IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, a New Jersey resident; JEANANNE AGUIRRE; NATHAN RIENSCHE, a Washington resident; KELLY LEMONS, a California resident, individually and on behalf of all the members of the class of persons similarly situated,	)	No. 80572-5
Respondents,	)	
JOHN GIRARD, a California resident; SEAN O'DAY, a Florida resident,	)	EN BANC
Plaintiffs,	)	
v.	)	
AT&T WIRELESS SERVICES, INC., a domestic corporation,	)	
Petitioner.	)	Filed January 21, 2010

MADSEN, C.J.—This case asks our court to decide whether Washington will become a locus of nationwide class action litigation. In the context of this case, we

believe the trial court did not abuse its discretion by declining to certify such a class. To the extent a class action is feasible here, the only appropriately certified class for plaintiffs' contract claims is a *state*wide class. We reverse, in part, and remand for proceedings consistent with this opinion.

FACTS

Customers of AT&T Wireless Services, Inc. (AT&T) filed a nationwide class action alleging the company misled consumers when it billed them for a charge that was not included in advertised monthly rates and was not described clearly in billing statements. The Federal Communications Commission (FCC) requires telecommunications companies like AT&T to contribute to the Universal Service Fund (USF), a fund created by the Telecommunications Act of 1996 that subsidizes phone and Internet service to low-income and rural areas. The FCC expressly permits companies to recover USF contributions from customers. AT&T recovered its contributions from customers by charging a Universal Connectivity Charge (UCC), listed in customer agreements as either "Other Charges & Credits" or "Taxes, Surcharges & Regulatory Fees." Pet. for Review at 3. Named plaintiff Martin Schnall claims this categorization of the UCC violates the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, and further, that AT&T violated the terms of its contract by failing to disclose the charge at the time he signed his agreement for wireless service. Schnall further claims AT&T violated the terms of its user contracts by increasing the UCC charge without notice. Schnall sought certification of a nationwide class of all AT&T customers "who have been improperly billed and paid a universal

connectivity charge that they did not owe." Clerk's Papers (CP) at 186 (First Amended Class Action Complaint).

The trial court determined that "individual questions predominated over common questions" and denied class certification on all of Schnall's claims. CP at 417-18 (Mem. Op. Denying Mot. for Class Certification at 1-2) (Mem. Op.). Schnall appealed that decision to Division One of the Court of Appeals which reversed the trial court and certified the class.

Standard of Review

The standard of review is paramount in this case: it is not our place to substitute our judgment for that of the trial court. When this court reviews a trial court's decision to deny class certification, that decision is afforded a substantial amount of deference. "[I]f the record indicates the court properly considered all CR 23 criteria," this court will not disturb its decision. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007). "[A] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds." *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Enforceability of Choice of Law Clauses

The parties initially dispute whether the choice of law clauses in the customers' contracts are enforceable. The choice of law clauses in this case require customers to litigate asserted violations of their contract in the respective jurisdiction where they signed the contract. This jurisdiction is often based on the customer's area code.

We interpret contract provisions to

render them enforceable whenever possible. *Patterson v. Bixby*, 58 Wn.2d 454, 459, 364 P.2d 10 (1961). Further, "[w]e generally enforce contract choice of law provisions." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008) (citing *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 694-96, 167 P.3d 1112 (2007)). In *Erwin* we applied section 187 of the *Restatement (Second) of Conflict of Laws* (1971) (*Restatement*) to hold the parties' contractual choice of law provision was effective. Section 187 reads in significant part:

> "'(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> "'(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> "'(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.'"

Erwin, 161 Wn.2d at 694-95 (quoting *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 685, 586 P.2d 830 (1978), *adhered to on recons*., 93 Wn.2d 51, 605 P.2d 779 (1980)). To effectively void a choice of law provision, a court must find that the chosen state has no substantial relationship to the parties *and* that the application of the chosen law would be contrary to a fundamental policy of Washington. *Id*. at 698. Further, Washington courts have also adopted the "significant relationship" test in section 145 of the *Restatement*, which gives great weight to the place where the parties' relationship was entered. *Johnson v. Spider Staging Corp.*,

87 Wn.2d 577, 580-82, 555 P.2d 997 (1976).

Other courts have also recognized the importance of the location of the contractual relationship in deciding choice of law problems as they apply to class certification. In *Kelley v. Microsoft Corp.*, 251 F.R.D. 544 (W.D. Wash. 2008), the district court found the most significant contacts to exist in Washington because in addition to being the location where Microsoft "developed and launched its allegedly deceptive promotional program," "the parties' relationship is not centered in any particular place because the parties *did not contract* with one another." *Id*. at 552 (emphasis added) (citing *Restatement* § 145(2)(b), (d) and applying Washington state law to class action certification of CPA and contract claims). Though not a class action, in *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 423, 635 P.2d 708 (1981), we held that because the parties contracted in California to have California law apply, the choice of law clause should be enforced.

The choice of law provisions in this case were mostly based on customers' area codes, not on forums having no substantial relationship to the parties or location of the transaction between them. While it is true that AT&T is headquartered in Washington State, the customer's area code is left to the discretion of the customer, and this area code often corresponds with the customer's place of residence: in effect the *customer* selected which forum's law would apply when he requested phone service from AT&T. AT&T should not now be forced to face the enormous cost and complexity presented by a nationwide class action when they conscionably included choice of law provisions in their customers' contracts and the choice of

forum is dictated by the consumer. *See generally* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 13:63, at 476 (4th ed. 2002) ("Like all litigation, complex cases are more likely to be settled than tried. The stakes in the case and the cost of pretrial activity increase that likelihood.").

Schnall presents no valid reason why we should now invalidate the choice of law clause each customer signed when he or she purchased wireless service from AT&T. The trial court did not abuse its discretion when it held

> [t]here does not seem to be any public policy reason not to enforce the choice of law provision of the agreements in this case. The law of the State associated with the area code will generally be the law of the customer's home state, thereby applying to that customer the law with which he or she is most familiar.

CP at 418 (Mem. Op. at 2). Upholding the trial court's decision to deny certification of a *nation*wide class does nothing to prevent persons outside of Washington from filing statewide class actions in each of their respective home states. Indeed, the citizens of California have already filed such a statewide class action. Suppl. Br. of Pet'r AT&T, Ex. A (Order Granting Approval of Form Class Notice, *Randolph v. AT&T Wireless Servs., Inc.*, No. RG05193855).

Class Certification of Contract Claims

Schnall brings two types of claims before the court: one based in contract, the other based on the CPA. The differences between these two types of claims have important implications for analysis of their suitability as class action claims. AT&T argues the trial court was correct in deciding that the choice of law clauses in each customer's contract caused individual issues

to predominate over common ones.

As noted above, the choice of law clause in each customer's contract is valid. The trial court held: "[a]pplying the law of the customer's home state to the contract claims in this case makes the contract claims unmanageable." CP at 418 (Mem. Op. at 2) (citing *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); Rory Ryan, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 Baylor L. Rev. 467 (2002)).

To validly certify a nationwide class for the contract claims, Schnall must meet the requirements of CR 23(a): numerosity, commonality, typicality, and adequacy of representation. Once those have been met, he must further satisfy the tougher standard of CR 23(b)(3) and prove that common legal and factual issues *predominate* over individual issues and that a class action is an otherwise superior form of adjudication. Factors to be considered by the court when assessing predominance and superiority include

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

CR 23(b)(3). It is "incumbent upon class counsel to prove to the court . . . that there are no significant differences in the various state laws, or if there are variations, that they can be managed by the trial court." 4 Conte & Newberg, *supra*, § 13:36, at 436-37 (citing Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after* Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 63-68 (1986)).

The Court of Appeals held that a

"common nucleus of operative facts" predominated, but failed to substantially analyze the issue of predominance, especially in consideration of the potential application of 50 different states' laws. *Schnall v. AT&T Wireless Servs., Inc.*, 139 Wn. App. 280, 298-99, 161 P.3d 395 (2007). The Court of Appeals' predominance analysis reads more like a CR 23(a) commonality test: "The common nucleus of facts among all class members on this breach of contract claims *is* . . . . The common legal theory *is*." *Schnall*, 139 Wn. App. at 299 (emphasis added). Simply stating the existence of commonalities does not prove predominance.[1] The trial court's analysis on this point is more thorough and is clearly supportable under our abuse of discretion standard.

As the Court of Appeals noted, the trial court "made several findings about the individual issues the contract claim raised." *Id*. at 298. The trial court found that the choice of law clauses, the interpretation of the contract terms, the differences in the materials and information each potential class member received, and the availability of differing affirmative defenses created a predominance of individual issues over common ones. CP at 418-19 (Mem. Op. at 2-3).

Because CR 23 is identical to its federal counterpart, "cases interpreting the analogous federal provision are highly persuasive." *Schwendeman v. USAA Cas. Ins.*

[1] Further, the Court of Appeals relied, in part, on *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351 (2001), and the similarity between the legal theory in this case and the theory in *Pickett* to support its conclusion that common issues predominate. *Schnall*, 139 Wn. App. at 299. However, we have held *Pickett* holds little "precedential value." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 76, 170 P.3d 10 (2007). Because the plaintiffs in this case must prove more than mere payment of a fee, the proof they must offer is necessarily more individualized than that required in *Pickett*.

Co., 116 Wn. App. 9, 19 n.24, 65 P.3d 1 (2003) (citing *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001)). The Court of Appeals reached a conclusion that flies in the face of this "highly persuasive" federal law regarding nationwide class action certification: "[b]ased primarily on the burden of applying multiple states' laws, an *overwhelming number* of federal courts have denied certification of nationwide state-law class actions." Ryan, *supra*, at 470 (emphasis added) (citing *Stirman v. Exxon Corp.*, 280 F.3d 554, 564-66 (5th Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187, *amended by* 273 F.3d 1266 (9th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 678 (7th Cir. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 147 (3d Cir. 2001); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 316 (5th Cir. 2000); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995); *Walsh v. Ford Motor Co.*, 257 U.S. App. D.C. 85, 807 F.2d 1000, 1010-11 (1986); *In re Citigroup, Inc.*, No. CIV.A.10011912REK, 2001 WL 1682865, at *3 (D. Mass. Dec. 19, 2001); *Hammett v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 700-02 (S.D. Fla. 2001); *Duncan v. N.w. Airlines, Inc.*, 203 F.R.D. 601, 605, 610-14 (W.D. Wash. 2001); *Neely v. Ethicon, Inc.*, No. 1:00-CV-00569, 2001 WL 1090204, at *8-11, *15 (E.D. Tex. Aug. 15, 2001); *Begley v. Acad. Life Ins. Co.*, 200 F.R.D. 489, 497 (N.D. Ga. 2001); *Oxford v. Williams Cos.,*

Inc., 137 F. Supp. 2d 756, 764 (E.D. Tex. 2001); *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 308 (N.D. Ohio 2001); *Stipelcovich v. DirecTV, Inc.*, 129 F. Supp. 2d 989, 995 (E.D. Tex. 2001); *Shelley v. AmSouth Bank*, No. CIV.A.97-1170-RV-C, 2000 WL 1121778, at *8-10 (S.D. Ala. July 24, 2000), *aff'd*, 247 F.3d 250 (11th Cir. 2001); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 220-23 (E.D. Pa. 2000); *Adams v. Kan. City Life Ins. Co.*, 192 F.R.D. 274, 277-78 (W.D. Mo. 2000); *Hallaba v. Worldcom Network Servs. Inc.*, 196 F.R.D. 630, 645 (N.D. Okla. 2000); *Velasquez v. Crown Life Ins. Co.*, MDL-1096 No. CIV.A.M-97-064, 1999 WL 33305652, at *4-7 (S.D. Tex. Aug. 10, 1999); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 497-98, 503 (S.D. Ill. 1999); *Carpenter v. BMW of N. Am., Inc.*, No. CIV.A.99-CV-214, 1999 WL 415390, at *4, *8 (E.D. Pa. June 21, 1999); *Chilton Water Auth. v. Shell Oil Co.*, No. CIV.A.98-T-1452-N, 1999 WL 1628000, at *8 (M.D. Ala. May 21, 1999); *Powers v. Gov't Employees Ins. Co.*, 192 F.R.D. 313, 319-20 (S.D. Fla. 1998); *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25, 33 n.7 (D.N.H. 1998); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532-34 (N.D. Ill. 1998); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 402-03 (D.N.J. 1998); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 465 (D.N.J. 1998); *Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 340-41 (N.D. Miss. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 222-26 (E.D. La. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 368 (N.D. Ill. 1998); *Poe v. Sears, Roebuck & Co.*, 1 F. Supp. 2d 1472, 1476 (N.D. Ga. 1998); *Borskey v. Medtronics*, No. CIV.A.94-2302, 1998 WL

122602, at *3 (E.D. La. Mar. 18, 1998); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 496-99, 502 (N.D. Ill. 1998); *Peoples v. Am. Fid. Life Ins. Co.*, 176 F.R.D. 637, 646 (N.D. Fla. 1998); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 376 (E.D. La. 1997); *Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 23 & nn.10-12 (D. Conn. 1997); *Dubose v. First Sec. Sav. Bank*, 183 F.R.D. 583, 587 (M.D. Ala. 1997); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 347-52 (D.N.J. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 219 (E.D.N.C. 1997); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 100 (W.D. Mo. 1997); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 341-42 (N.D. Ill. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-27 (E.D. La. 1997); *Mack v. Gen. Motors Acceptance Corp.*, 169 F.R.D. 671, 679 (M.D. Ala. 1996); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 631-33 (D. Kan. 1996); *Barbarin v. Gen. Motors Corp.*, No. CIV.A.84-0888, 1993 WL 765821, at *3 (D.D.C. Sept. 22, 1993); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1275 (D. Minn. 1988); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 608 (S.D.N.Y. 1982)).

Even where courts find that a nationwide, state-law governed class otherwise meets Rule 23(a) and 23(b)(3) criteria, "the choice-of-law inquiry will ordinarily make or break certification." Ryan, *supra*, at 474. This is because if the laws of 50 jurisdictions apply to plaintiffs' claims, "the variations in the laws of the states . . . 'may swamp any common issues and defeat predominance.'" *Spence*, 227 F.3d at 311 (quoting *Castano*, 84 F.3d at 741); *see also Georgine*, 83 F.3d at 627 ("[B]ecause we must apply an individualized choice of law analysis to

each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially" (citation omitted)); *In re Am. Med. Sys., Inc.*, 75 F.3d at 1085 ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action.").

The choice of law provisions in this case will do more than cause variations in damages. The availability of the voluntary payment doctrine alone could abrogate AT&T's liability for all customers who voluntarily paid the UCC after receiving the informational flyer detailing their responsibility for its payment and reside in states employing the doctrine. This is only one example.

The Court of Appeals dismissed the trial court's concerns in part because it determined that "extrinsic evidence" "will not be necessary here because these consumers entered into a standardized contract." *Schnall*, 139 Wn. App. at 299-300. However, there is no support cited for this conclusion. Indeed, some Washington courts have held just the opposite: "When material extrinsic evidence shows that outside agreements were relied upon, those parol agreements should be given effect rather than allowing boilerplate 'to vitiate the manifest understanding of the parties.'" *Lopez v. Reynoso*, 129 Wn. App. 165, 173, 118 P.3d 398 (2005) (quoting *Lyall v. DeYoung*, 42 Wn. App. 252, 258, 711 P.2d 356 (1985)). Further, simply because the Court of Appeals finds extrinsic evidence would be unnecessary under Washington law does not mean that the law of all other 49 states would exclude such evidence as well.

An additional concern is the

availability of affirmative defenses. As the trial court noted, "[s]ome states, such as Illinois, . . . allow as a contract claim defense, the voluntary payment doctrine which prohibits a contract claim for refund of a sum voluntarily paid." CP at 419-20 (Mem. Op. at 3-4) (citing *Smith v. Prime Cable of Chi.*, 276 Ill. App. 3d 843, 658 N.E.2d 1325, 213 Ill. Dec. 304 (1995)). The Court of Appeals suggested the trial court employ subclasses and master's hearings to sort out the morass. However, the availability of these mechanisms for efficient management of large class actions cannot change the predominance of the individualized issues in this case. *See* 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:32, at 286-87 (4th ed. 2002) (noting courts have found "subclasses would not cure the problems" of diverse factual issues and that "when a court determines that a multitude of mini-trials will be necessary to dispose of individual claims, the court will likely find that common questions do not predominate."). As the trial court noted, "[w]hile Washington would be only one of fifty jurisdictions' law[s] which would have to be addressed in resolving the contract claims, it is illustrative of the issues that would arise." CP at 418 (Mem. Op. at 2).

Superiority Analysis

Even if individualized issues did not predominate, CR 23(b)(3) also requires "that a class action [be] *superior* to other available methods for the fair and efficient adjudication of the controversy." (Emphasis added.) *See also* 4 Conte & Newberg, *supra*, § 13:11, at 406 ("It must be emphasized that, under the rule, a class action *must be superior, not just as good as*, other available methods." (emphasis added)). The superiority requirement "focuses upon a

comparison of available alternatives." *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 256, 63 P.3d 198 (2003) (citing 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4.27 (3d ed. 1992)).

In more traditional statewide class actions, these alternatives include joinder, intervention, or consolidation. *Id.* The most obvious alternative to the proposed nationwide class action in this case is numerous statewide class actions brought by the citizens of each state against AT&T. This is not a case where the choice is either a nationwide class action or no action at all. Miller & Crump, *supra*, at 71 ("Our analysis suggests that some of the problems of jurisdiction and choice of law could be solved by resort to statewide, as opposed to nationwide, class actions."). Given the sheer number of AT&T customers in each of the 50 states, no one state's citizens will be left out in the class action cold without the possibility of amassing enough individual claims within their state to cover litigation costs. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available.").

Although it is true that small amounts of money are at issue and the decision will have broad impact, *Schnall*, 139 Wn. App. at 299, there is simply no efficiency in asking a trial judge to manage the laws of 50 different states as they apply to plaintiffs' contract claims and the varied factual scenarios inherent therein. *See* Miller & Crump, *supra*, at 64 ("Beyond the difficult task of correctly

determining foreign law, the nationwide class action may present an even greater problem because of the sheer burden of organizing and following fifty or more different bodies of complex substantive principles. Although the comparison obviously is inexact, one can appreciate the magnitude of the trial judge's task by imagining a first-year law student who, instead of a course in contracts, is required simultaneously to enroll in fifty courses, each covering the contract law of a single state, and to apply each body of law correctly on the final examination." (footnote omitted)).

Further, Washington has no interest in seeing contracts executed by AT&T representatives in other states with citizens of those states examined and adjudicated in Washington courts. Certified as a nationwide class action, this case would present an unwarranted and unnecessary burden on the state judicial system, all at a large cost to taxpayers. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 (Fla. Dist. Ct. App. 1996) ("No doubt a tremendous number of retired judges, special masters, and general masters would have to be appointed by the court in order to complete this herculean task within a reasonable period of time—all at a staggering cost to the taxpayers."). There is no sound reason in this case for this court to force Washington trial courts to entertain the contract claims of citizens from around the nation. Their state courts are equally as prepared, if not better situated to apply the contract laws of their states. The trial court did not abuse its discretion by denying nationwide certification of the plaintiffs' contract claims. This court does not dispute, however that if the contract class were constructed as a statewide class, it would meet the requirements of both CR

23(a) and (b)(3).

Extraterritorial Application of Washington's Consumer Protection Act

The trial court and the Court of Appeals both noted that the CPA was applicable to all plaintiffs' claims because they arose from statute instead of contract. However, nothing in our law indicates that CPA claims by nonresidents for acts occurring outside of Washington can be entertained under the statute. "Because the laws of each state are designed to regulate and protect the interest of that state's own residents and citizens, each state has a measurable, and usually predominant, interest in having its own substantive laws apply." 4 Conte & Newberg, *supra*, § 13:37, at 438. While it is true that "Washington has a strong interest in regulating any behavior by Washington businesses which contravenes the CPA," CP at 421 (Mem. Op. at 5), the CPA indicates the legislature's intent to limit its application to deceptive acts that affect the citizens and residents of Washington. The CPA states: "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. "Trade" or "commerce" is defined as "the sale of assets or services, and any commerce directly or indirectly *affecting the people of the state of Washington*." RCW 19.86.010(2) (emphasis added). To state a CPA claim a person must show that the unfair or deceptive act affected the people of the state of Washington. This geographic and jurisdictional limitation originates in the CPA's history as a tool used by the State attorney general to protect the citizens of Washington. *Indoor Billboard/Wash., Inc. v. Integra Telecom of*

Wash., Inc., 162 Wn.2d 59, 74, 170 P.3d 10 (2007). The attorney general of the state of Washington has no power outside the geographic boundary of this state. It is understood that her actions will be brought on "behalf of persons residing in the state." RCW 19.86.080(1).

This statutory and jurisdictional limitation cannot be obviated simply because the claimants are private citizens. Indeed, our courts retained this limitation for private attorneys general through the requirement that the private claimants prove a defendant's practices affect "the public interest." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Because of the statute's jurisdictional limitation, applicable to both the attorney general and private claimants, a private claimant cannot state a CPA claim by proving the defendant's practices affected the public interest or the citizens of *another* state. *See Lyon*, 194 F.R.D. at 215 ("State consumer fraud acts are designed to either protect state residents or protect consumers engaged in transactions within the state."). RCW 19.86.920 does not indicate otherwise. This portion of the CPA empowers courts analyzing unfair competition claims to consider "whether conduct restrains or monopolizes trade or commerce" even when those market effects are felt outside of Washington. RCW 19.86.920. This provision merely closes a potential loophole in the CPA that would allow companies to escape liability by claiming their methods of competition are within Washington's boundaries even though those methods effectively monopolize trade *outside* the state. This portion of the statute does not give Washington the power to enforce its laws outside its territorial borders.

Even the general extraterritorial

flavor of RCW 19.86.920 cannot change the clear standing limitations in the statute: a claimant must allege injury in trade or commerce that "directly or indirectly affect[s] the people of the state of Washington." RCW 19.86.010(2); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 38, 204 P.3d 885 (2009) ("[T]he *Hangman Ridge*-test incorporates the issue of standing, particularly the elements of public interest impact and injury."). In the context of this case, the CPA only applies to claims brought by persons residing in Washington.

Remaining Washington Plaintiffs' CPA Claims

The question then remains, can a class of Washington only CPA plaintiffs be certified? The trial court correctly found that "proof of causation is an essential element of a CPA action." CP at 421 (Mem. Op. at 5). *Hangman Ridge*, 105 Wn.2d at 785, requires CPA plaintiffs to establish a causal link "between the unfair or deceptive act complained of and the injury suffered." We have more recently held that this causal link must establish that the "injury complained of . . . would not have happened" if not for defendant's violative acts. *Indoor Billboard*, 162 Wn.2d at 82. The quantum of proof necessary to establish the proximate, "but for" causation required by the CPA is not fully developed in our case law. However, *Indoor Billboard* clearly establishes that proximate cause in a class action cannot be established by "mere payment" of an allegedly injurious charge, though that payment can be "considered with all other relevant evidence on the issue of proximate cause." *Id*. at 83. *Indoor Billboard* did not reject individual reliance as a method of proving causation under the CPA, but merely held that plaintiffs cannot be required to show reliance where other

evidence is sufficient to establish "but for" causation. *Id*. at 85 (noting that injury may be established as a result of "reliance on information" and citing *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982) for support). *Nuttall* held "a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it." *Nuttal*, 31 Wn. App. at 111. We recently affirmed that reliance is not a dead letter in our law: "[d]epending on the deceptive practice at issue and the relationship between the parties, the plaintiff may need to prove reliance to establish causation, as in *Indoor Billboard*." *Panag*, 166 Wn.2d at 59 n.15.

Our decision to retain reliance as one method of proving "but for" causation inherently recognizes a principle established in multiple forums, that the difference between "but for proximate cause" and individual reliance varies with the context of the claim:

> [W]here, as here, the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct . . . , as a practical matter it is not possible that the damages could be caused by a violation [of the Minnesota CPA] without reliance on the statements or conduct alleged to violate the statutes.

Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2, 13 (Minn. 2001); *accord*, *e.g.*, *Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F. Supp. 303, 308 (M.D.N.C. 1988) ("To prove actual causation, a plaintiff must prove that he or she detrimentally relied on the defendant's deceptive statement or misrepresentation.") (citing *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174, 180 (1986)); *Feitler v. Animation Celection, Inc.*, 170 Or. App. 702, 13 P.3d 1044, 1047 (2000) (holding causal element of misrepresentation claim requires

reliance by the consumer); *cf. Siemer v. Assocs. First Capital Corp.*, No. CV 97-281 TUC JMR (JCC), 2001 WL 35948712, at *4 (D. Ariz. Mar. 30, 2001) ("The injury element of the [state consumer protection statute] claim occurs when the consumer relies on the misrepresentations."); *see generally* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Leg. 1 (2006).

As noted in *Nuttall*, in the context of private CPA actions where plaintiffs seek damages, more than a mere capacity to deceive must be shown to establish "some causal link between defendant's unfair act and [consumer's] injury." 31 Wn. App. at 110.

In the context of private misrepresentation cases, a plaintiff can satisfy the "but for" causation requirement by showing she relied on the misrepresentation. *See State ex rel. D.R.M. v. Wood*, 109 Wn. App. 182, 197 n.8, 34 P.3d 887 (2001) ("The *but-for* test of causation employed in that case would fail here since McDonald did not rely on Wood's promise."); *Bank of China, N.Y. Branch v. NBM, LLC*, 359 F.3d 171, 178 (2d Cir. 2004) (requiring plaintiffs to demonstrate "reasonable reliance" to satisfy the proximate cause requirement in a civil RICO proceeding); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218-19 (5th Cir. 2003) (holding that where "[k]nowledge of the truth defeats a claim of fraud because it eliminates the deceit as the 'but for' cause of the damages," proof of reliance is required); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981) (reliance is "a type of 'but for' requirement: had the [purchaser] known the truth he would not have acted"), *aff'd in part, rev'd in part*, 459 U.S. 375, 103 S. Ct. 683, 74 L.

Ed. 2d 548 (1983).

As the trial court recognized, this court does not *require* proof of individual reliance from CPA claimants as a separate element. But, where knowledge of the truth would defeat a claim of misrepresentation, that alleged misrepresentation has been eliminated as the "but for" cause of the claimant's injury. In misrepresentation and deception or fraud cases, the claimant may be called upon to offer more individualized proof that she had no knowledge of the truth because the remaining evidence is simply insufficient to establish "but for" causation. *Kelley*, 251 F.R.D. at 557-58 (analyzing class certification under Washington's CPA after *Indoor Billboard* to hold "a deception-based theory of causation would necessarily require the trier of fact here to determine whether individual class members were actually deceived and whether they would have purchased [the goods] but for Microsoft's marketing of them." The court went on to allow class certification on plaintiff's "price inflation" or "market theory" of causation.) (citing *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575 (N.D. Ill. 2005), *aff'd*, 472 F.3d 506 (7th Cir. 2006); *Wright v. Fred Hutchinson Cancer Research Ctr.*, No. C01-5217L, 2001 WL 1782714 (W.D. Wash. Nov. 19, 2001); *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090 (Fla. Dist. Ct. App. 2003)). In the case at hand, for example, some plaintiffs received materials that "specifically list the 'universal connectivity charge' as one of the fees, taxes, and surcharges which the customer is responsible for paying." CP at 418 (Mem. Op. at 2). Under plaintiffs' misrepresentation theory of causation the trial court will need to decide, as in *Kelley*, whether "individual class members were actually deceived and whether they would have"

purchased their cellular service, or paid the UCC but for AT&T's marketing of the cost of the cellular plan or their explanations regarding the genesis of the UCC. *Kelley*, 251 F.R.D. at 558.

The trial judge found that "[i]n the context of" a nationwide CPA action, proof of causality for each plaintiff "must necessarily be individual for each potential class member," resulting in an uncertifiable class in which "individual issues would predominate over class issues and a class action would be unmanageable." CP at 422 (Mem. Op. at 6) ("In the context of this case, each plaintiff must show that [AT&T's] alleged misrepresentation about the plaintiff's obligation to pay a UCC affected the plaintiff's decision to chose [AT&T] as a wireless provider."). However, the trial court provided no specific analysis of whether proof of causality would be so individualized among a class comprised only of Washington customers. For example, if Washington customers all had received no information regarding the UCC, proof of causality could be more common than if they all had received different and allegedly fraudulent representations: proving a plaintiff relied on an affirmative misrepresentation is necessarily individualized, but proving the lack of information was the common cause of each plaintiffs' decision to sign up for wireless service could be more generalized.

Because the trial court did not analyze the causality element of plaintiffs' CPA claims as it would apply only to the facts and evidence pertaining to Washington customers, we remand for further consideration of this issue in accordance with our opinion.

In sum, we agree with the trial court

that this action should not be certified as a *nation*wide class action. Washington need not apply its Consumer Protection Act, or its contract laws, to the citizens of other states in order to protect the interests of the citizens of Washington. A nationwide class would be unmanageable and unduly burdensome on the trial court and the state judicial system and serve no real benefit to plaintiffs who are free to bring statewide class actions in their home states.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson	Justice Mary E. Fairhurst
Justice Gerry L. Alexander	Justice James M. Johnson