2012 WL 6761791 (Wash.Super.) (Trial Order)
Superior Court of Washington.
King County

Sandy JUDD, Tara Herivel, and Columbia Legal Services, for themselves, and on behalf of all similarly situated persons, Plaintiffs,
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and T-Netix, Inc., Defendants.

No. 00-2-17565-5 SEA.
February 23, 2012.

Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification

Beth M. Andrus, Judge.

CLASS ACTION

I. INTRODUCTION

This matter came before the Court on a motion for class certification filed by Plaintiffs Sandy Judd, Tara Herivel, and Columbia Legal Services. Plaintiffs allege that they received inmate-initiated collect phone calls from Washington Department of Corrections (DOC) facilities that lacked audible rate disclosures required by the Washington Utilities & Transportation Commission (WUTC) in violation of the Consumer Protection Act (CPA), RCW ch. 19.86. Plaintiffs seek to represent a class of Washington residents who received collect calls from prison inmates from one of 16 DOC facilities between June 20, 1996 and December 31, 2000.

For the reasons set forth below, the Court finds that class certification is not warranted for the claims against T-Netix, but is warranted for the claims against AT&T, and that the class definition should be narrower than proposed by Plaintiffs.

The Court will certify the following two subclasses of claimants against Defendant AT&T only as defined below.

II. MATERIALS CONSIDERED BY COURT

The Court considered the following materials as well as oral argument of counsel on January 27, 2012:

A. *Plaintiffs' Submissions*

1. Plaintiffs' Motion For Class Certification, dkt. #265;

2. Declaration of John Midgley Re: Motion For Class Certification, dkt. #266;

3. Declaration of Richard E. Spoonemore Re: Motion For Class Certification, dkt. #267;

4. Declaration of Chris R. Youtz Re: Motion For Class Certification, dkt. #268

5. Plaintiffs' Consolidated Reply In Support Of Motion For Class Certification, dkt. #427;

6. Declaration of Maureen Janega In Support Of Motion For Class Certification, dkt. #428;

7. Declaration of Paul Wright In Support Of Motion For Class Certification, dkt. #429;

8. Declaration of Richard E. Spoonemore Re: Reply In Support Of Class Certification, dkt. #430;

9. Plaintiffs' Response to AT&T's Objections, dkt. #434;

10. Declaration of Richard E. Spoonemore Re: Response to AT&T's Objections, dkt. #435;

11. Declaration of Richard E. Spoonemore in Support of Plaintiffs' Response to T-Netix's Motion for Summary Judgment (still not yet filed with clerk).

B. *AT&T's Submissions*

1. AT&T's Opposition to Plaintiff's Motion For Class Certification, dkt. #416;

2. AT&T's Objection To The Declarations Of Richard Spoonemore, Maureen Janega, and Paul Wright, dkt. #432;

3. Declaration of Bradford J. Axel In Support Of AT&T's Opposition to Plaintiff's Motion For Class Certification, dkt. #433;

4. AT&T's Surreply in Opposition to Plaintiffs' Motion For Class Certification, dkt. #445;

5. Declaration of Shelley M. Hall In Support Of AT&T's Surreply on Motion for Class Certification, dkt. #446.

C. *T-Netix's Submissions*

1. T-Netix, Inc. Opposition to Plaintiffs' Motion for Class Certification, dkt. #417A;

2. Declaration of Patrick O'Donnell In Support Of T-Netix's Opposition to Plaintiffs' Motion For Class Certification, dkt. #417B;

3. Declaration of Dan Gross In Support Of T-Netix, Inc.'s Opposition to Plaintiffs' Motion for Class Certification, dkt. #417D;

4. Declaration of Dion Borgmann In Support Of T-Netix, Inc. Opposition to Plaintiffs' Motion for Class Certification, dkt. #417E;

5. Declaration of Duncan C. Turner In Support Of T-Netix, Inc. Opposition to Plaintiffs' Motion For Class Certification, dkt.

#417F;

6. T-Netix, Inc.'s Joinder in AT&T's Objections To The Declarations Of Richard Spoonemore, Maureen Janega, and Paul Wright, dkt. #436.

III. DISCUSSION

A. Inmate Calls from DOC Facilities

In 1992, AT&T entered into a contract with DOC to provide telecommunications services and equipment to various inmate correctional institutions and work release facilities in Washington. The DOC contract authorized AT&T to subcontract with three local exchange carriers, Verizon, Qwest and CenturyTel (known as "LECs"), for the provision of both local and intraLATA telephone and operator service at specified DOC facilities.

The DOC contract also authorized AT&T to subcontract with a fourth LEC, PTI, to provide telephone and operator service for local calls at five specified DOC facilities: Clallam Bay Corrections Center, Washington Correction Center for Women at Purdy, Olympic Corrections Center, Pine Lodge Pre-Release and Coyote Ridge (hereafter referred to as "PTI Facilities"). In AT&T's 1992 subcontract with PTI, AT&T agreed to "carry and pay commissions on all operator-assisted and sent-paid intraLATA calls originating from correctional facilities located in PTI territory in the State of Washington."

In February 1997, AT&T and DOC executed Amendment No. 3 to the 1992 DOC contract in which the subcontracting relationship with PTI was terminated and T-Netix became a "station provider" at the PTI Facilities.

Inmates in DOC facilities were permitted to make only collect phone calls from the public telephones to which they were given access. AT&T was responsible under the DOC contract for implementing a system of live or mechanical operator announcements for all personal calls coming from inmates that the call was coming from a prison inmate, that it was being recorded, and that it may have been monitored or intercepted.

B. Regulatory Framework Relating to Collect Calls

After the break-up of the Bell System in the 1980s, the Washington legislature enacted statutes to protect consumers receiving collect telephone calls. In 1988, the Washington Legislature found that a growing number of companies were providing telecommunications services without disclosing the rates to be charged for these services. RCW 80.36.510. It determined that "provision of these services without disclosure to consumers is a deceptive trade practice." *Id.*

The legislature directed the WUTC to promulgate rules to require any telecommunications company operating with an "alternate operator services company" (now referred to by the parties as "operator services provider" or "OSP") to assure appropriate disclosure to consumers and the rate for such services. RCW 80.36.520.

In 1991, the WUTC promulgated a rule requiring OSPs to make certain rate disclosures to consumers:

> The [OSP] shall immediately, upon request and at no charge to the consumer, disclose to the consumer:
>
> (A)A quote of the rates or charges for the call, including any surcharge;
>
> (B) The method by which the rates or charges will be collected; and

(C)The methods by which complaints about the rates, charges, or collection practices will be resolved.

Former WAC 480-120-141(5)(a)(iv) (1991). This rule was revised in 1999 when the WUTC made the disclosure requirement more specific:

> Verbal disclosure of rates. Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line. This message must precede any further verbal information advising the consumer how to complete the call, such as to enter the consumer's calling card number. This rule applies to all calls from pay phones or other aggregator locations, including prison phones, and store-and-forward pay phones or "smart" telephones. After hearing an OSP's message, a consumer may waive their rights to obtain specific rate quotes for the call they wish to make by choosing not to press the key specified in the OSP's message to receive such information or by hanging up. The rate quoted for the call must include any applicable surcharge. Charges to the user must not exceed the quoted rate.

Former WAC 480-120-141(2)(b) (1999).

C. Plaintiffs' CPA Claim

Between June 20, 1996 and December 31, 2000, Judd, Herivel, and Columbia Legal Services received collect phone calls from inmates at certain Washington state prisons. They have testified that they were never advised how to obtain a rate quote for any of the collect calls they received from inmates and that this failure constituted a violation of both versions of the WUTC rate disclosure regulation.

After lengthy pre-trial motions with this Court, multiple hearings before the WUTC, and several appeals to the Court of Appeals for Division One and the Washington Supreme Court, the parties are before this Court seeking certification of a class to prosecute this CPA claim. Plaintiffs seek, on behalf of a class, the recovery of presumptive statutory damages under RCW 80.36.530.

RCW 80.36.530 provides:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, 80.36.520, or 80.36.524 constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. Acts in violation of RCW 80.36.510, 80.36.520, or 80.36.524 are not reasonable in relation to the development and preservation of business, and constitute matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. It shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

(Emphasis added.) The parties disagree whether this statute requires a CPA plaintiff to prove causation under *Hangman*

Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986) if the only recovery requested is the presumed statutory damages.

Plaintiffs contend that if they prove that AT&T or T-Netix violated the WUTC disclosure regulation, they need not prove that the Defendants' actions "caused" any injury to any member of the putative class. AT&T and T-Netix contend that a violation of a WUTC disclosure regulation would only establish the existence of an unfair or deceptive act affecting the public interest and a presumed injury. They argue that each claimant must still establish that but for the lack of a rate disclosure, he or she would not have accepted the collect call.

In *Hangman Ridge,* the Supreme Court identified five elements that a plaintiff must prove in order to prevail in a private CPA action: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) which affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) causation. 105 Wn.2d at 784-85. In that case, the Supreme Court discussed the concept of a "per se CPA violation" and concluded that it was for the legislature, and not for courts, to define the relationship between any statute and the CPA. *Id.* at 787.

In *Anderson v. Valley Quality Homes, Inc.,* 84 Wn. App. 511, 928 P.2d 1143 (1997), the Court of Appeals for Division III held that if the legislature passes a statute making the violation of certain regulations a violation of the CPA, the plaintiff will be automatically entitled to CPA remedies without having to establish a public interest impact. *Anderson* does not address the exact issue presented here because in that case, the plaintiff was found to have established causation as a matter of fact after trial.

The legislature did not state that a violation of the WUTC disclosure regulation "is a per se violation of the CPA," probably because it was instructed by the Supreme Court in *Hangman Ridge* to be more specific in explaining the relationship between a piece of legislation and the CPA. *See Hangman Ridge,* 105 Wn.2d at 792 ("The term 'per se violation' is ... imprecise."). In RCW 80.36.530, the legislature explicitly declared that the prohibited conduct is an unfair or deceptive trade practice in commerce that affects the public interest for which damages are to be "presumed" at a certain amount.

Did the legislature intend for consumers alleging violations of the WUTC regulation to prove that the prohibited conduct caused them to incur damage? The Court concludes that the Plaintiffs have the more persuasive statutory interpretation in this case and that both causation and injury are to be presumed if the unlawful conduct is proved at trial.

First, the Supreme Court addressed legislative intent in promulgating RCW 80.36.530 in *Judd v. AT&T,* 152 Wn.2d 195, 95 P.3d 337 (2004). It concluded that "the legislature intended a violation of the WUTC regulations promulgated pursuant to section.520 to constitute a violation of the CPA." *Id.* at 203. The Supreme Court's discussion of the legislative intent supports Plaintiffs' interpretation.

Indeed, when the legislature originally passed the statute in 1988, the provision explicitly stated as follows:

> In additional to the penalties provided in this title, a violation of RCW 80.36.510 or 80.36.520 constitutes a violation of chapter 19.86 RCW, the consumer protection act. It shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

1988 Wash. Sess. Laws ch. 91, § 3 (emphasis added). This, too, strongly suggests that the legislature intended courts to presume both causation and injury.

The legislature modified RCW 80.36.530 in 1990 to its current language. *See* 1990 Wash. Sess. Laws ch. 247, § 4. But the only explanation for the change is a comment in a February 23, 1990 Senate Bill Report to HB 2526, which states:

"Technical references to applying the Consumer Protection Act are corrected." *See* Senate Bill Report 2526 (1989-90), An Act Relating to Registration of Telecommunications Companies, found at *http:// search.leg.wa.gov/advanced/3.0/main.asp.*

RCW 80.36.540, known as the Washington Unsolicited Facsimile Act (or "WUTA"), passed in the same session as the 1990 amendments to RCW 80.36.530, uses almost identical language:

> The unsolicited transmission of telefacsimile messages promoting goods or services for purchase by the recipient is a matter affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. The transmission of unsolicited telefacsimile messages is not reasonable in relation to the development and preservation of business. A violation of this section is an unfair or deceptive act in trade or commerce for the purpose of applying the consumer protection act, chapter 19.86 RCW. Damages to the recipient of telefacsimile messages in violation of this section are five hundred dollars or actual damages, whichever is greater.

RCW 80.36.540(5). The legislative history associated with this statute indicates that the Senate proposed the language found in the first three sentences because it believed that it was "necessary to bring a violation of the act under the Consumer Protection Act." *See* House Bill Report, EHB 2299 (1989-90), Regulating Telefacsimile Messages for Commercial Solicitation, February 6, 1990, found at *http://search.leg.wa.gov/advanced/3.0/main.asp.*

This legislative history strongly suggests to this Court that the amendment to RCW 80.36.530 occurred to ensure that courts understood the relationship between that provision and the CPA, given the directive by the Supreme Court in *Hangman Ridge* to be more explicit in describing the relationship to the CPA.

In *Kavu v. Omnipak Corp.,* 246 F.R.D. 642, 645 (W.D. Wash. 2007), a federal district court interpreted this provision to mean that "a violation of the WUTA is also a violation of the CPA" and certified a state-wide class under WUTC and the CPA. In doing so, the court noted that because the damages sought were statutory, there would be no need for a complex, individual determination of damages. 246 F.R.D. at 649. The logical inference to be drawn from this decision is that the federal court interpreted the statute to presume both causation and the amount of damages.

The Court has found only two other statutes in which the legislature used the same "presumed damages" language found in RCW 80.36.530. RCW 19.130.060, the Telephone Buyers' Protection Act, makes a violation of that chapter a violation of the CPA. The provision goes on to state: "It shall be presumed that damages to the consumer are equal to the purchase price of any telephone equipment sold in violation of this chapter up to one hundred dollars. Additional damages must be proved." Similarly, RCW 80.36.400 prohibits commercial solicitations using automatic dialing devices. Subsection (3) provides that a violation of the statute is a CPA violation. Like RCW 80.36.530, it provides: "It shall be presumed that damages to the recipient of commercial solicitations made using an automatic dialing and announcing device are five hundred dollars." There is no case law interpreting these two statutes, but both were passed before *Hangman Ridge.*

Finally, in other contexts, our Supreme Court has consistently held when legislation treats an award as a penalty, it is not necessary for a claimant to show actual damages to receive the statutory award. *See, e.g., Amren v. City of Kalama,* 131 Wn.2d 25, 36, 929 P.2d (1997) (claimant may recover statutory penalty for city violation of Public Disclosure Act without showing actual injury).

For the foregoing reasons, the Court concludes that RCW 80.36.530 explicitly allows Plaintiffs and putative class members to recover the statutory damages without having to make an individualized showing of actual injury.

B. CR 23(a) Requirements

Class certification is governed by CR 23. CR 23 is liberally interpreted because the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and frees the defendant from the harassment of identical future litigation. *Moeller v. Farmers Ins. Co. of Washington,* 173 Wn.2d 264, 267 P.3d 998, 1004 (2011). Trial courts have been instructed to err in favor of certifying a class since the class is always subject to modification or decertification by that court. *Weston v. Emerald City Pizza LLC,* 137 Wn. App. 164, 168, 151 P.3d 1090 (2007).

Under CR 23(a), a plaintiff must establish numerosity, commonality, typicality, and fair and adequate protection of class interests by the class representative.

1. Numerosity

The Plaintiff has established, and Defendants do not dispute, that the proposed class meets the numerosity requirement.

2. Commonality

Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury and that their claims depend on a common contention. *Wal-Mart Stores, Inc. v. Dukes,* ___ U.S. ___, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). The common contention "must be of such a nature that it is capable of classwide resolution." *Id.* "The capacity of a classwide proceeding to generate common *answers"* likely to resolve the dispute is what matters to class certification. *Id.*

Under Washington precedent, there is a low threshold to satisfy the commonality requirement. *Smith v. Behr Process Corp.,* 113 Wn. App. 306, 320, 54 P.3d 665 (2002). There need be only a single issue common to all members of the class. *Id.*

Plaintiffs have met this requirement. They contend that AT&T and T-Netix systematically failed to make rate disclosures to collect call consumers throughout the class period. Defendants argues that the Plaintiffs and putative class members did not suffer the same injury because the computer system was programmed to give rate disclosures to consumers and did in fact give rate disclosures to most call recipients. But this is the common factual dispute that goes to the heart of the Plaintiffs' claim. If Plaintiffs cannot establish that there was a system-wide failure to make rate disclosures, then they will not prevail on their claim under RCW 80.36.530 and the CPA.

For this reason, the commonality requirement has been met.

2. Typicality

"The claims of the representative plaintiffs must be typical of the class claims." *Hansen v. Ticket Track, Inc.,* 213 F.R.D. 412, 415 (W.D. Wash. 2003). "The test of typicality is whether (1) other members have the same or similar injury, (2) the action is based on conduct which is not unique to the named plaintiffs, and (3) other class members have been injured by the same course of conduct." *Id.*

The Court finds that the Plaintiffs' claims as to interLATA collect calls from the DOC facilities covered by the 1992 DOC Agreement and their claims as to intraLATA calls from the five PTI Facilities are typical of the class claims. Plaintiffs' claims arise from the same alleged course of conduct (the systematic failure to provide rate quote information to any call

recipients) and are based on the same legal theories. Typicality has been established as to these calls.

The Court agrees with Plaintiffs that Columbia Legal Services is not an atypical plaintiff because it could have recovered the cost of collect calls from opponents in lawsuits it successfully prosecuted or it may have had a special agreement with AT&T for prisoner collect calls. Columbia Legal Services reasonably treated the cost of inmate collect calls as overhead that was not segregated for purposes of cost recovery in litigation. The Court agrees with Plaintiffs that, given the statutory language of RCW 80.36.530, a failure to mitigate damages defense is not available. Also, there is no evidence before the Court that Columbia Legal Services negotiated some special rate for collect calls.

Plaintiffs also allege that members of the putative class received local collect calls from the five PTI Facilities and that either AT&T or T-Netix acted as OSP for these calls. The Court finds that the Plaintiffs have not established that claims as to local calls from the five PTI facilities are typical of the class claims because the Plaintiffs have not demonstrated that any of them received local collect calls from inmates during the class period. The Court agrees with T-Netix that Plaintiffs may not act as class representatives for claims that are unrelated to the Plaintiffs' cause of action. Given that Plaintiffs have presented no evidence that any of them received local collect calls from the PTI Facilities during the class period, the Court will not certify a class of claimants for local collect calls or a class of claimants for any claims against T-Netix.

3. Adequacy

"To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.*

The Defendants sole challenge to adequacy is the lack of standing discussed above. The Court finds that the Plaintiffs are otherwise adequate class representatives and counsel is experienced and willing to prosecute this action on behalf of the class.

C. CR 23(b)(3) Requirements

A class action may be maintained under CR 23(b)(1), (2) or (3). Here, Plaintiffs seek to maintain a class action under CR 23(b)(3), governing actions for damages. CR 23(b)(3) requires the Court to find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods of adjudication. *Sitton v. State Farm Mut. Auto Ins. Co.,* 116 Wn. App. 245, 253, 63 P.3d 198 (2003). To determine if the predominance requirement is met, the Court will inquire into whether there is a " 'common nucleus of operative facts' " to each class member's claim. *Id.* at 255 (quoting *Behr,* 113 Wn. App. at 323). To determine whether class action is superior to other available methods, several factors are considered: manageability; conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities. *Id.* at 256-57.

The Court concludes that the questions of law and fact common to the members of the class predominate over any questions affecting individual members. The common questions of fact and law are:

1. What disclosures were required under former WAC 480-120-141(5)(a)(iv) (1991)?

2. What disclosures were required under former WAC 480-120-141(2)(b) (1999)?

3. Did AT&T implement any protocol to automatically provide rate information to recipients of interLATA collect calls from DOC facilities and recipients of intraLATA collect calls from the PTI Facilities with any disclosure about?

4. If not, did this constitute a violation of any WUTC regulation?

5. If AT&T violated WUTC regulations, what statutory damages, if any, flow from such a finding?

The Court agrees with Plaintiffs that these questions predominate over any questions affecting individual members of the class. If a trier of fact finds that AT&T and T-Netix had implemented a protocol for automatically providing rate information to collect call recipients, then Plaintiffs will not have proven their claim and there will be no need to determine whether any individual call recipient actually heard the recording AT&T and T-Netix contend they implemented for these calls.

D. Appropriate Class Definition

The Plaintiffs' proposed class definition is too broad given the Court's rulings on summary judgment and in this order. The Court hereby orders that the two classes of claimants shall be certified to prosecute claims against Defendant AT&T only:

1. *InterLATA Call Recipients:* Any person who, between June 20, 1996 and December 31, 2000, accepted one or more intrastate, interLATA collect calls from an inmate housed in one of the following Washington Department of Corrections facilities:

Washington State Reformatory, Monroe

Twin Rivers Corrections Center

Indian Ridge Corrections Center, Arlington

Special Offender Center, Monroe

Clallam Bay Corrections Center

Washington Correction Center for Women, Purdy

Olympic Corrections Center

Pine Lodge Pre-Release

Coyote Ridge

Washington Corrections Center, Shelton

McNeil Island Penitentiary

Washington State Penitentiary, Walla Walla

Airway Heights

Tacoma Pre-Release

Cedar Creek Corrections Center

Larch Corrections Center

> 2. *IntraLATA Call Recipients:* Any person who, between June 20, 1996 and December 31, 2000, accepted one or more intrastate, intraLATA collect calls from an inmate housed in one of the following Washington Department of Corrections facilities:

Clallam Bay Corrections Center

Washington Correction Center for Women, Purdy

Olympic Corrections Center

Pine Lodge Pre-Release

Coyote Ridge

E. Appointment of Class Counsel

The Court appoints the law firm of Sirianni Youtz Spoonemore, and Chris R. Youtz and Richard Spoonemore as class counsel and names Plaintiffs Columbia Legal Services, Tara Herivel, and Sandy Judd as the class representatives.

Class counsel shall draft and submit for Court approval a form of notice(s) within 21 days of this Order. The proposed form(s) of notice shall comply with the requirements of CR 23(a)(2), including the right to opt out of the action. To the extent not already produced, Defendant AT&T is directed to produce to class counsel any information it has in its possession or under its control that may identify class members in order to ensure the best notice practicable under the circumstances. Class counsel shall detail the proposed method of notice (including any publications in which class counsel proposed to publish notice) for approval by the Court at the same time it submits the sample form(s) of notice.

III. CONCLUSION

Based on the foregoing, it is hereby ORDERED:

1. Plaintiffs' motion to certify the class is GRANTED in part and DENIED in part.

2. Two subclasses are certified as defined in this order but only to prosecute claims against Defendant AT&T.

3. Plaintiffs are approved as the class representatives.

4. Plaintiffs' attorneys are approved as class counsel.

It is so ORDERED this 23nd day of February, 2012.

\ s\ (E-FILED)

Judge Beth M. Andrus

King County Superior Court