

CLASS ACTION

**Washington Supreme Court Restricts
Nationwide Class Actions in Washington
Courts**

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Breaking Developments In Class Action Law

The Washington Supreme Court published its hotly-contested 5 to 4 decision in *Schnall v. AT&T Wireless Services, Inc.* on January 21. The decision will make it more difficult for plaintiffs to obtain certification of a nationwide class action in Washington state court, and its interpretation of the Washington Consumer Protection Act ("CPA") should further hamper plaintiffs' efforts to bring CPA claims as a class action.

The case arose from AT&T's practice of billing customers for a charge assessed against AT&T by the Federal Communications Commission ("FCC"). The plaintiffs alleged that they were misled because this charge was not included in advertised rates or explained in billing statements. They brought claims for breach of contract and violation of the CPA. The trial court denied class certification, but the Court of Appeals reversed. On review, the Supreme Court held that the trial court's decision to deny certification was proper, at least with respect to potential class members outside of Washington. The Court's opinion addressed three main issues: (1) the effect of a choice-of-law clauses on class certification, (2) the CPA's applicability to conduct and injury occurring outside Washington, and (3) the interplay between the CPA's causation requirement and class certification.

Choice-of-Law Clauses. All of AT&T's wireless service contracts contained a choice-of-law clause that required disputes arising from the contract to be decided under the law of the state in which the contract was made. After concluding that the clauses were enforceable, the Court then considered their effect on nationwide class certification. The Court recognized that there were significant differences in the contract law in the various states and, therefore, the plaintiffs could not show that common legal and factual issues would predominate over individual issues. The Court rejected the Court of Appeals' suggestion that subclasses and master's hearings could "sort out the morass" of addressing variations in state law. Finally, the Court concluded that a nationwide class action was not a superior method of adjudication since the sheer number of AT&T customers in each of the 50 states made statewide class actions a viable alternative.

Extra-Territorial Reach of the CPA. The Court then considered whether the CPA could be enforced by non-residents for acts occurring outside of Washington. With emphasis on the

statute's limitation that it apply only to trade or commerce "affecting the people of the state of Washington," the Court ruled that a plaintiff must show that the unfair or deceptive act affected residents of Washington. Thus, despite the fact that AT&T is headquartered in Washington, the Court concluded that the CPA would not apply to conduct affecting the citizens of another state. Indeed, the Court suggested, although it limited its holding to the particular facts of the case, that only Washington residents would have standing to bring an action under the CPA.

Statewide Certification of CPA Claims. Lastly, the Court considered whether class certification was proper for Washington-only CPA plaintiffs. The Court began by noting that its prior precedents required CPA plaintiffs to prove that the unfair or deceptive act was a "but for" cause of their injuries, and that causation could be established in the absence of reliance. Nevertheless, the Court suggested that a showing of individual reliance will almost always be necessary in *misrepresentation* cases, making class certification inappropriate. In the words of the dissent, the majority's causation analysis "creates an individual issue that will predominate over the class issues ... in every CPA misrepresentation class action in the future." The Court was careful to note, however, that in an *omission* case, proof of causality could be shown on a generalized basis without individual reliance. The Court remanded the case to the trial court to consider statewide certification under these standards.

In summary, the *Schnall* decision is favorable to companies subject to class action litigation in Washington courts. The decision will make it much more difficult for plaintiffs to bring nationwide class action suits generally, and impossible to do so under the CPA. Just as significant, the decision deals a major blow to plaintiffs seeking statewide class certification in CPA cases as well, at least where the unfair or deceptive act is an affirmative misrepresentation. As a consequence, it seems likely that would-be class action plaintiffs will increasingly characterize their CPA claims as omissions, rather than misrepresentations, in order to avoid proof of individual reliance and increase the prospect of certification.

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