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2007 OCT -9 P 2:13 Nos. 80357-9 & 80366-8

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SUPREME COURT OF THE STATE OF WASHINGTON

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CLERK

RAJVIR PANAG, on behalf of herself and all others similarly situated,  
Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,  
a foreign insurance company, and CREDIT CONTROL SERVICES,  
INC., d/b/a Credit Collection Services, Petitioners

---

MICHAEL STEPHENS, on behalf of himself and  
all others similarly situated, Respondent,

v.

OMNI INSURANCE COMPANY, a foreign insurance company, and  
CREDIT CONTROL SERVICES, INC., d/b/a Credit Collection Services,  
Petitioner

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**RESPONDENTS RAJVIR PANAG'S & MICHAEL STEPHENS'  
ANSWER TO AMICI MEMORANDA**

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**FILED**  
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CLERK OF SUPREME COURT  
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## **I. IDENTITY OF RESPONDENTS**

Rajvir Panag, as an individual and the proposed class action representative, is the Respondent in Supreme Court Cause No. 80357-9.

Michael Stephens, as an individual and the proposed class action representative, is the Respondent in Supreme Court Cause No. 80366-8.

In the interest of judicial economy, Panag and Stephens file this single joint response to the two amici memoranda.

## **II. ISSUES PRESENTED**

Respondents adopt their respective previous statements of the issues presented.

## **III. STATEMENT OF THE CASE**

Respondents adopt their previous respective Statements of the Case.

## **IV. ARGUMENT**

Amicus ACA International (“ACA”) argues that review should be accepted “for the reasons articulated in the CCS and Farmers petitions for review.” ACA Br. at 2. Consequently, the ACA brief adds little that is either new or helpful.

ACA first alleges that the decision below is contrary to other Court of Appeals’ decisions, citing only two. This argument is without merit for at least two reasons. First, the controlling authority for CPA cases is the

Supreme Court's *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 719 P.2d 531 (1986) opinion. As long as the Court of Appeals' opinion here is consistent with *Hangman* – which it is – there is no purpose served by accepting review of this case. See, e.g., *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 386, 743 P.2d 832 (1987) “[S]ince *Salois*[<sup>1</sup>] and *Hangman Ridge* are decisions of this state’s highest court, they control over decisions from the divisions of this court.”).

Second, ACA’s assertion is just plain wrong as to its allegation of conflict. According to ACA, the “conflicting” cases are *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981)<sup>2</sup> and *Marsh v. General Adjustment Bureau, Inc.*, 22 Wn. App. 933, 592 P.2d 676 (1979). To begin with, it is notable that both of these decades-old Court of Appeals opinions pre-date by several years the seminal, instructive *Hangman*.<sup>3</sup>

In any event, contrary to ACA’s representation, these two cases did not create any sort of “adversary” exception to the CPA.<sup>4</sup> Rather, the

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<sup>1</sup> *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978).

<sup>2</sup> Although ACA contends the purported conflict is with cases of other Court of Appeals Divisions, *Green* is – just like the opinion below – a Division One case.

<sup>3</sup> Indeed, *Green* simply relied on *Marsh*, and *Marsh* in turn relied on the long-since discredited (on the relevant point) *Bowe v. Eaton*, 17 Wn. App. 840, 565 P.2d 826 (1977). See *Escalante*, 49 Wn. App. at 386-87 (rejecting *Bowe*’s consumer transaction requirement as, *inter alia*, inconsistent with *Hangman*).

<sup>4</sup> See, e.g., *Dussault v. Am. Int’l Group, Inc.*, 123 Wn. App. 863, 870-71, 99 P.3d 1256 (2004) (*Marsh* and *Bowe* did not prevent *adversary* of insurer from asserting other tort claims (*i.e.*, non-bad faith), such as misrepresentation, against insurance company).

cases merely addressed the issue of duty – specifically, an insurer’s affirmative duty of “good faith.” Since the duty of good faith arises from the insurance contract, the duty does not extend to someone who is a complete stranger to that contract. *See Green*, 28 Wn. App. at 137 (“[CPA] claim against an insurance company for breach of its duty to exercise good faith under RCW 48.01.030 is limited to the insured.”); *Marsh*, 22 Wn. App. at 936-37.

As has been pointed out, neither the *Panag* nor *Stephens* matter involve a claim for bad faith. Consequently, to the extent the two cases cited by ACA are even good law post-*Hangman*, the simple fact is that there is no conflict with the opinion below because they address entirely different situations, claims and relationships.

ACA also alleges that the opinion below cannot be squared with the rights of various public agencies to protect their subrogated interests. But all ACA does is point out that various statutes give various agencies certain rights to recover payments they have made; ACA fails to identify any way in which the opinion below inhibits these agencies from lawfully pursuing and protecting their rights.

ACA goes on to claim that every matter will now have to be litigated, alleging that the opinion below prohibits attempts to recover any sort of alleged debt without first obtaining court adjudication. This

argument rests on a patent mischaracterization of the Opinion.

The Court of Appeals made it clear that the lawful pursuit of rights claimed through subrogation is not affected. It is only the pursuit of those claimed rights through deceptive or other unlawful means that are implicated – such as misrepresenting the nature or extent of the purported obligation (as occurred here). This is (or should be) nothing new to businesses operating in Washington. For example, in *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), the Court did not say that the coffee shop couldn't sell coffee – it merely said the shop could not use deception (by pretending it was related to Nordstrom) to do so. Likewise, in *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000), *rev. denied*, 143 Wn.2d 1024 (2001), the Court did not prohibit the charging or collection of a fax fee, it merely prohibited the company from using deceptive means to do so. The Court of Appeals Opinion here is entirely consistent.

As with other arguments asserted by Petitioners and their Amici, the overarching fallacy with this argument is the ongoing pretense that “means” and “end” are one and the same. They are not, as no matter how legitimate a desired “end” might be, any illegal means employed to achieve it are still illegal. Indeed, even in the realm of the collection of

actual debts,<sup>5</sup> no matter how legitimately the debt is owed, there are myriad limitations on the means a collector can lawfully employ to try to collect it.

Second, while ACA is correct in pointing out that debt collectors<sup>6</sup> are subject to specific debt collection laws when pursuing the collection of actual debts, the plain, indisputable fact is that there were no debts here. To be precise, there were no “debts” as defined by the FDCPA, which is a prerequisite for application of that Act. *E.g.*, *Turner v. Cook*, 362 F.3d 1219, 1227 (9th Cir. 2004). ACA is certainly aware that subrogation claims do not fall within the definition of “debt” under the FDCPA, and that the FDCPA is thereby wholly inapplicable to these matters.<sup>7</sup> This is why ACA’s claim that the opinion below has “profound implications” for debt collectors who “collect debts in accordance with strict federal and state regulations applicable to debt collection” (ACA Br. at 2-3) is, at best, misleading: ACA is referring to “debts” as defined by the FDCPA, but no

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<sup>5</sup> Of course, neither Panag nor Stephens actually owed anything.

<sup>6</sup> It is telling that while ACA wants to speak about the implication for debt collectors, the actual collection agency defendant in the case, CCS, prefers not to identify itself a debt collector in this context, but rather prefers “subrogation recovery specialist.” *E.g.*, *CCS Stephens Pet.* at 2.

<sup>7</sup> The repeated pretense that these matters could be covered by the FDCPA is an attempt to set up a straw man: since subrogation claims are not debts under the Act, a plaintiff would not be entitled to any of the Act’s protections. Otherwise, were the Act applicable, the conduct here would plainly be illegal. *See, e.g.*, 15 U.S.C. § 1692e(2)(A) (prohibiting misrepresentation as to “the character, amount, or legal status of any debt”).

such “debts” are at issue here.<sup>8</sup>

Although Amicus The National Association of Subrogation Professionals (“NASP”) parrots some of ACA’s arguments, its main thrusts concern general public policy arguments and an economic rationale. As for its public policy arguments, they are more appropriately addressed to the Washington legislature.

As for its economic rationale, NASP unintentionally highlights the motivation for the deceptive and illegal scheme at issue: complying with the law and operating in a legal manner can cost more than cutting corners and acting unlawfully. NASP’s aim is to have the Court accept review and then hopefully issue an opinion that provides, in essence, that businesses can deceive and cheat a little as long as they have a good economic reason to do so.<sup>9</sup> There is nothing in any case law cited by either the Amici or Petitioners, however, that would support the creation, much less the existence, of such a dangerous precedent.

For example, NASP alleges that insurers will have to forego the pursuit of some subrogation claims if they are limited in the means that they can employ to try to extract payment. In essence, NASP asserts that

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<sup>8</sup> For the same reason, the Court of Appeals Opinion lacks the purported “profound implications” for debt collectors who are engaged in the collection of actual “debts.”

<sup>9</sup> Who would expect anything to go wrong with that?

if insurers can't deceive or intimidate people into paying claims, smaller claims might be abandoned because it would not be economical to pursue litigation.<sup>10</sup> Even if NASP is correct, it does not provide a basis for permitting insurers, their agents or accomplices to try to skirt the law, as the fact that economic reality impacts decisions is neither new, nor limited to insurance companies. In fact, it is no different than that faced by a personal injury claimant with a small claim when the insurance company declines to pay it: if the claim is too small for an attorney to take up, the claim is often not pursued.<sup>11</sup> But as the Court of Appeals plainly understood, subrogation merely puts the insurer into the shoes of the insured – not in some better position that is above the law.

Echoing a similar theme by ACA, NASP also contends that the affected Washington public does not need the protection of the CPA because there are already sufficient checks and balances within the subrogation recovery process. Apparently with complete sincerity, NASP points out that “trained and licensed” insurance company employees “determine the level of fault and damage[s]” to attribute to others.<sup>12</sup>

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<sup>10</sup> Where the insurer would be put to the test of actually proving that it is entitled to anything at all, much less the amount it might lay claim to.

<sup>11</sup> If that claimant used deceptive means to try to get paid “economically,” his rationale would likely be called insurance fraud.

<sup>12</sup> Once again, who would expect anything to go wrong with that?

NASP Br. at 8. NASP wisely refrains from any attempt to explain why, in *Panag*, these “trained and licensed” insurance company employees: (i) determined that their own insured was mostly at fault for the accident, yet (ii) they still tried to get Panag to pay every penny of their unverified claimed damages.<sup>13</sup> The fact is, we have laws like the CPA because we know that we cannot leave self-interested businesses to be the final authority as to what is fair to the individuals with whom they interact.

As another part of its economic rationale argument, NASP trots out the familiar bogeyman of “higher insurance rates.” The vague possibility of higher costs, however, is never a suitable excuse for violating the law or overriding public policy, such as the CPA and its purpose of protecting Washington citizens from overreaching businesses. *See, e.g., Brown v. Snohomish Cty. Phys. Corp.*, 120 Wn.2d 747, 758, 845 P.2d 334 (1993) (public policy cannot be abrogated “simply because the cost of health care service contracts may go up to some degree”).

Trying to create a slippery slope argument, NASP footnotes an assertion that the collection notices at issue here are somehow akin to a settlement demand letter from a plaintiff’s attorney. NASP Br. at 4, n.4. Both the assertion itself, and the overstatement of the reach of the Court of

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<sup>13</sup> About 3 times the insurance company’s own calculation of its claim.

Appeals Opinion, are absurd. For example, demand letters don't pretend that a "debt" is "due" and owing, that all sorts of bad collection activities will happen if the insurance company does not pay, or, for that matter, style themselves "FORMAL COLLECTION NOTICES" to begin with.<sup>14</sup>

## V. CONCLUSION

At bottom, while the Amici speak in generalities and platitudes (subrogation is good, uninsured drivers are bad, *etcetera*), they fail to provide this Court with any reason to accept review of an opinion that faithfully follows the statutory language of the CPA and controlling Supreme Court precedent. Rather than treading new ground, the opinion below merely observes that claims of entitlement to an end, no matter how purportedly justified, cannot abrogate the requirement that the end be pursued through legitimate and lawful means. Moreover, this straightforward and common sense principle protects not only the Washington public in general, but also those members of ACA and NASP that would otherwise be put at a competitive disadvantage for no other reason than conscientiously playing by the rules.

October 9, 2007.

/s/ Matthew J. Ide, WSBA No. 26002  
Matthew J. Ide, WSBA No. 26002  
IDE LAW OFFICE

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<sup>14</sup> Not to mention that demand letters are sent to one of NASP's "trained and licensed" insurance professionals, not to an unsophisticated member of the Washington public.

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DECLARATION OF SERVICE

I certify that on October 9, 2007, I caused to be filed with the Supreme Court, via electronic filing, the foregoing Respondents Rajvir Panag's & Michael Stephens' Answer to Amici Memoranda, and caused to be sent, via first class mail, postage pre-paid, true and accurate copies to:

<p>Stevan D. Phillips Rita Latsinova Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101-3197</p> <p><i>Attorneys for Petitioner Farmers Insurance Company of Washington</i></p>	<p>John A. Granger Melissa O'Loughlin White Cozen O'Connor 1201 Third Avenue, Suite 5200 Seattle, Washington 98101</p> <p><i>Attorneys for Petitioner Credit Control Services, Inc.</i></p>
<p>Jerret E. Sale Shawnmarie Yates Bullivant Houser Bailey PC 1601 Fifth Ave., Suite 2300 Seattle, WA 98101</p> <p><i>Attorneys for Omni Insurance Company</i></p>	<p>Philip A. Talmadge Talmadge Law Group PLLC 18010 Southcenter Parkway Tukwila, WA 98188-4630</p> <p><i>Attorneys for Petitioner Credit Control Services, Inc.</i></p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

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Dear Clerk of the Court:

Attached please find the joint answer to amici memoranda, which we are submitting for electronic filing in the two cases referenced.

Case Name: Rajvir Panag v. Farmers Insurance Co. of Washington, et al.  
Case No.: 80357-9

and

Case Name: Michael Stephens v. Omni Insurance Co., et al.  
Case No.: 80366-8

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Thank you.

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