in other respects relating to the WCPA claim, but  
7 did not reach a decision with respect to the extraterritorial application of the Washington  
8 Consumer Protection Act against Washington and Illinois defendants.

9 Defendants argued that the Washington Consumer Protection Act does not apply  
10 extraterritorially, citing a Washington Supreme Court opinion that was later withdrawn. Schnall  
11 v. AT&T Wireless Servs. Inc., 168 Wn.2d 125, 142 (2010) (“Schnall I”), opinion withdrawn  
12 upon reconsideration by Schnall v. AT&T Wireless Servs. Inc., 171 Wn.2d 260 (2011) (“Schnall  
13 II”). The superseding opinion contains the dissenting opinion of three justices who would have  
14 specifically held that claims against Washington corporations are cognizable under the WCPA,  
15 while the majority declined to reach the issue. See Schnall II, 171 Wn.2d 260, 287 (opinion of  
16 Sanders, J.). The dissenting justices thought it was important that “[a]t least one party [in the  
17 case] is native to Washington in every transaction here.” Id.

18 In the wake of Schnall II, several judges in this District have held that the WCPA has  
19 extraterritorial application to claims by out-of-state plaintiffs against Washington corporations  
20 based on the understood state of the law prior to Schnall I. See, e.g., Keithly v. Intellius Inc., No.  
21 C09-1485RSL, 2011 WL 2790471, \*1 (W.D. Wash. May 17, 2011); Rajagopalan v. NoteWorld,  
22 LLC, No. C11-05574BHS, 2012 WL 727075, \*5 & n.6 (W.D. Wash. Mar. 6, 2012); Peterson v.  
23 Gmoch Assocs. No. 111 Ltd. Partnership, No. C11-069BHS, 2012 WL 254264, \*2 (W.D.

1 Wash. Jan. 26, 2012). This case, however, relates to an Illinois corporation and its alleged  
2 Washington agent. No case specifically holds that the WCPA applies to a foreign plaintiff's suit  
3 against a foreign corporation, even one that hired a Washington vendor to pursue the conduct at  
4 issue.

5 Furthermore, the Ninth Circuit has described the extraterritorial reach of the WCPA as an  
6 open question. See Red Lion Hotels Franchising, Inc. v. MAK, LLC, 663 F.3d 1080, 1091 (9th  
7 Cir. 2011).

### 8 Analysis

9 Under Washington law,

10 When in the opinion of any federal court before whom a proceeding is pending, it is  
11 necessary to ascertain the local law of this state in order to dispose of such proceeding  
12 and the local law has not been clearly determined, such federal court may certify to the  
13 supreme court for answer the question of local law involved and the supreme court shall  
14 render its opinion in answer thereto.

15 RCW 2.60.020.

16 The certification process serves the important judicial interests of efficiency and comity.  
17 According to the United States Supreme Court, certification saves "time, energy, and resources  
18 and helps build a cooperative judicial federalism." Lehman Bros. v. Schein, 416 U.S. 386, 391  
19 (1974). Because this matter presents a question about the extraterritorial application of an  
20 important Washington statute, it has potentially wide-ranging implications for the protection of  
21 out-of-state consumers from the allegedly deceptive acts of Washington corporations and the  
22 availability of Washington courts for the adjudication of nationwide class actions. The following  
23 questions are hereby certified to the Washington Supreme Court:  
24

1  
2 1) Does the Washington Consumer Protection Act create a cause of action for a plaintiff  
3 residing outside Washington to sue a Washington corporate defendant for allegedly  
4 deceptive acts?

5  
6 2) Does the Washington Consumer Protection Act create a cause of action for an out-of-  
7 state plaintiff to sue an out-of-state defendant for the allegedly deceptive acts of its in-  
8 state agent?

9  
10 This Court does not intend its framing of the questions to restrict the Washington  
11 Supreme Court's consideration of any issues that it determines are relevant. If the Washington  
12 Supreme Court decides to consider the certified questions, it may in its discretion reformulate the  
13 questions. See *Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc.*, 556 F.3d 920, 922 (9th Cir.  
14 2009).

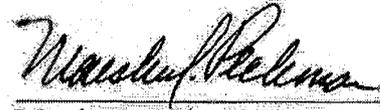
15 **Conclusion**

16 This Court CERTIFIES the above questions and STAYS the action until the Washington  
17 Supreme Court answers the certified questions.

18  
19 The Clerk of Court is directed to submit to the Washington Supreme Court certified  
20 copies of this Order and the Order on the Motion to Dismiss; a copy of the docket in the above-  
21 captioned matter; and Docket Numbers 1, 9, 12, 18, 21, 22, and 26. The record so compiled  
22 contains all matters in the pending causes deemed material for consideration of the local-law  
23 questions certified for answer. The Clerk is further ordered to provide copies of this order to all  
24 counsel.

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Dated this 6th day of March, 2015.



Marsha J. Pechman  
Chief United States District Judge

Amended Stipulation and Order Regarding Briefing of Certified Questions  
to Washington Supreme Court (Dkt. # 46)..... A-4

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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

Plaintiff,

vs.

SEATTLE SERV. BUREAU, INC. d/b/a  
NATIONAL SERV. BUREAU, INC., and  
STATE FARM MUT. AUTO INS. CO.,

Defendants.

NO. 14-CV-01601 MJP

AMENDED STIPULATION AND  
ORDER REGARDING BRIEFING OF  
CERTIFIED QUESTIONS TO  
WASHINGTON SUPREME COURT

**STIPULATION**

Plaintiff Sandra C. Thornell's ("Plaintiff") and Defendants State Farm Mutual  
Automobile Insurance Company and Seattle Service Bureau, Inc. d/b/a National Service  
Bureau, Inc. (together "Defendants") (all together the "Parties") stipulate and agree to the  
following:

1. On March 6, 2015, the Court entered an Order certifying the following questions  
to the Washington Supreme Court:

- 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?

A-4 Page 2

STIPULATION AND ORDER REGARDING  
BRIEFING OF CERTIFIED QUESTIONS TO  
WASHINGTON SUPREME COURT -  
No. 14-CV-01601 MJP

- 1 -

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

Order Certifying Questions to Washington Supreme Court (Doc. 42) at 4.

2. Pursuant to Washington RAP 16.16(e)(1), “[t]he federal court shall designate who will file the first brief” on the certified questions with the Washington Supreme Court.

3. Subject to the entry of this Court’s Order pursuant to Washington RAP 16.16(e)(1), the Parties stipulate that Defendants will file their briefs first with the Washington Supreme Court on the certified questions.

DATED this 11th day of March 2015.

BETTS, PATTERSON & MINES, P.S.

By /s Joseph D. Hampton

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Daniel L. Syhre, WSBA No. 34158

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Thomas J. Frederick (admitted *pro hac vice*)

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Attorneys for State Farm Mutual Automobile Insurance Company

A-4 Page 3

STIPULATION AND ORDER REGARDING BRIEFING OF CERTIFIED QUESTIONS TO WASHINGTON SUPREME COURT - No. 14-CV-01601 MJP

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ORDER

SO ORDERED.

The clerk is ordered to provide copies of this order to all counsel and to the Washington Supreme Court.

Dated this 12th day of March, 2015.



Marsha J. Pechman  
Chief United States District Judge

Copy of Unpublished Decision from the US District Court for the Western  
District of Washington, *Coe v. Phillips Oral Healthcare Inc.*, No. C13-  
518, 2014 US Dist. LEXIS 146469 (W.D. Wash. Decided Oct. 10, 2014  
and Filed Oct. 14, 2014) ..... A-5

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Time of Request: Wednesday, December 17, 2014 17:29:57 EST  
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Research Information

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Send to: HASSON, JEFFREY  
DAVENPORT & HASSON, LLP  
12707 NE HALSEY ST  
PORTLAND, OR 97230-2343



AMY COE, et al., Plaintiffs, v. PHILIPS ORAL HEALTHCARE INC, Defendant.

CASE NO. C13-518 MJP

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2014 U.S. Dist. LEXIS 146469

October 10, 2014, Decided

October 14, 2014, Filed

PRIOR HISTORY: *Coe v. Philips Oral Healthcare, Inc.*, 2014 U.S. Dist. LEXIS 19186 (W.D. Wash., Feb. 14, 2014)

COUNSEL: [\*1] For Amy Coe, on behalf of herself and all others similarly situated, Plaintiff: Robert I Lax, LEAD ATTORNEY, PRO HAC VICE, LAX LLP, NEW YORK, NY; Lori G Feldman, MILBERG (NY), NEW YORK, NY; Clifford A Cantor, SAMMAMISH, WA.

For Robert Buesco, on behalf of himself and all others similarly situated, Plaintiff: Robert I Lax, LEAD ATTORNEY, PRO HAC VICE, LAX LLP, NEW YORK, NY; Clifford A Cantor, SAMMAMISH, WA.

For Lance Ng, Sam Chawla, Plaintiffs: Daniel E Sobelsohn, LEAD ATTORNEY, PRO HAC VICE, THE SOBELSOHN LAW FIRM, LOS ANGELES, CA; Clifford A Cantor, SAMMAMISH, WA.

For Philips Oral Healthcare Inc, Defendant: Antonia Stamenova-Dancheva, Brian R England, LEAD ATTORNEYS, PRO HAC VICE, SULLIVAN & CROMWELL (CA), LOS ANGELES, CA; Jeffrey M Thomas, LEAD ATTORNEY, Jeffrey I Tilden, GORDON TILDEN THOMAS & CORDELL LLP, SEATTLE, WA; Michael H Steinberg, LEAD ATTORNEY, PRO HAC VICE, SULLIVAN & CROMWELL, LOS ANGELES, CA.

JUDGES: Marsha J. Pechman, Chief United States District Judge.

OPINION BY: Marsha J. Pechman

OPINION

ORDER ON MOTION TO DENY CLASS CERTIFICATION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Defendant's motion to deny certification of a nationwide class under the Washington Consumer [\*2] Protection Act (Dkt. No. 69) and motion for partial summary judgment on Plaintiffs' fifth and sixth causes of action (Dkt. No. 102). Having reviewed the motions, Plaintiffs' responses (Dkt. Nos. 83, 111), and Defendant's replies (Dkt. Nos. 87, 113), and all related papers, the Court GRANTS the motion to deny class certification and GRANTS the motion for summary judgment on Plaintiffs' sixth cause of action. Plaintiffs' fifth cause of action is DISMISSED for lack of subject matter jurisdiction.

Background

This putative class action seeks damages and equitable relief for purchasers of Defendant's allegedly defective Sonicare Diamond Clean, FlexCare, FlexCare+, Healthy White, EasyClean, and Sonicare for Kids powered toothbrushes and related replacement parts (collectively, the "Toothbrushes"). (Dkt. Nos. 20, 90.)

The suit began when Plaintiff Amy Coe filed a class action on behalf of Toothbrush purchasers citing, among other things, breach of Washington and New Jersey state law. (Dkt. No. 1.) Approximately two months later, Plaintiffs Sam Chawla and Lance Ng filed a separate action with similar claims under Washington, Connecticut, and New York state law. *Chawla v. Philips Oral Healthcare, Inc.*, No. 13-cv-875-MJP, Dkt. No. 1 [\*3].

Plaintiffs Coe, Chawla, and Ng then filed a consolidated complaint incorporating all claims. (Dkt. No. 20).

Defendant asks the Court to preemptively deny certification of a single nationwide class under Washington law, and to grant summary judgment on Plaintiff Chawla's Connecticut Unfair Trade Practices Act claim, *Conn. Gen. Stat. § 42-110a et seq.* (Dkt. No. 20 at 39) and Plaintiff Ng's claim under *New York's General Business Law §§ 349, 350* (Dkt. No. 20 at 42). Defendant argues that under Washington's choice-of-law rules, the laws of the consumers' home states, and not Washington law, must apply to their claims. (Dkt. No. 69 at 7-8.) Defendant also argues the claims of Plaintiffs Ng and Chawla are barred by the applicable statute of limitations. (Dkt. No. 102 at 3-10.) Plaintiffs contend Washington law applies, certification is appropriate, and Plaintiffs' claims are not time-barred. (Dkt. Nos. 83, 111.)

## Discussion

### I. Legal Standards

#### A. Class Certification

"A class action may be maintained if two conditions are met -- the suit must satisfy the criteria set forth in *subdivision (a)* (i.e., numerosity, commonality, typicality and adequacy of representation), and it must also fit into one of the three categories described in *subdivision (b)*." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). Certification [\*4] in this matter is sought under *Fed. R. Civ. P. 23(b)(3)*, which necessitates a finding that common questions of law or fact predominate and that maintaining the suit as a class action is superior to other methods of adjudication. *Fed. R. Civ. P. 23(b)(3)*. Class certification is proper if and only if "the trial court is satisfied, after a rigorous analysis," that Plaintiffs have met their burden under *Rule 23*. *Wal-mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

#### B. Choice of Law

A federal court sitting in diversity applies the choice-of-law rules of its forum state to determine which substantive law controls. *Atl. Marine Constr. Co. v. United States Dist. Court*, 134 S. Ct. 568, 582, 187 L. Ed. 2d 487 (2013). Washington uses a two-step approach to choice-of-law questions. *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D. Wash. 2008). First, courts determine whether an actual conflict between Washington and other applicable state law exists. *Id.* A conflict exists when the various states' laws could produce different outcomes on the same legal issue. *Id.* In the absence of a conflict, Washington law applies. *Id.* If a conflict exists, courts then determine the forum or fora that

have the "most significant relationship" to the action to determine the applicable law. *Id.*

### C. Summary Judgment

Federal *Rule 56(a)* provides that the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to [\*5] judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. In determining whether a factual dispute requiring trial exists, the court must view the record in the light most favorable to the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). All material facts alleged by the nonmoving party are assumed to be true, and all inferences must be drawn in that party's favor. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1088 (9th Cir. 2008).

A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. There is no genuine issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

### II. Preemptive Motion to Deny Class Certification

*Fed. R. Civ. P. 23* does not preclude affirmative motions to deny class certification. In *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009), the Ninth Circuit affirmed the right of defendants to bring preemptive motions, provided that plaintiffs are not procedurally prejudiced by the timing of the motion. *Id.* at 944.

No procedural prejudice exists here. Resolution of the class certification issue turns primarily on the choice-of-law analysis, which determines whether Washington law or the laws of putative class members' home states should apply. If Washington law applies, common questions will predominate for a nationwide class, [\*6] and a class action may be efficient and desirable. On the other hand, if the consumer protection laws of the consumers' home states apply, variations in the laws will overwhelm common questions, precluding certification. The relevant inquiry then is whether sufficient discovery has taken place to allow for the choice-of-law analysis.

Plaintiffs argue consideration of the motion is premature because they received Defendant's first production of documents on the same day that their opposition to Page 4 the motion was due. (Dkt. No. 83 at 4.) Plaintiffs assert that it would be contrary to *Vinole* to deny certification without permitting them to develop facts to inform the Court's choice-of-law analysis. *Id.* However, this Court

now has pending before it Plaintiff's affirmative motion for class certification, filed after Plaintiffs had sufficient time to review documents and inform the Court of relevant facts.

Because Plaintiffs have had sufficient time to inform the Court of facts relevant to its choice-of-law analysis, and have presented those facts in their Motion for Class Certification (Dkt. No. 90), the Court may now properly consider Defendant's motion to deny certification.

### III. Choice of [\*7] Law

Defendant asserts, and Plaintiffs do not contest, that an actual conflict exists between the Washington Consumer Protection Act ("WCPA") and the consumer protection laws of other states. (Dkt. No. 69 at 9.) Because a conflict exists between WCPA and the consumer protection laws of the various states where the Toothbrushes were purchased and used, the Court must apply Washington's most significant relationship test in order to determine which law to apply. *Kelley*, 251 F.R.D. at 551. In adopting the approach of the Second Restatement of Law on Conflict of Laws (1971), Washington rejected the rule of *lex loci delicti* (the law of the place where the wrong took place). *Id.* Instead, Washington's test requires courts to determine which state has the "most significant relationship" to the cause of action. *Id.* If the relevant contacts to the cause of action are balanced, the court considers the interests and public policies of potentially concerned states and the manner and extent of such policies as they relate to the transaction. *Id.*

Washington has a significant relationship to alleged deceptive trade practices by a Washington corporation. Washington has a strong interest in promoting a fair and honest business [\*8] environment in the state, and in preventing its corporations from engaging in unfair or deceptive trade practices in Washington or elsewhere. Washington recognizes WCPA claims asserted by non-resident consumers against Washington corporations. *Keithly v. Intelius Inc.*, 2:09-cv-1485-RSL, 2011 U.S. Dist. LEXIS 79733, 2011 WL 2790471, \*1 (W.D. Wash. May 17, 2011).

Conversely, the putative class members' home states have significant relationships to allegedly deceptive trade practices resulting in injuries to their citizens within their borders. The Toothbrushes were sold and purchased, and representations of their quality made and relied on, entirely outside of Washington. No Plaintiff resides in Washington. While Plaintiffs contend Philips Oral Healthcare spent considerable time and resources analyzing the problem and attempting to fix it at their Washington facilities, thus increasing Washington's relationship to the action, the crux of Plaintiffs' action involves the marketing and sale of the Toothbrushes,

which took place in other states. Furthermore, the Ninth Circuit recently recognized the strong interest of each state in determining the optimum level of consumer protection balanced against a more favorable business environment, and to calibrate its consumer [\*9] protection laws to reflect their chosen balance. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012).

In *Kelley*, this Court explained that in deceptive trade practice cases, the place of injury is often of lower importance than the place in which the fraudulent conduct arose. This is especially true in cases where the alleged injuries are scattered throughout the country but stemmed from a defendant's deceptive practice in one state. *Kelley*, 251 F.R.D. at 552. Since *Kelley*, however, Washington has formally adopted § 148 of the Restatement in the fraud and misrepresentation context. *Future-Select Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 934, 331 P.3d 29, 36 (2014). Section 148 of the Restatement and its comments make clear that the alleged misrepresentation to consumers and the consumers' pecuniary injuries, both of which occurred in consumers' home states and not in Washington, should be considered the most significant contacts in this particular case. *Restatement (Second) of Law on Conflict of Laws § 148 cmts. i, j* (1971).

The Court agrees with Defendant that consumers' home states have the most significant relationship to their causes of action. Therefore, the consumer protection laws of those states, and not WCPA, apply. Material differences between the various consumer protection laws prevent Plaintiffs from demonstrating *Rule 23(b)(3)* predominance and manageability for a nationwide class. Accordingly, the Court GRANTS Defendant's motion to deny certification of [\*10] a nationwide class under WCPA.

### IV. Connecticut Unfair Trade Practices Act

The Parties agree this Court lacks jurisdiction over Plaintiff Chawla's Connecticut Unfair Trade Practices Act ("CUTPA") claim if the WCPA claim is dismissed. (Dkt. No. 113 at 2.) There is no jurisdiction over Chawla's claim under the Class Action Fairness Act of 2005 ("CAFA") because Plaintiff Chawla does not seek class certification for his CUTPA claim. (Dkt. No. 111 at 8.) There is no diversity jurisdiction over Plaintiff Chawla's claim because it fails to meet the amount in controversy requirement of 28 U.S.C. § 1332. *Id.*

As determined in Section III, above, Washington's choice-of-law rules mandate application of the laws of the consumers' home states, not WCPA. Plaintiff Chawla's CUTPA claim is therefore DISMISSED for lack of subject matter jurisdiction.

V. *New York General Business Law* §§ 349, 350

Defendant contends that Plaintiff Ng's claims under New York General Business Law ("NYGBL") §§ 349, 350 are time-barred by New York's three-year statute of limitations. *N.Y. C.P.L.R. § 214* (MCKINNEY 2014). Plaintiff Ng admits to filing his original complaint more than three years after purchasing his toothbrush, the date which would have triggered the statute of limitations. (Dkt. No. 103-1 at 41-42.) [\*11] Ng contends, however, that Plaintiff Coe's filing of her class action - which contained no NYGBL claims - tolled his statute of limitations. (Dkt. No. 111 at 5; Dkt. No. 1.) In other words, Plaintiff Ng claims cross-jurisdictional tolling, arguing his New York state law claim was tolled when Plaintiff Coe filed her claims under the law of another state.

To support this use of cross-jurisdictional tolling, Plaintiff Ng cites the Supreme Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). There, the State of Utah was denied class action status for a price rigging claim against American Pipe under the Sherman Act. Several towns, municipalities and water districts - all would-be members of the unsuccessful class - then filed motions to join in Utah's individual action. *Am. Pipe & Constr. Co.*, 414 U.S. at 544. The district court denied all of the motions because they were filed after expiration of the statute of limitations. *Id.* Members of the unsuccessful class argued that their statute of limitations should have been tolled when the State of Utah filed the (unsuccessful) motion for class action status. *Id.* The Supreme Court agreed - filing a class action on a federal claim tolls the statute of limitations for the claims of all potential class members regardless [\*12] of ultimate class certification. *Am. Pipe & Constr. Co.*, 414 U.S. at 554 ("[T]he rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.").

Here, Plaintiffs contend the rule of *American Pipe* - which allows tolling within the federal court system in federal question class actions - permits cross-jurisdictional tolling as a matter of New York state procedure. (Dkt. No. 111.) This is incorrect. Cross-jurisdictional tolling may be permitted where a class action is filed in New York and makes claims under New York state law; it is not, however, permitted where the class action was filed outside of New York and make no New York claims. *In re Bear Stearns Cos., Secs.*,

*Derivative, & ERISA Litig.*, 995 F. Supp. 2d 291, 2014 U.S. Dist. LEXIS 14751, 48-49 (S.D.N.Y. Feb. 3, 2014) ("In certain circumstances, a New York statute of limitations may be tolled by the pendency of a class action, but New York currently does not recognize tolling where that class action is filed outside New York state court (so-called 'cross-jurisdictional tolling')").

When a state legal system is unclear on cross-jurisdictional tolling Federal courts do not generally introduce a rule. [\*13] See, e.g., *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (declining to import cross-jurisdictional class action tolling into California law). See also *In re Fosamax Prods. Liab. Litig.*, 694 F. Supp. 2d 253, 258 (S.D.N.Y. 2010) (gathering cases). Because New York state law does not expressly permit cross-jurisdictional tolling, this Court will not allow Plaintiff Ng to rely on Plaintiff Coe's class action filing to toll his NYGBL statute of limitations.

The Court rejects Plaintiff Ng's argument for cross-jurisdictional tolling of the statute of limitations and holds that his claims are time-barred. Defendant's motion for summary judgment on the NYGBL cause of action is GRANTED.

#### Conclusion

Under Washington's choice-of-law provisions, the laws of the consumers' home states, and not Washington law, apply to their claims. Material differences between the consumer protection laws of the relevant states overwhelm common questions, and Plaintiffs are unable to demonstrate the predominance or manageability required for class certification. Defendant's motion to deny certification of a nationwide class under WCPA is GRANTED.

Having determined that WCPA does not apply, the Court DISMISSES Plaintiff Chawla's CUTPA claim for lack of subject matter jurisdiction. Plaintiff Ng's claims are time-barred by the applicable [\*14] statute of limitations, and Defendant's motion for summary judgment as to his claims is GRANTED.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 10th day of October, 2014.

/s/ Marsha J. Pechman

Marsha J. Pechman

Chief United States District Judge



**RCW 19.86.010**  
**Definitions.**

As used in this chapter:

(1) "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.

(2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.

(3) "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

[1961 c 216 § 1.]

Copy of Tex. Bus. & Com. Code Ann. § 17.45..... A-7

Sec. 17.45. DEFINITIONS. As used in this subchapter:

- (1) "Goods" means tangible chattels or real property purchased or leased for use.
- (2) "Services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.
- (3) "Person" means an individual, partnership, corporation, association, or other group, however organized.
- (4) "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.
- (5) "Unconscionable action or course of action" means an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.
- (6) "Trade" and "commerce" mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.
- (7) "Documentary material" includes the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated.
- (8) "Consumer protection division" means the consumer protection division of the attorney general's office.
- (9) "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations

indicate that a person acted with actual awareness.

(10) "Business consumer" means an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state.

(11) "Economic damages" means compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(12) "Residence" means a building:

(A) that is a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system; and

(B) that is occupied or to be occupied as the consumer's residence.

(13) "Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally.

Added by Acts 1973, 63rd Leg., p. 322, ch. 143, Sec. 1, eff. May 21, 1973. Amended by Acts 1975, 64th Leg., p. 149, ch. 62, Sec. 1, eff. Sept. 1, 1975; Acts 1977, 65th Leg., p. 600, ch. 216, Sec. 1, eff. May 23, 1977; Acts 1979, 66th Leg., p. 1327, ch. 603, Sec. 2, eff. Aug. 27, 1979; Acts 1983, 68th Leg., p. 4943, ch. 883, Sec. 2, 3, eff. Aug. 29, 1983; Acts 1995, 74th Leg., ch. 414, Sec. 2, eff. Sept. 1, 1995.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 411 (S.B. 1047), Sec. 1, eff.  
September 1, 2007.

Copy of Tex. Bus. & Com. Code Ann. § 17.46..... A-8

Sec. 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL. (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

- (1) passing off goods or services as those of another;
- (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) using deceptive representations or designations of geographic origin in connection with goods or services;
- (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
- (6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;
- (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) disparaging the goods, services, or business of another by false or misleading representation of facts;
- (9) advertising goods or services with intent not to sell them as advertised;
- (10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;
- (11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;

(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

(17) advertising of any sale by fraudulently representing that a person is going out of business;

(18) advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 4151.152, Insurance Code, in accordance with rules adopted by the commissioner of insurance, which offers a discount on the purchase of health care goods or services from a third party provider, and which is not evidence of insurance coverage, unless:

(A) the discount is authorized under an agreement between the seller of the card and the provider of those goods and services or the discount or card is offered to members of the seller;

(B) the seller does not represent that the card provides insurance coverage of any kind; and

(C) the discount is not false, misleading, or deceptive;

(19) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or

representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(20) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.212 through 2A.216 to involve obligations in excess of those which are appropriate to the goods;

(21) promoting a pyramid promotional scheme, as defined by Section 17.461;

(22) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(23) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract;

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

(25) using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business

entity that is not incorporated under the laws of this state or another jurisdiction;

(26) selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act or is not registered with the Teacher Retirement System of Texas as required by Section 8A of that Act; or

(27) taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by:

(A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

(c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. Sec. 45(a)(1)].

(2) In construing this subchapter the court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions.

(d) For the purposes of the relief authorized in Subdivision (1) of Subsection (a) of Section 17.50 of this subchapter, the term "false, misleading, or deceptive acts or practices" is limited to the acts enumerated in specific subdivisions of Subsection (b) of this section.

Added by Acts 1973, 63rd Leg., p. 322, ch. 143, Sec. 1, eff. May 21, 1973. Amended by Acts 1977, 65th Leg., p. 601, ch. 216, Sec. 2, 3, eff. May 23, 1977; Acts 1977, 65th Leg., p. 892, ch. 336, Sec. 1, eff. Aug. 29, 1977; Acts 1979, 66th Leg., p. 1327, ch. 603, Sec. 3, eff. Aug. 27, 1979; Acts 1987, 70th Leg., ch. 280, Sec. 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, Sec. 6,

eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 414, Sec. 3, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 463, Sec. 1, eff. Sept. 1, 1995; Acts 2001, 77th Leg., ch. 962, Sec. 1, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1229, Sec. 27, eff. June 1, 2002; Acts 2003, 78th Leg., ch. 1276, Sec. 4.001(a), eff. Sept. 1, 2003.  
Amended by:

Acts 2005, 79th Leg., Ch. 728 (H.B. 2018), Sec. 11.101, eff. September 1, 2005.

Acts 2007, 80th Leg., R.S., Ch. 1230 (H.B. 2427), Sec. 26, eff. September 1, 2007.