No. 37471-8

**COURT OF APPEALS, DIVISION III**
**OF THE STATE OF WASHINGTON**

PAUL LEWIS,

Appellant,

v.

VERNICE ZANCO AND FRED ZANCO, d.b.a. ZANCO PROPERTIES and UNIVERSITY SOUTH AND EAST, LLC,

Respondents.

# AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

Yesica Hernandez, WSBA #48399
Assistant Attorney General
Wing Luke Civil Rights Division
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Other Authorities**

## I. INTRODUCTION

The Washington State Attorney General's Office enforces the Consumer Protection Act, RCW 19.86, on behalf of the people of the State of Washington. As such, it has a significant interest in the correct interpretation of the Consumer Protection Act's broad prohibition against "unfair or deceptive acts or practices in the conduct of *any* trade or commerce." RCW 19.86.020 (emphasis added). That includes the proper construction of any exceptions to the statute's reach, including judicially created exceptions like the one set forth in *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985).

At issue in *State v. Schwab* was whether violations of the Residential Landlord-Tenant Act, RCW 59.18, also constitute violations of the Consumer Protection Act. The Court determined they do not. Despite that narrow holding, Respondents Vernice Zanco, Fred Zanco, and University South and East, LLC, ask this Court on appeal to construe *Schwab* as providing Consumer Protection Act immunity to landlords for *any* dispute involving a "landlord-tenant problem." There is no basis to so broaden *Schwab*. To the contrary, in light of the language in *Schwab*, the underlying dispute in that case, the Residential Landlord-Tenant Act's legislative history, and the liberal construction afforded to the Consumer Protection Act, the Attorney General respectfully asks this Court to reject the invitation

to broaden *Schwab*. Instead, the Court should confirm that the *Schwab* exception is a narrow one, and only precludes Consumer Protection Act claims where the conduct at issue is directly addressed and redressed by the Residential Landlord-Tenant Act.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae is the Attorney General of Washington. The Attorney General is the legal adviser to the State of Washington. RCW 43.10.030. Amongst other duties, the Attorney General is responsible for protecting the public from unfair and deceptive practices by enforcing the Consumer Protection Act (CPA). RCW 19.86.080.

Given this Office's enforcement role, the Attorney General has a strong interest in ensuring the correct interpretation of any limitation to the scope of claims available under the CPA. That interest is especially significant in light of the Attorney General's enforcement work in the residential housing context. In that sphere, the Attorney General's Office routinely brings enforcement actions that include CPA claims. *See* Civil Rights Division Cases, "Housing" Sub-Heading, Wash. State Office of the Att'y Gen., https://www.atg.wa.gov/cases (last visited Dec. 10, 2020). Most recently, the Attorney General's office has initiated two actions against residential housing providers who violated Governor Inslee's eviction moratorium, Emergency Proclamation 20-19, an emergency measure

enacted, in part, to ensure housing stability during the COVID-19 pandemic. *See id*. (case entries and links to complaints in *State v. JRK Residential Grp., Inc.*, Case No. 20-2-05933-7 (Pierce Cnty. Super. Ct., filed Apr. 20, 2020) and *State v. Whitewater Creek, Inc.*, Case No. 20-2-02271-32 (Spokane Cnty. Super. Ct., filed Aug. 20, 2020)). Both actions include CPA claims to address the unfair and deceptive rent-collection tactics used by residential housing providers during a public health and economic emergency—unlawful practices that are not covered by the RLTA.

The State has also pursued CPA claims in connection with housing discrimination matters. These enforcement actions include suits against residential housing providers who advertised and applied criteria that restricted housing rights on the bases of race, religion, disability, veteran status, and source of income—which the State contends are unfair and deceptive practices prohibited by the CPA. *See id.* (case entries and links to complaints, consent decrees, and/or assurances of discontinuance in *State v. Coho Real Estate Grp., LLC*, Case No. 16-2-26931-1 (King Cnty. Super. Ct, filed Nov. 3, 2016); *State v. Marble Cmty. Landowners Ass'n*, Case No. 20-2-00258-33 (Stevens Cnty. Super. Ct., filed Oct. 5, 2020); *State v. Realty Mart Prop. Mgmt., LLC*, Case No. 17200677-1 (Spokane Cnty. Super Ct.,

filed Feb. 23, 2017); and *State v. Celski & Assocs., Inc.*, Case No. 17-2-303255-4 (Benton Cnty. Super. Ct., filed Jan. 17, 2018)).

The State has also pursued CPA actions to enforce the rights of mobile home park tenants to avoid unfair and deceptive changes to their landlord-tenant relationship. *See* Press Release, Wash. State Office of the Att'y Gen., Attorney General sues Grant County mobile home landlord for sham sales used to evade city health and safety inspections — tenants live in poor conditions (Mar. 17, 2015).[1] That case involved, among other violations, the landlord's years-long avoidance of critically necessary maintenance on his rentals, including to plumbing and sanitation, electrical wiring hazards, heat and ventilation systems, and dangerous black mold conditions—achieved by requiring tenants to sign sham "purchase" agreements for the homes. *Id.* While at first blush these issues might seem redressable under the RLTA or its sister statute, the Manufactured/Mobile Home Landlord Tenant Act, RCW 59.20, the defendant's scheme to avoid the application of those statutes required that his unfair and deceptive conduct be addressed through other statutes, including the CPA. *See id.*

This matter, therefore, directly implicates the public interest. An improper and overbroad interpretation of *Schwab* threatens to preclude CPA

[1] Available at https://www.atg.wa.gov/news/news-releases/attorney-general-sues-grant-county-mobile-home-landlord-sham-sales-used-evade (last visited Dec. 10, 2020).

claims whenever a dispute involves a landlord and tenant, even where the RLTA does not directly, or adequately, address a landlord's challenged conduct. The Attorney General thus submits this amicus curiae brief in support of a proper interpretation of the limited exemption to CPA claims created in *Schwab*. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 207–09, 588 P.2d 195, 197–98 (1978) (the Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest).

## III. ISSUES ADDRESSED BY AMICUS

Whether the Washington Supreme Court's ruling in *Schwab* precludes CPA claims where the Residential Landlord-Tenant Act does not directly address a landlord's challenged practice(s) or does not provide an express remedy to a tenant for the landlord's engagement in the prohibited conduct.

## IV. STATEMENT OF THE CASE

The Attorney General's Office adopts Appellant's Statement of the Case, with which Respondents agreed save for two exceptions not material to the Attorney General's submission as amicus.

## V. ARGUMENT

The Washington Supreme Court's decision in *State v. Schwab* limits the availability of CPA claims only where a landlord's conduct results in a

direct violation of the RLTA *and* where the RLTA provides an express remedy. That *Schwab* only applies where a landlord's business practice is directly addressed and redressed by the RLTA is supported by *Schwab*'s language, the underlying dispute in *Schwab* itself, the RLTA's legislative history, and the liberal construction which must be afforded to the CPA.

### A. By Its Terms, *Schwab* Applies Only to "Violations" of the RLTA that Carry "Specific Remedies"

The first line of the *Schwab* opinion describes the specific (and only) issue addressed by the Court in that case: "whether violations of the Residential Landlord-Tenant Act of 1973 come under the Consumer Protection Act." 103 Wn.2d at 543, 693 P.2d at 109. In concluding they do not, the Court held that "violations of [the RLTA] do not *also* constitute violations of the Consumer Protection Act." *Id*. at 545, 693 P.2d at 110 (emphasis added). Violations cannot be double counted, according to the Court, because where the RLTA spells out "the respective rights and duties of residential tenants and landlords . . . in great detail," and also provides "specific remedies for . . . violations thereof," the proper mechanism to enforce those specific rights and duties is the RLTA. *Id*. at 550, 693 P.2d at 112. By its own terms, then, the *Schwab* exception is limited to residential rental practices within the "express purview of the [RLTA]," and for which the RLTA delineates "specific rights, duties, and remedies." *Id*. at 545, 551,

693 P.2d at 110, 113. By contrast, where an allegedly unfair or deceptive business practice occurs in the residential housing context, but is *not* addressed directly by the RLTA, *Schwab* does not apply and the CPA remains available as an enforcement mechanism.

Respondents appear to ask the Court to go much further, inviting the Court to extend *Schwab* to all cases touching, however indirectly, on "[r]esidential landlord-tenant problems." Resp'ts Br. at 4 (quoting *Schwab*, 103 Wn.2d at 545, 693 P.2d at 110). To do so ignores the very next line from *Schwab*—which Respondents themselves quote—limiting the exemption to matters within the "express purview" of the RLTA. *Id.* By expanding *Schwab* beyond its original holding, Respondents' proposed construction would provide blanket CPA immunity for landlords with unfair or unscrupulous business practices, as long as they structured their practices to avoid the discrete terms of the RLTA. In addition to producing this absurd result, Respondents' approach would be at odds with the *Schwab* Court's acknowledgment that the RLTA directly addressed and redressed the landlord's conduct at issue in that matter, the Court's analysis of the RLTA's legislative history, and the principle that judicially created exceptions to the CPA must be construed narrowly.

## B. The Narrow Scope of the Court-Created Exception in *Schwab* Is Supported by the Underlying Dispute in that Matter

In *Schwab*, the Court acknowledged that the RLTA directly addressed and redressed the landlord's business practice at issue. *See* 103 Wn.2d at 551, 693 P.2d at 113 (noting that tenants "had the right to themselves proceed directly against the landlord and recover their actual damages as well as reasonable attorneys' fees under the protective provisions of [the RLTA]."). Specifically, the underlying dispute involved a landlord's attempt to absolve himself of his duties as a landlord by entering into rental agreements where, in exchange for low rent, his tenants agreed to accept their rental units "as is" and not rely on the landlord to carry out any repairs or provide landlord services. *Id*. at 544, 693 P.2d at 109. At the time the landlord required the "as is" leases, the RLTA squarely prohibited them by barring landlords from waiving any section of the RLTA, including the section delineating a landlord's duties, and prohibiting any lease provision requiring tenants to waive their rights or remedies under the RLTA. *See* Laws of 1973, 1st Ex. Sess., ch. 207, § 23(1)–(2) (codified as amended at RCW 59.18.230(1)–(2)). In addition to addressing the specific leases at issue in *Schwab*, the RLTA included a corresponding remedy that allowed tenants to recover their actual damages, and reasonable attorneys' fees, if their landlord deliberately used a rental

agreement containing provisions prohibited by the RLTA. Laws of 1973, 1st Ex. Sess., ch. 207, § 23(3) (codified as amended RCW 59.18.230(3)). The landlord's conduct in *Schwab* was thus directly addressed and redressed by the RLTA, both of which were necessary components to the holding that an identical, duplicate claim under the CPA was unavailable. *See* 103 Wn.2d at 545, 693 P.2d at 110.

### C. The Narrow Scope of the Court-Created Exception in *Schwab* Is Also Supported by the RLTA's Legislative History

The Court's analysis of the RLTA's legislative history further supports recognizing the limited scope of the exception to CPA claims created by *Schwab.* In particular, the Court emphasized that many duties of landlords and tenants are "spelled out in great detail" and that the statute provides "an array of specific remedies" that are tethered to the specific rights and duties delineated therein. *Schwab*, 103 Wn.2d at 550–51, 693 P.2d at 112–13. The RLTA's specific protections and remedies thus, in part, led the Court to reject the inclusion of RLTA violations within the CPA's ambit. *See id*. at 551; 693 P.2d at 113 (citing the RLTA's comprehensive nature and delineation of specific rights, duties, and remedies as the reason for declining to expand the RLTA's coverage "so as to include a Consumer Protection Act cause of action"). The Court's focus on the Legislature's decision to reject an amendment to the RLTA that would have made RLTA

violations *per se* CPA claims further supports the reading that *Schwab* only precludes square RLTA violations from forming the basis of CPA claims. *See id*. at 545, 551–52; 693 P.2d at 110, 113 (citing Senate's decision to reject a *per se* violation provision within the RLTA as evidence of Legislature's intent "that violations of [the RLTA] do not *also* constitute violations of the Consumer Protection Act") (emphasis added).

That the Court's ruling in *Schwab* does not preclude all landlord-tenant disputes from forming the basis of a CPA claim is further evidenced by the legislative development of the RLTA, including its delineation of discrete rights and obligations of tenants and landlords, along with the corresponding remedies available to each.

Since its passage in 1973, the RLTA has not only afforded tenants and landlords specific rights and duties, it has also provided specific, corresponding remedies in the event of a violation. For example, when the RLTA went into effect in 1973, at least six sections set forth specific rights for tenants. *See* Laws of 1973, 1st Ex. Sess., ch. 207, §§ 6, 23, 24, 28, 29, and 30 (codified as amended at RCW 59.18.060, .230, .240, .280, .290, and .300). At the time, these rights included a tenant's right to: (1) safe and sanitary housing (as evidenced by the specific duties imposed on a landlord); (2) a rental agreement devoid of provisions violative of public policy; (3) freedom from retaliation for seeking to vindicate their rights

under the RLTA; (4) ability to recover their security deposit; (5) freedom from self-help evictions; and (6) freedom from intentional utility shut-offs. Each of these specific rights was accompanied by specific remedies tenants could avail themselves of in the event a landlord violated these rights. *See* Laws of 1973, 1st Ex. Sess., ch. 207, §§ 7, 9, 10, 11, 12, 23(3)–(4), 25, 28, 29, and 30 (codified as amended at RCW 59.18.070, .090, .100, .110, .120, .230(3)–(4), .250, .280, .290(1), .300). The rights and remedies afforded to tenants under the RLTA were thus bound closely to discrete aspects (namely those related to ensuring safe, stable, and sanitary housing) of the landlord-tenant relationship.

Over time, amendments and additions to the RLTA have continued to enumerate specific rights and duties of both landlord and tenant, by addressing specific conduct of each and providing corresponding remedies. For example, in 1989 a new section was added to the RLTA to directly address the issue of landlords entering into rental agreements despite having notice that the rental property was condemned or otherwise unlawful to occupy. *See* RCW 59.18.085(1). In addition to directly prohibiting this conduct, the Legislature afforded tenants a specific remedy for a landlord's intentional violation of this prohibition. *See* RCW 59.18.085(2). Subsequent amendments to RCW 59.18.085 have likewise addressed specific problems that have become known to the Legislature by, for example, requiring

landlords who knew or should have known about conditions that violate building, housing, or other codes to pay relocation assistance to affected tenants. *See* RCW 59.18.085(3)(a)–(c). These new provisions came with corresponding remedies for tenants in the event a landlord fails to comply with their obligations. RCW 59.18.085(3)(e). Likewise in 1991, the Legislature added new sections to the RLTA to prohibit landlords from assessing certain fees, for example a fee to be placed on a waitlist to be considered for a rental unit or fees for the cost of tenant-screening reports. *See* RCW 59.18.253, .257. Again, these new provisions, which addressed specific conduct, included corresponding remedies in the event of a landlord's violation. *See* RCW 59.18.253(5) (formerly subsection (3)); RCW 59.18.257(3).

To this day, amendments and additions to the RLTA continue to address and redress specific conduct. *See, e.g.*, RCW 59.18.255 (prohibiting source of income discrimination and providing specific remedies for violations of this section; added in 2018); *also* RCW 59.18.610(1), (5) (allowing tenants to request permission to pay certain move-in costs in installments and providing specific remedy for landlord's failure to allow this; added in 2020).

The RLTA thus regulates specific, discrete acts within the landlord-tenant relationship, but does not purport to regulate every aspect

of the landlord-tenant relationship or a landlord's broader business practices. It makes good sense, therefore, that *Schwab* only precludes CPA claims where the RLTA directly addresses and redresses the precise conduct at issue. To conclude otherwise—that is, to hold that any dispute involving a landlord and tenant falls within the *Schwab* exception—is overbroad and would potentially leave tenants without recourse in the many situations where the Legislature has not addressed the specific business practice at issue. Thus, where a landlord's conduct is not directly addressed by the RLTA, tenants—or the Attorney General acting in the public interest—may seek redress through other statutes or the common law.

### D. The Limited Scope of the Court-Created Exception in *Schwab* Is Consistent with the Legislative Mandate that the CPA Be Construed Liberally and Any Exemptions Confined Narrowly

Finally, the narrow scope of the exception to CPA claims created by the Court in *Schwab* is consistent with the legislative mandate that the CPA be construed liberally. *See* RCW 19.86.920 ("To this end this act shall be liberally construed that its beneficial purposes may be served."). As the Court has remarked frequently in its CPA jurisprudence, "[t]here is no limit to human inventiveness" in the field of "unfair practices." *See, e.g.*, *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786, 295 P.3d 1179, 1187 (2013) (quoting *Panag v. Farmers. Ins. Co. of Wash.*, 166 Wn.2d 27, 48, 204 P.3d 885, 895 (2009)). "Even if all known unfair practices were specifically

defined and prohibited, it would be at once necessary to begin over again." *Id.* In light of this reality, "courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purpose of the CPA." *Id*. The CPA thus "shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163, 168 (1984). To give effect to the requirement of liberal construction, the Supreme Court has been explicit that CPA exceptions must be "narrowly confined." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364, 1370 (1991).

Consistent with the Legislature's intent that the CPA address the full scope of unfair or deceptive business practices, the Attorney General has brought CPA claims against residential housing providers where the specific landlord conduct at issue is not directly addressed or redressed by the RLTA. This has included actions against residential housing providers for violations of emergency proclamations enacted in response to the COVID-19 pandemic where housing providers used unfair and deceptive rent-collection tactics against economically distressed tenants during a public health and economic emergency. *See* Civil Rights Division Cases, "Housing" Sub-Heading, Wash. State Office of the Att'y Gen., https://www.atg.wa.gov/cases (last visited Dec. 10, 2020) (case entries and

links to complaints in *State v. JRK Residential Grp., Inc.*, Case No. 20-2-05933-7 (Pierce Cnty. Super. Ct., filed Apr. 20, 2020) and *State v. Whitewater Creek, Inc.*, Case No. 20-2-02271-32 (Spokane Cnty. Super. Ct., filed Aug. 20, 2020)).

The State has also brought CPA claims against residential housing providers who discriminate in advertising and tenant selection on the bases of race, religion, disability, or veteran status—all unfair, deceptive, and unlawful practices about which the RLTA is silent. *Id*. (case entries and links to complaints, consent decrees, and/or assurances of discontinuance in *State v. Coho Real Estate Group, LLC*, Case No. 16-2-26931-1 (King Cnty. Super. Ct., filed Nov. 3, 2016); *State v. Marble Cmty. Landowners Ass'n*, Case No. 20-2-00258-33 (Stevens Cnty. Super. Ct., filed Oct. 5, 2020); *State v. Realty Mart Prop. Mgmt., LLC*, Case No. 17200677-1 (Spokane Cnty. Super. Ct., filed Feb. 23, 2017); and *State v. Country Homes Realty, LLC*, Case No. 18-2-00336-3 (Spokane Cnty. Super. Ct., filed Jan. 26, 2018)).

The State has likewise brought litigation to remedy the unfair and deceptive conversion of leases to "purchase and sale" agreements, and to challenge efforts by a landlord to forego necessary health and safety repairs in order to save money. *See* Press Release, Wash. State Office of the Att'y Gen., Attorney General sues Grant County mobile home landlord for sham

sales used to evade city health and safety inspections — tenants live in poor conditions (Mar. 17, 2015); *also* Press Release, Wash. State Office of the Att'y Gen., Mattawa landlord to fix homes, pay about $500,000 in AG lawsuit over sham sales (Oct. 27, 2017).[2] In each of these cases, the RLTA did not address or redress the specific business practice at issue, did not provide complete relief, or both. Under *Schwab*, the State properly sought relief through the CPA.

Finally, the principle of narrow construction for judicially created exemptions to statutes applies to the *Schwab* exemption and supports its limited application. *See Wade's Eastside Gun Shop Inc. v. Dep't of Lab. & Indus.*, 185 Wn.2d 270, 282, 372 P.3d 97, 102 (2016) (holding "exemption created [by Washington Supreme Court] is narrow, and must remain that way"); *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651, 654 (2009) ("Like all judicially created exceptions, [an exception from the constitutional warrant requirement] is limited and narrowly drawn[.]"); *see also Brown v. Pro Football, Inc.*, 518 U.S. 231, 258, 116 S. Ct. 2116, 2131, 135 L. Ed. 2d 521 (1996) (Stevens, J., dissenting) (noting that statutory

[2] Available at https://www.atg.wa.gov/news/news-releases/attorney-general-sues-grant-county-mobile-home-landlord-sham-sales-used-evade (last visited Dec. 10, 2020) and https://www.atg.wa.gov/news/news-releases/mattawa-landlord-fix-homes-pay-about-500000-ag-lawsuit-over-sham-sales (last visited Dec. 10, 2020).

exemptions should be construed narrowly "and judicially crafted exemptions more narrowly still[.]").

In summary, *Schwab*'s language, the landlord conduct at issue in that case, the RLTA's legislative history, and the legislative mandate requiring a liberal construction of the CPA, all support construing narrowly the judicially created exemption to CPA claims set forth in *Schwab*.

## VI. CONCLUSION

For the foregoing reasons, the Attorney General of Washington respectfully requests that this Court reaffirm that the exemption to CPA claims created by *Schwab* is narrow and limited to those circumstances where (1) the conduct challenged is directly addressed by the RLTA; and (2) where an express remedy for the challenged conduct is provided by the RLTA.

RESPECTFULLY SUBMITTED this 11th day of December 2020.

ROBERT W. FERGUSON
Attorney General

Yesica Hernandez, WSBA #48399
Assistant Attorney General
Wing Luke Civil Rights Division
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
Yesica.Hernadez@atg.wa.gov