

No. 91393-5

**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

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

IN RE:

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.

***AMICUS CURIAE* BRIEF OF
WASHINGTON DEFENSE TRIAL LAWYERS &
DRI—THE VOICE OF THE DEFENSE BAR**

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TABLE OF CONTENTS

	<u>Pages</u>
I. INTRODUCTION	1
II. IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT: Washington’s CPA Should Not Be Extended to Matters Impacting Texans Based Upon Acts in Texas.	4
V. CONCLUSION.....	7

TABLE OF AUTHORITIES

Cases

Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.,
105 Wn.2d 778, 719 P.2d 531 (1986).....5

Lyon v. Caterpillar, Inc.,
194 F.R.D. 206 (E.D. Pa. 2000).....6

Panag v. Farmer’s Ins. Co.,
166 Wn.2d 27, 204 P.3d 885 (2009).....3, 5

Red Lion Hotels Franchising, Inc. v. MAK, LLC,
663 F.3d 1080 (9th Cir. 2011)4

Schnall v. AT & T Wireless Servs., Inc., 168 Wn.2d 125,
225 P.3d 929 (2010), *as corrected* (Feb. 9, 2010),
opinion withdrawn on reconsideration (Feb. 17, 2011),
opinion superseded on reconsideration, 171 Wn.2d
260, 259 P.3d 129 (2011))4

Thornell v. Seattle Serv. Bureau, Inc.,
C14-1601 MJP, 2015 WL 1000426
(W.D. Wash. Mar. 6, 2015)2, 4

*W.G. Clark Const. Co. v. Pac. Nw. Reg’l Council of
Carpenters*, 180 Wn.2d 54, 322 P.3d 1207 (2014).....5

Statutes

RCW 19.86 *et seq.*1, 3, 4, 5, 7

Tex. Bus. & Com. Code Ann. § 17.45(4)3

Other Authorities

Bob Cohen, *Right to Private Action Under State Consumer Protection Act—Preconditions to Action*, 117 A.L.R.5th 155
(originally published in 2004).....6

4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*
§ 13:37 (4th ed. 2002).....6

Neil A. Helfman, *Proof of Statutory Unfair Business Practices*,
36 Am. Jur. Proof of Facts 3d 221
(originally published in 1996).....6

I. INTRODUCTION

Washington Defense Trial Lawyers (WDTL) and DRI—The Voice of the Defense Bar (DRI) are associations of civil defense attorneys.

WDTL and DRI submit this *amicus curiae* brief to supplement the parties' briefing and provide a broader perspective to this Court on the following certified question:

Whether a plaintiff who is not a Washington resident may sue a Washington corporation under the Washington Consumer Protection Act, RCW 19.86.010 *et seq.*, for allegedly deceptive acts committed by the corporation as the in-state agent of an out-of-state corporation and, if so, whether the plaintiff may also sue the out-of-state corporation under the Act.

WDTL and DRI urge this Court to respect the distinct laws and policies that differ in each state and, in doing so, provide predictability and avoid forum shopping that wastes Washington's limited judicial resources. To that end, WDTL and DRI respectfully request that this Court answer "No" to the certified questions.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WDTL, established in 1962, includes more than 750 Washington attorneys principally engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve its members through education, recognition, collegiality, professional development and

advocacy. One important way in which WDTL represents its members is through *amicus curiae* submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clientele, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, clientele, and the judicial system.

III. STATEMENT OF THE CASE¹

At issue in this case are letters received by a Texas resident arising out of an automobile accident that took place in Texas. The letters, sent by a Seattle company, sought payment on a subrogated insurance claim that had been paid by an Illinois corporation. It is undisputed that Plaintiff

¹ This summary of the facts is based upon pleadings filed in this Court and in *Thornell v. Seattle Serv. Bureau, Inc.*, C14-1601 MJP, including the District Court's Order Certifying Questions. *Thornell v. Seattle Serv. Bureau, Inc.*, C14-1601 MJP, 2015 WL 1000426 (W.D. Wash. Mar. 6, 2015).

Sandra Thornell is a Texan, not a Washingtonian, and that the automobile accident took place in Texas, not in Washington.

It is also undisputed that under Texas law, Plaintiff Thornell is barred from bringing suit under the Texas consumer protection statute because she is not a “consumer,” defined by Texas statute as “an individual . . . who seeks or acquires by purchase or lease, any goods or services.” Tex. Bus. & Com. Code Ann. § 17.45(4). Texas has made the legal and public policy decision to require that a person must first seek or acquire goods or services in order to be eligible to reap the benefits of its consumer laws. In order to avoid the law and public policy of her home state, Plaintiff Thornell seeks to invoke what she believes to be more favorable Washington state law to support her theory of liability. Thus, she opted to file suit under Washington state consumer protection laws over the monetary claims allegedly arising out of the accident in Texas.²

Although the Washington Consumer Protection Act (“CPA”), Chapter 19.86 RCW, has never been applied in this manner, the Federal District Court certified to this Court the threshold question of whether the

² Plaintiff Thornell suggests that the language in letters sent to her in Texas violated the Washington Consumer Protection Act (“CPA”), Chapter 19.86 RCW, based upon *Panag v. Farmer’s Ins. Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009). See Plaintiff’s Responsive Brief, at 15. *Panag*, however, did not make a determination as to whether all five elements of the CPA had been proven. See *Panag*, 166 Wn.2d ¶ 80.

CPA creates a cause of action for an out-of-state plaintiff. *Thornell v. Seattle Serv. Bureau, Inc.*, C14-1601 MJP, 2015 WL 1000426, at *2 (W.D. Wash. Mar. 6, 2015).³

IV. ARGUMENT: Washington’s CPA Should Not Be Extended to Matters Impacting Texans Based Upon Acts in Texas.

The issue presented in the certified questions before this Court is whether a plaintiff who is without the ability to bring suit or recover anything under her home state’s consumer protection law should nonetheless be permitted to sue under another state’s laws.

Washington’s CPA necessarily requires an effect on the people of the state of Washington that is simply not present in this Texas-based case. RCW 19.86.020 provides that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” “Trade” or “commerce,” in turn, are defined as “the sale of assets or services, and any commerce directly or indirectly

³ In certifying the issue to this Court, the District Court remarked that the Ninth Circuit has described the “territorial reach” of the CPA as an “open question” because this Court withdrew part of an opinion in *Schnall* that confirmed the CPA does not apply extraterritorially. See *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1091 (9th Cir. 2011) (citing *Schnall v. AT & T Wireless Servs., Inc.*, 168 Wn.2d 125, 142-43, 225 P.3d 929 (2010), as corrected (Feb. 9, 2010), opinion withdrawn on reconsideration (Feb. 17, 2011), opinion superseded on reconsideration, 171 Wn.2d 260, 259 P.3d 129 (2011)).

affecting the people of the state of Washington.” RCW 19.86.010(2)
(emphasis added).⁴

The only way to uphold the purpose and intent of Washington’s CPA is to recognize and respect this territorial limitation, thereby respecting the legislative, referendum, and judicial processes of other states. If, instead, this Court were to answer the certified questions in the affirmative, it would be encouraging litigants to engage in the kind of “blatant” and “harmful” forum shopping among inconsistent laws that this Court has expressly disdained. *W.G. Clark Const. Co. v. Pac. Nw. Reg’l Council of Carpenters*, 180 Wn.2d 54, 57-58, 67, 322 P.3d 1207 (2014) (addressing ERISA preemption).

This conclusion is consistent with sound public policy concerning enforcement of state consumer protection laws generally. The preconditions to asserting, and maintaining, a consumer protection suit vary greatly from state to state, as determined by each state’s unique

⁴ This Court has extended this Washington focus to the broader concept of who has standing to bring suit under the CPA, affirming that the five-element test initially set forth by this Court in *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986) for a private CPA claim “incorporates the issue of standing ...” *Panag*, 166 Wn.2d at 38.

legislative, referendum, and judicial processes.⁵ In addition, there are significant differences in remedies in each state, including the availability of and standards for proving punitive damages⁶ and whether unsuccessful plaintiffs must pay the defendants' attorney fees.⁷ As there is no uniform private consumer protection law that subjects all parties to the same criteria and remedies, each plaintiff is—by design—subject to the legislative, referendum, and judicial processes set in his or her home, or in the state where he or she was injured: “State consumer fraud acts are designed to either protect state residents or protect consumers engaged in transactions within the state.”⁸ “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.”⁹

If Texans are dissatisfied with Texas law, there are steps they can take to seek changes in their legislation. Unless and until that occurs, Texans must abide by the laws set by their elected and appointed officials,

⁵ Bob Cohen, *Right to Private Action Under State Consumer Protection Act—Preconditions to Action*, 117 A.L.R.5th 155, 155 (originally published in 2004) (collecting and analyzing preconditions).

⁶ Neil A. Helfman, *Proof of Statutory Unfair Business Practices*, 36 Am. Jur. Proof of Facts 3d 221, at §13.5 (originally published in 1996).

⁷ *Id.* at §13.7.

⁸ *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 215 (E.D. Pa. 2000).

⁹ 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 13:37, at 438 (4th ed. 2002).

even if that means they do not have the right to bring suit. It is simply not appropriate for them to look to other states to fill in laws they wish they had at home.

If, instead, plaintiffs such as Thornell are allowed to survey states' laws in an effort to find laws that best suit their desires, there will be no predictability and tremendous amounts of Washington's judicial resources will be wasted. Resources are limited and Washington's judges and juries should be jealously guarded and preserved for Washingtonians.

V. CONCLUSION

For the reasons set forth herein and in the briefing of the Defendants and supporting *amici*, WDTL and DRI respectfully request that this Court respect the distinct laws and policies that differ in each state and, in doing so, provide predictability and avoid forum shopping that wastes Washington's limited judicial resources. To do so, this Court should answer the certified questions in the negative, confirming that Washington's CPA should not be extended to apply extra-territorially.

RESPECTFULLY SUBMITTED this 4th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify, that on the date below, the foregoing was served
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