No. 80572-5

SANDERS, J. (dissenting)—Because the trial court abused its discretion when it denied nationwide class certification absent a sufficient analysis of the feasibility of such a class, I dissent.

This court reviews a trial court's class certification ruling for abuse of discretion. *Smith v. Behr Process Corp*., 113 Wn. App. 306, 318, 54 P.3d 665 (2002). A discretionary decision will not be disturbed unless it is based on untenable grounds or is manifestly unreasonable or arbitrary. *Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8 (2002). To certify a class, a trial court must find numerosity, commonality, typicality, and adequacy of representation. CR 23(a); *Smith*, 113 Wn. App. at 319. The court must also find (1) that there is a risk of inconsistent results on individual claims resulting in inconsistent standards of conduct or the possibility of a preclusive effect on other class members, *or* (2) that injunctive or declaratory relief is appropriate for the class as a whole, *or* (3) that common questions of law or fact predominate. CR 23(b); *Smith*, 113 Wn. App. at 321-22.

The trial court denied class certification because it reasoned the contract claims

would be unmanageable (lacking commonality, typicality, and predominance of common questions) because 50 different state laws would need to be applied in order to interpret contract provisions and apply affirmative defenses, Clerk's Papers (CP) at 617-19 (Mem. Op. at 2-4); and Washington's Consumer Protection Act (CPA) applied nationwide but each individual would need to prove causation—that the alleged misrepresentation affected his or her decision to choose AT&T[1] as a wireless provider—and therefore individual issues predominated over class issues, CP at 619-21 (Mem. Op. at 4-6).

The Court of Appeals reversed, reasoning the contract claims all shared a common legal theory, and any differences could be resolved through subclasses and master's hearings, and the CPA claims could be litigated nationwide and causation could be proven by means other than individual reliance. *Schnall v. AT&T Wireless Servs., Inc.*, 139 Wn. App. 280, 289, 290-92, 161 P.3d 395 (2007), *review granted*, 163 Wn.2d 122, 1085 P.3d 1194 (2008).

The majority reverses the decision of the Court of Appeals, largely following the trial court's decision, reasoning the contract claims require application of individual state laws, and thus do not satisfy the predominance requirement for class certification, majority at 6-16; and the CPA claims cannot be certified for a class action because the general class issues do not predominate over individual ones where

[1] AT&T Wireless Services, Inc.

the trial court must make individual determinations of reliance, *id.* at 18-22. Unlike the trial court, the majority rejects the application of the Washington CPA nationwide, *id.* at 16-18, and leaves open whether a Washington-only class for the CPA claims might permit generalized proof of causation to provide for class certification, *id.* at 22-23.

I dissent. As recognized by the Court of Appeals, subclasses and master's hearings could be used to address differing state contract laws. Not every state contract law is materially different for purposes here, and the trial court abused its discretion by failing to consider whether the laws of the states could be grouped together in a manageable number of subclasses. I agree with the trial court and Court of Appeals that the Washington CPA can be applied nationwide; the majority all but ignores that AT&T Wireless Services, Inc. (AT&T), a party to every transaction at issue, is headquartered in Redmond, Washington, and the decisions, representations, and communications were made, formulated, and/or approved there. I disagree with the majority's view of causation under the CPA. The CPA and CR 23 (governing class certification), are intended to be liberally construed and should provide the class with a forum to litigate these claims. The majority creates impossible evidentiary burdens for the class that preclude it and future classes from challenging conduct as alleged here—a corporation nickel and diming consumers wholesale, escaping litigation by only taking small amounts of money from each customer.

For the sake of clarity I follow the headings used in the majority.[2]

Enforceability of choice of law provisions

The majority concludes that the choice of law clauses in the individual customers' contracts should be enforced. The majority's analysis appears to address only the contract claims and not the CPA ones. *See* majority at 3-6. I concur with the application of the choice of law clauses to the contract claims. As explained more fully below, however, this application of different state contract laws does not necessarily defeat class certification because subclasses and other mechanisms could likely be used to address any variances.

The choice of law clauses do not apply to the CPA claims.[3] The CPA claims

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[2] Although one of the grounds upon which we granted review was federal preemption, the majority does not address that issue—but since the majority concludes that a Washington-only CPA class may survive, it tacitly rejects the preemption argument. There is no federal preemption here. The CPA does not preclude AT&T from billing its customers for contributions to the Universal Service Fund (which would be preempted), but rather precludes AT&T from doing so through misrepresentation or a failure to disclose the true nature of the charge (a matter of generally applicable state consumer protection). *See In re Truth-in-Billing & Billing Format*, 20 F.C.C.R. 6448, 6450 (2005), ("[N]o action we propose will limit states' ability to enforce their own generally applicable consumer protection laws."), *vacated on other grounds sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. Fed. Commc'ns Comm'n*, 457 F.3d 1238, *modified*, 468 F.3d 1272 (11th Cir. 2006).

[3] I can only assume that the majority, silent on this issue, *see* majority at 3-6, does not find the choice of law clauses applicable to the CPA claims. If it did, its further analysis of the "extraterritorial" application of and causation issues under the CPA would be rendered dictum since the multistate-law issue the majority finds so damning to class certification with regard to the contract claims would also apply to the CPA claims.

are based upon statute, not contract, and many of the claims arose *before* the class members even entered into their contracts with AT&T pertaining to choice of law. The first element of a CPA action—an unfair or deceptive act—can arise prior to a contract; a litigant need only show an act "had the capacity to deceive a substantial portion of the public." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) (emphasis omitted).[4] That is the case here where the CPA claims relate to the use of allegedly deceptive language, advertising, and promotional materials.

Class certification of contract claims

The majority endorses the trial court's view that individual issues predominate over the common legal and factual issues due to the "interpretation of the contract terms" and "the availability of differing affirmative defenses" under the laws of 50 different states. Majority at 7-8. The trial court listed potential differences in contract interpretation, the voluntary payment doctrine, and the interpretation of arbitration

[4] A litigant can make such a showing even prior to suffering an injury, because the CPA not only vindicates individual rights but protects the public interest. *See Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007); *Hangman Ridge*, 105 Wn.2d at 785 ("The purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs.") (citing Jeffrey M. Koontz, Recent Development, *Washington Lawyers Under the Purview of the State Consumer Protection Act—the "Entrepreneurial Aspects" Solution*, 60 Wash. L. Rev. 925, 944 (1985)). This protection of the public interest extends to misrepresentations made to one person, where those misrepresentations have the capacity to deceive a substantial portion of the public—for example, if they are made in a standard form contract. *See, e.g.*, *Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 327-28, 814 P.2d 670 (1991).

agreements as examples of where the claims would need to be analyzed under 50 different state laws. However, not *every* law of the 50 states has a different approach to contract interpretation and affirmative defenses. Where state laws materially differ, subclasses could be established to address those differences. *See Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 255, 63 P.3d 198 (2003) ("courts have a variety of procedural options to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members"); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 468 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998).[5]

The trial court abused its discretion by failing to determine whether the laws of the states could be separated into a few, manageable subclasses. The trial court only referenced speculative differences in the law of every state without determining whether material differences actually existed in each. I would therefore remand this issue to provide the parties an opportunity to further brief, and the trial court to fully consider, whether subclasses could be created to address materially different state laws within a nationwide class.

[5] The majority cites over 50 cases in which federal courts declined to certify a class based on Fed. R. Civ. P. 23 where multiple state laws applied. Majority at 9-11. But this list of cases, devoid of detail or discussion, merely supports the obvious proposition that under some facts, application of numerous state laws can defeat class certification. There is no need to counter in kind to cite to the equally obvious corollary—that under some facts the potential application of multiple state laws can be managed, and class certification *is* warranted.

Superiority analysis

CR 23(b)(3) requires a court to find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The majority concludes that a nationwide class action is not superior to other available methods—namely, that individual state class actions are better suited to resolve the controversy. Majority at 14. However, the majority's reasoning does not support this conclusion.

First, the majority asserts that, although class actions permit claims involving small amounts of money to be brought to court, this does not weigh in favor of a nationwide class because there are enough AT&T customers to bring 50 individual statewide class action suits.[6] *See id*. This ignores the significant advantages of a nationwide suit. The claims in every state involve the nature of the universal connectivity charge (UCC), an apparent nationwide approach to charging fees in relation to the UCC, omissions or the same or similar misrepresentations to further that approach, and the same defendant corporation. A nationwide suit avoids a 50-fold redundancy of litigation, which will substantially increase the costs of the litigation to both parties, particularly attorney fees; result in redundant discovery, including

[6] The majority provides no basis for its insinuation that a class is waiting in every state to file a statewide class action suit now that the majority is dissolving the nationwide class action here. A nationwide class provides no risk that the consumers of any states will be left behind.

repetitive document production and depositions; result in redundant relitigation of the same issues; and saddle the judiciary of all 50 states with significant costs to redundantly try statewide class action suits based on the actions of a single Washington corporation.

Next, the majority claims it would be inefficient to have a trial judge manage a claim litigated under 50 different state laws. *Id*. at 14-15.[7] As more fully discussed *infra*, the law of all 50 states will not conflict and, as recognized by the Court of Appeals, *see Schnall*, 139 Wn. App. at 299, subclasses and master's hearings can be used to address subsets of class members. The trial court abused its discretion, asserting a nationwide class would be unmanageable without analyzing the extent to which the state laws are materially similar and can be grouped into multistate subclasses.

Finally, the majority asserts Washington has no interest in having claims against a Washington corporation litigated in this state if they involve customers from other states. *See* majority at 15. But as later discussed in more detail, Washington has a substantial interest in assuring Washington corporations conduct business in a fair and honest manner. Washington also has a substantial interest to provide a forum to

[7] The majority opines that granting class certification here would force Washington to "become a locus for nationwide class action litigation." Majority at 1. But perhaps it should, where the litigation involves the conduct of a Washington corporation stemming from corporate decision making occurring in this state.

resolve the legal issues of Washington businesses.

Pending a determination that the contract laws of the 50 states do not materially differ from one another so as to preclude a manageable number of subclasses to address those differences, a nationwide class is the most efficient, economical, and reliable way to assure that every class member is provided a forum in which to bring his or her claim.

"Extraterritorial" application of Washington's Consumer Protection Act

The trial court and the Court of Appeals agreed that the Washington CPA was applicable to the nationwide class because AT&T is headquartered in Redmond, Washington. Washington regulates the behavior of Washington businesses; the purpose of the CPA is not only to protect the public *from* unfair and deceptive acts, but also to "foster fair and honest competition" among businesses. *See* RCW 19.86.920. If a Washington business is acting in an unfair or dishonest way nationwide, Washington has a strong interest to address the full, nationwide effects of that behavior; Washington should not become a harbor for businesses engaging in unscrupulous practices out of state. *See Hangman Ridge*, 105 Wn.2d at 785 ("'The CPA, on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.'") (quoting *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984))

The majority instead ignores this interest, mischaracterizing transactions

between a Washington corporation and an out-of-state citizen as wholly extraterritorial, and then misreading the statutory language of the CPA to exclude "claims by nonresidents for acts occurring outside of Washington." *See* majority at 16-18. First, these transactions are not wholly extraterritorial. At least one party—AT&T—is native to Washington in every transaction here. The transactions involve AT&T's formulation of its representations,[8] the approval and distribution of those representations, and the offer and acceptance of the agreements.[9] Significant portions of each transaction occurred in Washington. [1]

Second, the statutory language of the CPA applies to transactions between a Washington party and an out-of-state party in two ways here. RCW 19.86.020 requires that the "[u]nfair methods of competition and unfair or deceptive acts or practices" must be "in the conduct of any trade or *commerce*." (Emphasis added.) "Commerce" under the CPA is described as "any commerce directly or indirectly affecting the *people* of the state of Washington." RCW 19.86.010(2) (emphasis

[8] These representations include those made in advertising and discussions prior to the contract, those made in the contract, and those made post-contract in response to customer inquiries.

[9] To the extent AT&T branch offices in other states offered and accepted the contracts with customers, the AT&T headquarters would have provided them the authority to do so under the representations and omissions challenged here.

[1] The CPA claims also include allegations of omissions. To the extent AT&T decided to omit information or failed to provide information it should have to consumers, those decisions or oversights would be attributable to decisions made at AT&T's headquarters in Washington.

added). "Person" is defined to include "natural persons, *corporations*, trusts, unincorporated associations and partnerships." RCW 19.86.010(1) (emphasis added). Thus, the transaction here is "commerce" that "directly . . . affect[s]" AT&T, a corporation headquartered in Washington and thus a "person" under the CPA. The CPA therefore applies.

Furthermore, RCW 19.86.010(2) also encompasses commerce that *indirectly* affects the people of the state of Washington. Ignoring, as the majority does, that the statutory definition of "person" includes corporations, *see* RCW 19.86.010(1), AT&T's exchange of goods and services with individuals outside the state of Washington is still commerce that indirectly affects Washingtonians. First, the Washington employees of AT&T are "natural persons," *see* RCW 19.86.010(1), and AT&T's commerce with the claimants indirectly affects the nature and availability of their employment. Second, to the extent "the people of the state of Washington," *see* RCW 19.86.010(2), is read as a broader appeal to the public interest, the commerce and trade AT&T brings into Washington, and the alleged unfair and dishonest method by which it does so, affects the state economy and thus affects the Washington public at large.

The transactions here, between a Washington resident and out-of-state customers, originating at least in part in this state, fall well within the jurisdictional boundaries of the CPA.[11] The CPA encompasses the nationwide class action proposed

here.

Remaining Washington plaintiffs' CPA claims (causation)

To prevail on a private CPA claim, a plaintiff must show the defendant (1) engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that affects the public interest, (4) and injured the plaintiff's business or property, and (5) there is a causal link between the unfair or deceptive act and the injury suffered. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (citing *Hangman Ridge*, 105 Wn.2d at 784-85). The fifth requirement, causation, is at issue here.

Causation "is a factual question to be decided by the trier of fact." *Id.* at 83. A plaintiff is not limited in how he or she can prove causation, as long as there is "some demonstration of a causal link between the misrepresentation and the plaintiff's injury." *Id.* In *Indoor Billboard* this court rejected the notion that payment of an invoice that contained a misrepresentation or omission was automatically sufficient evidence to establish causation; however, we recognized that such a payment, when considered with all relevant evidence, could be sufficient. *Id.* at 83-84.

That is the case here, where payment in combination with the whole of the evidence *is* sufficient to establish causation. The class members agreed to pay AT&T

[11] Although the statutory language here is clear, ambiguity would be liberally resolved with a construction that effectuates the CPA's purposes, including the fostering of fair and honest competition. *See* RCW 19.86.920.

a certain amount for services; AT&T charged more than that amount; AT&T misrepresented that the excess charges were imposed by the federal government on the consumer; those charges were not imposed by the federal government on the consumer; and the class members paid the excess charges.[12] A trier of fact could make the common sense inference that people do not willingly pay more money for commercial services than they must and, in particular, more than they originally agreed. People do, however, expect to be taxed; AT&T's misrepresentation of the fee as a mandatory federal tax on consumers causes class members to pay the "tax." Payment of the UCC in light of the nature of the misrepresentation and reasonable inferences drawn from common sense provides a sufficient basis for a trier of fact to find causation, as envisioned in *Indoor Billboard*. *See id*. at 84. Therefore the causation requirement does not preclude class certification here.

Despite our decision in *Indoor Billboard* the majority elevates the bar to prove causation far beyond any evidentiary standard that could be met by a class action seeking redress for a misrepresentation under the CPA. The majority requires *each* class member to show that he or she *individually* relied upon the misrepresentation—including that he or she did not have knowledge of the true nature of the UCC. Majority at 21-22. The majority reasons this is necessary because

[12] The trial court must take the plaintiffs' substantive allegations as true for the purpose of class certification. *See Cingular Wireless*, 160 Wn.2d at 856-57 (quoting *Smith*, 113 Wn. App. at 318-19).

knowledge of the truth of the charge would defeat causation since a misrepresentation could not cause an individual to pay a bogus fee where the individual already knew the fee to be bogus. *See id.*[13]

The majority's holding is nothing short of a disaster for plaintiffs, the CPA and CR 23, and the jurisprudence of this court. The majority's requirement of a showing of individualized reliance for misrepresentation claims under the CPA creates an individual issue that will predominate over the class issues here, *see* majority at 22, *and in every CPA misrepresentation class action in the future*. Under the majority's reasoning there is no longer any legal recourse for individuals who fall victim to the misrepresentations of corporations when those misrepresentations do not cause sufficient loss to make an individual lawsuit economically feasible. Yet assuring such access to the courts, even when the economic stakes are too small individually, is precisely the purpose of CR 23, *see Scott v. Cingular Wireless*, 160 Wn.2d 843, 856-57, 161 P.3d 1000 (2007)—which the majority so effectively eviscerates.

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[13] The majority requires satisfaction of a difficult evidentiary burden since class members are forced to prove a negative—that they did not know the true nature of the UCC. The majority does not explain why it is not sufficient that the plaintiffs allege ignorance—a factual allegation that must be taken as true for the purposes of class certification. *See Cingular Wireless*, 160 Wn.2d at 856-57 (quoting *Smith*, 113 Wn. App. at 318-19). After class certification AT&T could still put forth evidence that some plaintiffs had additional information concerning the UCC through materials it circulated. The trial court could utilize subclasses or master's hearings to permit a trier of fact to determine whether those materials conveyed the true nature of the charge to its recipients. This method does not wholesale extinguish individuals' ability to bring a class action under the CPA for misrepresentation, as does the majority.

The majority's holding also flies in the face of this court's history of liberally construing CR 23 and the CPA to effectuate their purposes. *See Cingular Wireless*, 160 Wn.2d at 856-57 (""[T]he interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action."" (quoting *Behr*, 113 Wn. App. at 318-19 (second alteration in original) (quoting *Esplin v. Hirschi,* 402 F.2d 94, 101 (10th Cir. 1968))); *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 161 P.3d 1016 (2007); *see also* RCW 19.86.920. The CPA, which permits private citizens to act as private attorneys general to protect the public interest against unfair and deceptive practices, *see Cingular Wireless*, 160 Wn.2d at 851-53, no longer provides any ability to protect the public now if a corporation misrepresents its charges or services to the public. The majority's requirement of proof that *each* class member did not know the truth of the lie will destroy any class action.

The majority cites *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 557-58 (W.D. Wash. 2008) for the proposition that deception-based claims require individualized proof of reliance (which then defeats class certification). *See* majority at 21. Causation is a fact-intensive inquiry, and the *Kelley* decision was decided *under its facts*. Under some facts, individualized proof may be required; under others, a trier of fact may find a sufficient causal link based upon a consideration of the circumstances as a whole. *See Indoor Billboard*, 162 Wn.2d at 84.

In *Kelley*, stickers on computer boxes stated the computers were using a Vista operating system, but did not inform customers that the Vista version they were using could not be upgraded to a premium version. 251 F.R.D. at 557. The court held a trier of fact considering causation would need to determine whether a consumer saw the sticker, knew the difference between the versions of Vista, and wanted the premium version. *Id.* at 558. The surrounding facts did not provide a basis to assume that all of the consumers wanted the ability to upgrade to the premium version.

Here, the surrounding facts provide a basis for a causal connection. Class members, after entering into a contract with AT&T at a certain price, would not have rationally intended to pay more without a valid justification for the additional charge. A trier of fact could draw the inference that individuals were motivated by the most obvious source—a belief that the charge was a mandatory federal tax on consumers. *Cf. Hangman Ridge*, 105 Wn.2d at 795 (where this court made a similar distinction between fact sets, comparing those in *Hangman Ridge*—where causation was not established due to causal gaps—to those in our decision in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 590, 675 P.2d 193 (1983)—where the causal link was sufficiently established with reasonable inferences concerning the plaintiff's behavior).

The majority's view of causation is excessive and contrary to this court's previous holdings. Rather than render the CPA and CR 23 ineffectual in addressing the wholesale bilking of consumers, I would certify the class.

California class

Since the filing of the nationwide class action in Washington, a separate, state class action has been filed in California. The nationwide class has moved to amend so as to exclude the California class from the Washington litigation. The trial court should determine on remand whether the plaintiffs can exclude the California consumers, resolve reportedly inconsistent arguments concerning which state consumer protection law should apply, and avoid conflicts of interest among counsel.

Conclusion

The majority errs by holding the trial court did not abuse its discretion to decline certification of a nationwide class without first considering whether subclasses or master's hearings could be used to address potential material conflicts among state contract laws. The majority also errs when it neuters the Washington Consumer Protection Act, rendering its protection lean and lank, by providing a safe haven for businesses in Washington to engage in unfair or dishonest practices outside the state of Washington. I would remand the nationwide class certification issue to the trial court for reconsideration in light of the discussion here.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Susan Owens

Justice Debra L. Stephens

Justice Tom Chambers