No. 825823

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 61372-3-I)

PAUL CURTIS, NORMAN CURTIS, and JANET GUSTAFSON, on behalf of themselves and all others similarly situated,

Respondents,

v.

NORTHERN LIFE INSURANCE COMPANY,

Petitioner.

AMICUS CURIAE MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Chamber of Commerce of the United States of America submits this memorandum in support of Northern Life Insurance Company's Petition for Review. As Northern Life has urged, this case satisfies RAP 13.4(b)(4) because it presents a recurring question of substantial public interest to businesses and consumers, i.e., whether Washington law governs claims asserted by out-of-state consumers arising out of relationships centered in the consumers' home states, simply because the businesses maintain their headquarters in Washington.

In applying Washington law to claims asserted by non-Washington consumers, the Court of Appeals' decision departs from the Restatement (Second) of Conflict of Laws, which sets forth the controlling test. The Restatement makes clear that a business's "headquarters state" rarely will supply the governing law for disputes with consumers who reside in other states. Instead, if any two factors other than the state of the defendant's residence favor application of the law of another state, that state's law should apply – an approach that generally results in the application of the law of the consumer's home state. Dozens of courts have reached that conclusion in similar circumstances, emphasizing that each state has a strong interest in protecting its own consumers with respect to transactions with out-of-state businesses. Consistent with this trend, this Court last year rejected the "headquarters state" choice of law theory in consumer cases. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384-85, 191 P.3d 845 (2008). In light of *McKee*, this Court should accept review to bring clarity and consistency to Washington law on this important issue.

II. REASONS FOR GRANTING REVIEW

The Court of Appeals held that when non-Washington consumers sue Washington businesses, Washington law has nationwide reach. The nationalization of Washington law (together with the relaxed causation standard for proposed CPA class actions identified in Northern Life's Petition for Review, at 2, 19-20) invites out-of-state consumers to bring grievances against Washington businesses to this state – rather than enlist the assistance of their local courts under local law. For Washington companies that transact business with consumers across the country, this development has breathtaking significance and potentially places them at a disadvantage vis-à-vis their competitors in other states.

The decision below would leave Washington companies exposed both to suits in Washington under a nationwide application of the CPA and to litigation in other states under local law. As almost every court to consider the issue has held, a consumer's home state – not the business's headquarters state – should supply the law to protect against consumer deception and compensate state residents. This Court in *McKee* followed this mainstream view and rejected the "headquarters state" choice of law approach. This Court should accept review of the decision below to correct Division I's misapplication of settled choice of law principles.

A. The Court of Appeals Did Not Properly Apply Choice of Law Factors under the Restatement.

The Court of Appeals accepted the trial court's finding that "'[t]he bulk of the members of the proposed class here are not Washington residents and have little or no contact with the state of Washington beyond

payment of premiums to the office of [Northern Life].'" 2008 WL 4927365, at *10 (quoting trial court ruling). Indeed, the non-Washington plaintiffs have no connection with this state: they do not reside here, did not suffer injury in Washington, did not sign their Northern Life contracts in Washington, did not have contact with independent agents in Washington, and did not have any other dealings with Northern Life in Washington. Nevertheless, the Court of Appeals decided that Washington law governed the claims of Northern Life's customers across the country. In so doing, the Court of Appeals relied on a single factor: "Northern [Life] is a Washington business."[1] *Id.* at *11.

In reaching this conclusion, the Court of Appeals woodenly applied *Schnall v. AT&T Wireless Servs., Inc.*, 139 Wn. App. 280, 161 P.3d 395 (2007), *rev. granted*, 163 Wn.2d 1022 (2008),[2] its earlier decision holding that a company's headquarters state supplied the governing law for consumer claims – even for consumers who never left their home states to do business with the company. *Id.* at 294. As in this

[1] The Court of Appeals also suggested that application of Washington law was appropriate because "the challenged interest crediting practice . . . can be efficiently determined in the class action context." 2008 WL 4927365, at *11. But choice of law constraints are constitutionally mandated; as a result, they cannot be swept aside in the quest for a more "efficient[]" outcome. *See Pickett v. Holland-America Line Westours, Inc.*, 145 Wn.2d 178, 198, 35 P.3d 351 (2001); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 562 (E.D. Ark. 2005).

[2] Because this Court granted review in *Schnall*, and this case presents the same choice of law question, this Court should, at the very least, hold Northern Life's Petition for Review until it decides *Schnall*. If this Court addresses the choice of law question in *Schnall*, it should then remand this case for consideration consistent with its decision Even the Court of Appeals recognized that its holding "assumes . . . that *Schnall* remains good law." 2008 WL 4927365, at *9 n.26. If this Court does not address the choice of law question in *Schnall*, however, it should grant review in this case and consider this important issue.

case, *Schnall* acknowledged the applicable choice of law rule, but then failed to apply the rule or to discuss cases applying it in similar circumstances. 139 Wn. App. at 292-94. In fact, settled choice of law principles compel reversal of the decision below.

Washington courts apply the Restatement (Second) of Conflict of Laws § 148(2), which sets forth six choice of law factors for deception-based claims, such as the claims here:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations;
>
> (b) the place where the plaintiff received the representations;
>
> (c) the place where the defendant made the representations;
>
> (d) the domicil, residence, nationality, place of incorporation and place of business of the parties;
>
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time; and
>
> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Taken as a whole, Section 148's factors strongly favor application of the laws of plaintiffs' various home states to their claims against Northern Life. Although the Court of Appeals relied exclusively on Northern Life's domicile in Washington, the Restatement actually teaches that "[t]he domicile, residence and place of business of the ***plaintiff*** are more important than the similar contacts on the part of the defendant." Restatement § 148, cmt. i (emphasis added). Indeed, if any two factors other than the defendant's residence favor a single state, that state's law usually applies. *Id.* cmt. j. Here, the factors that the Court of Appeals ignored – (a) the place where each plaintiff acted on the alleged deception;

(b) the place where each plaintiff received the alleged misrepresentations; (c) the place where the defendant allegedly perpetrated the deception; (d) each plaintiff's domicile; and (e) the places where each plaintiff performed – ***all*** favor the application of the law of the consumers' home states. *See id.* cmt. f (describing causation), cmt. g (focus on where consumers see allegedly deceptive advertising).

The Restatement test thus unequivocally favors application of the laws of consumers' home states. This does not amount to a rote counting of contacts. Rather, the relationship between consumers and the companies with which they do business rightly centers in the consumer's home state, where he or she reads advertising, shops, buys, and receives the benefits of (or suffers injuries from) the consumer transaction.

B. Courts Across the Country Reject the "Headquarters State" Approach to Choice of Law for Consumer Claims.

Absent a valid contractual choice of law clause, companies that serve customers in states other than their home states must conform their conduct to local laws – just as businesses that come to Washington must follow this state's law. Consumers assume that when they buy products or services without leaving home, they do not subject themselves to a foreign state's law, unless they expressly agree to do so. Courts – including courts in this state – routinely decide disputes between consumers and routinely use the laws of the consumers' home states to do so.

These principles are as old as the nation itself. "A basic principle of federalism is that each state may make its own reasoned judgment about

what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). For that reason, the decision of the Court of Appeals "that one state's law would apply to claims by consumers throughout the country – not just those in [Washington], but also those in California, New Jersey, and Mississippi – is a novelty." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002). This Court should set that novelty aside and grant review to restore Washington to the mainstream.

The "headquarters" approach to choice of law arrogates to a company's home state authority comparable to that entrusted to Congress, i.e., the power to prescribe rules of liability for consumers across the nation who do business with the corporation. Courts regularly reject that approach. In *Bridgestone/Firestone*, the Seventh Circuit reversed a ruling that a district court could apply Michigan consumer protection law to Ford Motor Company, and Tennessee consumer protection law to Firestone Tire Company, simply because their headquarters were in those states (and, not surprisingly, the companies' decisions and disclosures came from those states). "Differences across states may be costly ... but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." 288 F.3d at 1020. In *Zinser v. Accufix, Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001), the Ninth Circuit affirmed a district court that reached the same conclusion, holding that it "correctly rejected the contention that the law of a single state – either California or Colorado – applies to this action." And in *Spence v.*

Glock, Ges.m.b.H., 227 F.3d 308, 312-13 (5th Cir. 2000), the Fifth Circuit reversed certification of a nationwide class under Georgia law, even though the defendant was incorporated, assembled and distributed products, and did warranty work in Georgia. The claims in that case "implicate[d] the tort policies of all 51 jurisdictions in the United States, where proposed class members live and bought" products. *Id.* at 313. Recent state supreme court cases stand for the same proposition. *See, e.g.*, *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 920-24 (Ill. 2007); *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1035-37 (Okla. 2006); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 681 (Tex. 2004); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 698 (Tex. 2002). Dozens of trial and intermediate appellate decisions agree.[3]

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[3] The following cases decided since the beginning of 2007 are illustrative: *Agostino v. Quest Diagnostics Inc.*, 2009 WL 348898, at *18-*22 (D.N.J. Feb. 11, 2009) (refusing to certify nationwide class action because claims governed by law of states in which each plaintiff received, relied on, and paid bill, not defendant's headquarters state); *Vulcan Golf, LLC v. Google, Inc.*, __ F.R.D. __, 2008 WL 5273705, at *11 (N.D. Ill. Dec. 18, 2008) (refusing to certify class action because claims governed by law of states in which each plaintiff was injured, not defendant's headquarters state); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 149-50 (S.D.N.Y. 2008) (decertifying settlement class because claims governed by law of states in which each plaintiff purchased product, not defendant's headquarters state); *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 627-28 (D. Kan. 2008) ("the simple expedient of selecting a defendant's home state law for the apparent purpose of facilitating a nationwide class action strongly resembles the 'bootstrapping' criticized by the U.S. Supreme Court"); *Berry v. Budget Rent A Car Systems, Inc.*, 497 F. Supp. 2d 1361, 1364-66 (S.D. Fla. 2007) (refusing to certify class against car rental company under New Jersey law; claims governed by law of states in which each plaintiff rented car); *Lantz v. Am. Honda Motor Co., Inc.*, 2007 WL 1424614, at *4-6 (N.D. Ill. May 14, 2007) (deceptive marketing claim against California defendant; refusing to apply California law to non-California residents); *In re Gen. Motors Corp. Dex-Cool Prod. Liability Litig.*, 241 F.R.D. 305, 315-18, 324 (S.D. Ill. 2007) (refusing to certify nationwide class action; claims governed by laws of states in which consumer bought cars); *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 192-94 (E.D. Pa. 2007) (refusing to certify warranty class under Pennsylvania law, defendant's principal place of business and conduct); *Beegal v. Park West Gallery,* 925 A.2d 684, 696-702 (N.J. Super. Ct. App. Div. 2007) (reversing certification in class action against cruise ship company; action governed by law of plaintiffs' home states).

Washington choice of law principles do not have any unique attribute that counsels a different result. Washington follows the "most significant relationship" approach to choice of law espoused in the Restatement (Second) of Conflict of Laws, *see Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976), and many courts reject the headquarters state approach under the Restatement test. *E.g.*, *Spence*, 227 F.3d at 312-14; *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 215 (E.D. Pa. 2000). Courts applying the *lex loci delicti* approach, *e.g.*, *Bridgestone/ Firestone*, 288 F.3d at 1016, or the "state interests" approach, *e.g.*, *Zinser*, 253 F.3d at 1188, likewise decline to apply headquarters state law. Under ***every*** choice of law theory, the problem is the same: the "headquarters" approach focuses on a single factor – the defendant's domicile – and makes it dispositive by pointing to the unremarkable fact that corporations make decisions in their headquarters state.

By contrast, the other Restatement factors, including the place where the injury occurs, the plaintiff's domicile, and the place where the relationship of the parties is centered, all favor the state where the consumer lives, interacts with the seller, and makes a buying decision. *See* Restatement §§ 145, 148; *Spence*, 227 F.3d at 314-15; *Lyon*, 194 F.R.D. at 215. Injury where the plaintiff lives and buys products or services is not a "fortuitous" contact, as when a plane crashes in a jurisdiction that it happens to pass over. *Spence*, 227 F.3d at 315. "Each plaintiff's home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope

of recovery for its citizens under its own laws." *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997).

Washington law has the same essential purpose. The CPA focuses ***not*** on redressing wrongs in other states (which generally have their own consumer protection statutes) but on "commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010. "The Washington Legislature passed the Consumer Protection Act ... to protect Washington citizens from unfair and deceptive trade and commercial practices." *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547-48, 13 P.3d 240 (2000). Like other states' consumer protection laws, the CPA "operate[s] on the local or 'intra-state' level" and targets practices "with primarily a local impact." John O'Connell, *Washington Consumer Protection Act – Enforcement Provisions and Policies*, 36 WASH. L. REV. 279, 284 (1961) (article by Attorney General upon passage of CPA).

C. This Court's Decision in *McKee* Rejected the "Headquarters State" Approach to Choice of Law.

This Court's most recent choice of law decision shows that, in contrast to the decision below, this Court follows the approach taken generally by courts across the country. Although the Court in *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008), addressed choice of law for contract issues, its reasoning squarely supports the mainstream view rejecting the "headquarters state" theory.

In *McKee*, the Washington consumer's contract contained a clause choosing the law of New York, AT&T's home state. *Id.* at 383. In deciding whether to enforce that clause, the Court first had to decide

which state's law would govern ***absent*** the contractual choice of law. *Id.* at 384-85. Citing Restatement § 188, the Court wrote:

> Courts weigh the relative importance to the particular issue of (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance of the contract, (d) the location of the subject matter of the contract, and (e) the domicile, residence, or place of incorporation of the parties. Here, Washington is the place of contracting, the place of negotiation (what little there was), the place of performance, the location of the subject matter, and the residence of one of the parties. New York's only tie to this litigation is that it is the state of incorporation of AT&T.

164 Wn.2d at 384-85. Applying these factors (which resemble the factors that the Restatement applies to tort claims), this Court ruled that Washington law – the law of the consumers' home state, not the law of the defendant's headquarters state – governed. *See also In re Detwiler*, 2008 WL 5213704, at *1 (9th Cir. Dec. 12, 2008) (unpub.) (applying *McKee*; Florida law governed consumer dispute because Florida was "the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the residence of one of the parties"; "[t]hat T-Mobile is headquartered in Washington is the only fact tying Washington to this litigation").

III. CONCLUSION

For these reasons, the Chamber urges this Court to grant review.

RESPECTFULLY SUBMITTED this 17th day of February, 2009.

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