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No. 56625-3-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

RAJVIR PANAG, on behalf of herself and all others  
similarly situated, Respondent/Cross-Appellant

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,  
a domestic insurance company,  
and  
CREDIT CONTROL SERVICES, INC.,  
d/b/a Credit Collection Services, Appellants/Cross-Respondents.

REPLY BRIEF OF RESPONDENT/  
CROSS-APPELLANT RAJVIR PANAG

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## I. INTRODUCTION

Notwithstanding efforts to move the playing field, the central issue in this case remains whether business entities can deceive members of the Washington public by asserting that such persons owe debts when, in fact, no such debts are owed. Or, put another way, do businesses have the right to take shortcuts around the truth and the law in order to extract money?

On October 5, 2003, Ms. Panag was involved in an auto accident with Mr. Hamilton. Although liability was disputed, Ms. Panag's position has always been that it resulted solely from Mr. Hamilton's negligence.<sup>1</sup> Even Farmers – hardly unbiased as Mr. Hamilton's liability insurer – put the *majority* of blame squarely on his shoulders.<sup>2</sup> Regardless, since no legal determination of fault had been made, either Ms. Panag or Mr. Hamilton could have asserted a claim against the other for any alleged damages. Unless one party paid voluntarily, however, that is all either could have done – assert a claim. Before there was any *legal obligation* the claimant would need, *inter alia*, to file suit, establish liability and prove a quantum of damages. In short, at the time of the accident, neither

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<sup>1</sup> Contrary to defendants' bald assertions, nothing in the record establishes Ms. Panag "caused" the accident. Moreover, since this case was decided on summary judgment, Ms. Panag is entitled to have the facts and reasonable inferences resolved in her favor.

<sup>2</sup> Indeed, not only did Farmers pay, on behalf of Mr. Hamilton, Ms. Panag for personal injuries she sustained, but it also paid her the full amount of the property damage sustained by her totaled car, plus car rental and all towing charges. *See* CP 487, 490.

Ms. Panag nor Mr. Hamilton owed the other anything.

This means that Ms. Panag could not simply decide on an amount of alleged damages and hire ABC Collections Agency to pursue debt collection activities against Mr. Hamilton. Similarly, a lawyer retained by Ms. Panag would be unable to ascribe a value to her claim and then simply refer it out to ABC to collect the “amount due” from Mr. Hamilton. Of course, the converse is also true, and neither could Mr. Hamilton have done such things. Yet, this is precisely what Farmers did by retaining CCS,<sup>3</sup> even though Farmers claimed to stand in Mr. Hamilton’s shoes.<sup>4</sup>

CCS and Farmers strive to make much of the fact that Ms. Panag did not have liability insurance. But while a lack of insurance may have ramifications, it *does not* mean Ms. Panag is liable for the accident (or damages) regardless of actual fault. Nor does it mean entities are free to try to extract money from her by whatever means and without concern for the legality of their own actions. In short, while there are certain penalties for driving without insurance, they do not include being subjected to fraudulent “collection” activities or being denied the CPA’s protection.<sup>5</sup>

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<sup>3</sup> That Farmers’ own valuation of any such claim was thousands of dollar less than the amount it had CCS try to extract makes the conduct even more egregious.

<sup>4</sup> And even then, not for all of his claim, but only to the extent it made payment to him.

<sup>5</sup> A basic tenet of the FDCPA, for example, is that all debtors, *even those who have defaulted on their obligations*, have “a right to be treated in a reasonable and civil

## II. AUTHORITY & ARGUMENT<sup>6</sup>

### A. CPA IS NOT LIMITED TO “CONSUMER” TRANSACTIONS

Disregarding the CPA’s mandate that it be broadly and liberally interpreted, Farmers and CCS contend the CPA is actually narrow in scope. For example, CCS asserts Ms. Panag is trying to “read out” of the CPA the requirement of a “consumer” relationship. CCS Br. at 9. But there is nothing to “read out,” as the requirement CCS posits is not in the Act to begin with, *e.g.*, RCW § 19.86.090, as our courts have confirmed. Similarly, Farmers avers that protecting people like Ms. Panag from abusive practices does not further the purposes of the CPA. Farmers Br. at 11-12. But as even Farmers’ own quotation notes, the CPA was enacted to “protect the *public*,”<sup>7</sup> and Ms. Panag is undeniably a member of that group. In addition, protecting Ms. Panag here will also serve to protect the thousands of others who received the same deceptive collection notices, as well as those who will otherwise receive them in the future.<sup>8</sup>

In addition, just as the defendants in the linked *Stephens* case did,

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manner.”” *See Baker v. G.C. Services Corp.*, 677 F.2d 775, 777 (9th Cir. 1982) (quoting Congressional debates on the bill; citation omitted).

<sup>6</sup> Panag respectfully incorporates by reference the arguments set forth in the Brief of Respondent Michael Stephens in the linked *Stephens* appeal.

<sup>7</sup> *See* Farmers Br. at 11 (emphasis added) (quoting *Hangman Ridge*, 105 Wn.2d at 783 and RCW § 19.86.920).

<sup>8</sup> Not surprisingly, Farmers subrogation activities are extensive. *See, e.g.*, CP 598-99.

CCS and Farmers try to elevate every casual use of the term “consumer” as consequential. These casual uses, however, are manifestly insufficient to create a *requirement* that is found neither in the language of the CPA itself, nor in our leading case law interpreting it.<sup>9</sup>

At bottom, the CPA is not a “sales fraud” law limited to consumer transactions.<sup>10</sup> Notably, although the Legislature could easily have provided such a limitation if it so intended, nowhere does the Act contain such language. Rather, the CPA is a broad law aimed at protecting the public in general – explicitly stating as much: Act’s purpose is “to protect the *public* and foster fair and honest competition ....” RCW § 19.86.920 (emphasis added).<sup>11</sup> This is *in addition* to the Act’s mandate that it be liberally construed for precisely such reasons. *See id.*

#### B. MS. PANAG HAS “STANDING” TO ASSERT HER CPA CLAIM

Notwithstanding the CPA’s breadth and reach, Farmers and CCS aver that Ms. Panag has no standing to assert her claim. The CPA’s provisions dictate otherwise: according to RCW § 19.86.090, “any

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<sup>9</sup> Also, although for purposes of convenience the CPA is called the “Consumer Protection Act,” a short title simply cannot overcome the actual provisions of a statute.

<sup>10</sup> The terms of the Act itself make this clear, with specific provisions for unfair methods of competition (RCW § 19.86.020 & .050), restraints of trade (RCW § 19.86.030), and monopolistic practices (RCW § 19.86.040).

<sup>11</sup> *See also Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548, 13 P.3d 240 (2000), *rev. denied*, 143 Wn.2d 1024 (2001) (purposes include protection of “Washington citizens”) (emphasis added); *State Farm v. Hunyh*, 92 Wn. App. 454, 458, 962 P.2d 854 (1998) (purposes include protection of the “*public*”) (emphasis added).

person” may assert a CPA claim, as long as they sustain injury. There is absolutely nothing in the statute – express or implied – to indicate that “any person” is, inexplicably, actually limited to “any consumer.”

Our courts are in accord. The seminal CPA case is *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 719 P.2d 531 (1986), and nowhere in its exhaustive analysis does it mention being a “consumer” as one of the five elements. *See generally* 105 Wn.2d at 783-92.<sup>12</sup> The Supreme Court later pointed out that *Hangman Ridge* identified no such requirement:

“*Hangman Ridge* ... does not include a requirement that a CPA claimant be a direct consumer or user of goods or in a direct contractual relationship with the defendant.”

*Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993) (emphasis added). *Fisons* went on to contrast this with the fact that statutes in some states do contain such a requirement:

“Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services.”

*Id.* at 313 (emphasis added; citations omitted). *See also Industrial Indem.*

*Co. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990) (“In *Hangman Ridge* ... this court enunciated a 5-part test which a private citizen must

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<sup>12</sup> *Hangman Ridge*’s omission of any “consumer” requirement is made even more notable by the fact that the case increased what had been three elements for a CPA claim, to the now well known five elements. *See* 105 Wn.2d at 784-85.

satisfy in order to prevail in [a CPA] action”) (emphasis added).

CCS and Farmers cite the portion of *Fisons* that follows the above passages, where it goes on to note that the relationship between the CPA plaintiff (prescribing doctor) and the CPA defendant (drug manufacturer) was akin to an ordinary consumer in other settings, and that the physician in such circumstances was a logical private attorney general. *See* 122 Wn.2d at 313. The language is at best dicta, however, and the observation does not undermine the Court’s unequivocal statements just preceding it that *Hangman Ridge* does *not* include a “consumer” requirement. *See* 122 Wn.2d at 312-13. It also cannot change the fact that no such requirement is found anywhere in the language of the CPA itself.

Moreover, CCS and Farmers ignore other exemplar cases. For example, in *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), Nordstrom clearly had no “consumer” relationship with the CPA defendant; indeed, Nordstrom was completely outside of, as CCS puts it, the “chain of commerce” between the defendant and the public. *See* CCS Br. at 10. In fact, Nordstrom was not even the target of the deceptive conduct – the *public in general* was the target. *See* 107 Wn.2d at 740. Yet, Nordstrom’s CPA claim was viable because the deceptive conduct – though directed at deceiving others – caused its *harm* to Nordstrom. Notably, *Nordstrom* was decided less than a year after *Hangman Ridge*.

Similarly, in *Northwest Airlines, Inc. v. Ticket Exchange, Inc.*, 793 F. Supp. 976 (W.D. Wash. 1992), the CPA plaintiff, Northwest, had no consumer relationship – or any relationship – with the defendant. But the court rejected the defendant’s argument that the claim was fatally flawed for “lack of a ‘direct consumer relationship’ or ‘transaction’ between the parties,” and granted Northwest summary judgment. *Id.* at 979-80.

Additionally, in *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 795 P.2d 1143 (1990), plaintiffs sued several defendants for claims in a real estate investment gone bad. One defendant, Austin, obtained an essentially fraudulent appraisal of the property in question. *Id.* at 153. Austin provided the appraisal to Cornerstone Investments in connection with his sale of the property to it, and Cornerstone then gave the appraisal to Pacific Home Equity to help secure \$75,000 of financing. A Pacific sales agent then went to the Schmidts, provided them with the appraisal, and convinced them to put up the \$75,000. *Id.* at 154. Like defendants here, Austin argued the Schmidt’s CPA claim failed *as to him* because there was no “link” between him and the Schmidts. *See id.* at 167. The Supreme Court disagreed, pointing out the flaw in Austin’s argument was that the only link *required* is one between the *deceptive conduct* and the *resulting injury or damages* – not a link between the parties:

Austin asserts that a causal link must exist between

plaintiffs and himself in order to satisfy this part of the test. *This is incorrect.* Instead, the causal link must exist *between the deceptive act* (the inflated appraisal) *and the injury suffered.* ... There is no doubt such a causal link exists in this case.

*Id.* at 167-68 (emphasis added).<sup>13</sup>

In sum, the argument that a “consumer” relationship must exist contravenes not only established Washington precedent, but the plain language of the CPA itself, which expressly provides that “*any person*” who sustains injury or damage has standing to bring such a claim.

### C. EACH OF THE FIVE CPA ELEMENTS ARE PRESENT

#### 1. Deceptive Act or Practice

In mid November 2003, Ms. Panag received the “November 10 Collection Notice.” How do we know it was a collection notice? Even if we miss the two collection agency associations seals, or the “CREDIT COLLECTION SERVICES” trade name, it is impossible to miss the most prominent wording, overshadowing any other language, declaring:

**THIS IS A FORMAL COLLECTION NOTICE**

The notice asserted an amount of indebtedness – an “AMOUNT DUE” – of over six thousand dollars, and provided instructions for making “instant

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<sup>13</sup> Citing *Travis v. Washington Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 407, 759 P.2d 418 (1988); *Nordstrom*, 107 Wn.2d at 741. *Schmidt* is also a post-*Hangman Ridge* case.

payment” so as to avoid legal action and/or license suspension.

Nowhere did the notice reveal that the purported debt was actually nothing more than an unliquidated, unadjudicated, potential claim arising from an alleged tort purportedly committed against a Mr. Hamilton. In other words, nowhere did the notice indicate the truth: Ms. Panag didn't really owe anything, and there certainly was no “Amount Due.” This sort of misrepresentation is plainly deceptive. *E.g., Dwyer*, 103 Wn. App. at 547; *Pickett v. Bebhick*, 101 Wn. App. 901, 920, 6 P.3d 63 (2000). Similarly, the December 1 & 22 Collection Notices were deceptive, as they maintained the false assertion of a present, definitively-owed obligation being pursued through the debt collection process.<sup>14</sup> These two notices also ratcheted up the level of threats being made.<sup>15</sup>

CCS ignores the “FORMAL COLLECTION NOTICE” banner and pretends that Ms. Panag only takes issue with the following language: “SUBROGATION CLAIM AMOUNT DUE \$6,442.53.” CCS Br. at 21. CCS then argues that the notice is in no way inaccurate or untruthful, and that Ms. Panag was not deceived in any event.

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<sup>14</sup> The December 22 Notice threatened various “collection” activities, such as an asset search and pursuing “collection” through various other means. It also highlighted the potential for interest – which while possible on a debt action, is unlikely on a tort claim.

<sup>15</sup> The December 1 Notice ominously warned that further “activity” would take place in ten days; the December 22 notice was printed on canary yellow paper and purportedly sent via “Western Union,” giving it the appearance of a “last chance” to pay or else letter.

First, CCS blatantly misrepresents the notice, as even a cursory glance reveals that “Subrogation Claim” and “Amount Due” not only appear on different lines, but the “Amount Due” language appears in an entirely separate box, which is shaded to draw attention. Second, CCS apparently believes that including the word “subrogation” provides it with protection, but that term is undoubtedly meaningless to the average person,<sup>16</sup> and is substantially overshadowed by the “Formal Collection Notice” banner in any event. Third, what is “inaccurate and untruthful” are the representations that Ms. Panag owes a debt, fixed at \$6,442.53, subject to “collection,” and now “Due.”<sup>17</sup> *None* of these are true.<sup>18</sup>

Fourth, although CCS’s assertion that Ms. Panag was not deceived by the collection notice at best overstates the evidence,<sup>19</sup> it is simply an irrelevant point, as it is clear that the CPA does not require actual deception – only the capacity to deceive. *E.g., Hangman Ridge*, 105 Wn.2d at 785, *Dwyer*, 103 Wn. App. at 547.

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<sup>16</sup> As it was meaningless to Ms. Panag. CP 482.

<sup>17</sup> Farmers knew its claims were unliquidated and contingent. *See* CP 582, 588. Moreover, CCS’s assertion that it was asking for money *or* proof of insurance is disingenuous; since the notices were sent to persons believed to be uninsured, the notices really only provided one option: pay money.

<sup>18</sup> Other misrepresentations on the notice include that the “above referenced damages [had been] paid by [CCS’s] client.” CP 455-56. In truth, because of Mr. Hamilton’s deductible, Farmers had only paid him \$6,102.53. *See* CP 486 & 487. Another is the failure of the “Amount Due” to reflect the fact that Farmers had already recovered \$698.64 from the salvage sale of Mr. Hamilton’s vehicle. *See* CP 486.

<sup>19</sup> *See, e.g.,* CP 470, 534 (testimony by Ms Panag on her receipt of the collection notices).

Finally, it bears repeating that even though actual deception need not be shown, that the scheme apparently deceived numerous persons out of more than a million dollars in the aggregate amply illustrates that the collection notices have the “capacity” to deceive.<sup>20</sup>

2. The “Collection” Activities Occurred in Trade or Commerce<sup>21</sup>

CCS complains that Ms. Panag “seeks an expansive reading” of the terms “trade” and “commerce,” and fails to cite “any supporting authority.” CCS Br. at 27. But it is the CPA itself that requires the expansive reading: “trade” and “commerce” include not only “the sale of ... services,” but “*any* commerce directly *or indirectly* affecting the people of the State of Washington.” RCW § 19.86.010(2) (emphasis added). Broader language is hard to fathom, which is likely why Washington courts have given this provision such broad construction.<sup>22</sup>

CCS attempts to graft an additional requirement and assert that the trade or commerce must take place with the “consuming” public. CCS Br. at 27. This assertion, however, is little more than a repackaged extension

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<sup>20</sup> It also bears mentioning that others have construed letters from CCS to be, in fact, collection notices. *See* CP 119-121, 123-127 (regarding complaints to OIC about “collection” notices and activities by CCS on behalf of Farmers).

<sup>21</sup> Since this element was not argued in the summary judgment proceedings below it was not fully developed, and thereby cannot provide a basis to rule against plaintiff here.

<sup>22</sup> *E.g., Nordstrom*, 107 Wn.2d at 740; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)).

of its “consumer transactions” argument, which has already been exposed as incorrect.<sup>23</sup> CCS also argues that it did not engage in trade or commerce because, in essence, CCS didn’t make or sell anything to consumers.<sup>24</sup> CCS Br. at 10, 27-28. But trade or commerce is simply not limited to sales transactions.<sup>25</sup>

CCS provided “collection” services to Farmers pursuant to a broad, ongoing *commercial* agreement the two entities entered, the object of which was to extract money from Washington residents for the benefit of both companies.<sup>26</sup> *E.g.*, CP 586, 588-89, 592, 595. The sending of dunning letters on Farmers’ behalf to Washington residents, such as Ms. Panag, was the focus of – indeed, the only reason for – that commercial activity. That is more than sufficient.<sup>27</sup>

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<sup>23</sup> Moreover, whether the “public” is sufficiently affected to support a CPA claim is addressed in the separate “public interest” element.

<sup>24</sup> CCS’s argument implies that debt collection activities can never be subject to CPA liability because they are not “consumer transactions.” This position is untenable, however, as the Collection Agency Act – which applies in situations where debts really exist – specifically provides for CPA liability. *See* RCW § 19.16.440.

<sup>25</sup> *E.g.*, *Salois v. Mutual Of Omaha*, 90 Wn.2d 355, 359-360, 581 P.2d 1349 (1978) (that definition states it “shall ‘include’ sales must mean that there is encompassed more than just sales. *If the legislature had intended to so limit the act it could have said that it applies only to sales.* Not only did it not do so, it went on to include “*any* commerce *directly or indirectly* affecting the people of ... Washington.”) (Emphasis added).

<sup>26</sup> Farmers expected CCS to interact with the public on its behalf in the “collection” matters, CP 588-89, and in the course of the their business relationship. CP 589, 592.

<sup>27</sup> In contrast, if CCS’s argument were valid, it would also mean that the CPA would be inapplicable to, for example, a credit card processing company, as it, too, only collects the money but does no manufacturing or selling of its own.

Finally, even if CCS's argument were not otherwise devoid of merit, it would still not provide cover. By contacting Ms. Panag for Farmers, CCS established a direct relationship between it and Panag that plainly occurred in the conduct of trade or commerce.

3. Defendants' Conduct Affects the Public Interest<sup>28</sup>

Although various factors can be considered for this element, the primary focus is simply whether there are "indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." *Hangman Ridge*, 105 Wn.2d at 791. CCS advances its familiar mantra, again arguing that because the events here were not "consumer-centric," there can be no public interest impact. *See* CCS Br. at 26. But no matter how many times, or in how many forms CCS makes it, its "consumer transactions" argument remains without merit.

CCS also states that there is no public interest impact because the relationship arose from a tort (the motor vehicle accident) and CCS and Ms. Panag "have always been adversaries." Once again, CCS's mere repetition will not make it true: *this case* does not arise from the motor vehicle accident. *This case* arises from the conduct of *Farmers and CCS* in instituting debt collection activities against a person who owed no such

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<sup>28</sup> Since this element was not argued in the summary judgment proceedings below it was not fully developed, and thereby cannot provide a basis to rule against plaintiff here.

debt. As far as having “always been adversaries,” Ms. Panag and CCS had absolutely *no* relationship – adversarial or otherwise – *before* CCS started sending the dunning letters. And even if Ms. Panag had caused the accident, any purported tort would be vis-à-vis Mr. Hamilton, not against either CCS or Farmers.<sup>29</sup> The only “tort” in *this suit* stems from the conduct of CCS and Farmers directed at Ms. Panag – Ms. Panag has done *nothing* to them.

CCS boldly talks of “Farmers entitlement to recover payments it made ....” CCS Br. at 26. But Farmers never established the “right to recover” anything; as a subrogee, Farmers merely had the right to *seek* to recover those payments. To be “entitled,” Farmers first needed to legally establish that Ms. Panag was in whole or in part responsible for amounts it paid. Of course, this crucial step is the very one the “collection notice” scheme is designed to avoid.

While Ms. Panag previously described several “indicia of an effect on public interest” in her opening brief, another indicia is the confusion of persons who are targeted by the collection activities, who don’t understand how Farmers and CCS claim the right to unilaterally determine liability and damages. *E.g.*, CP 119. Along the same lines is the fact that if

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<sup>29</sup> CCS’s repeated statements that Ms. Panag was “negligent” or “caused” the accident, although irrelevant, are also wholly unsupported by facts in the record.

Farmers and CCS can make these unilateral adjudications out of the public eye, it presents fertile ground for abusive conduct and other mischief.<sup>30</sup>

At bottom, however, possibly the best “indicia of public interest impact” is that more than 1.5 million dollars has already been wrongfully extracted from Washington residents in connection with this scheme.

#### 4. The Deceptive Conduct Caused Plaintiff Injury<sup>31</sup>

CCS and Farmers have apparently conceded that since *any level of injury* suffices, no matter how slight or whether even quantifiable, they cannot challenge this element based on the amounts or level of injury. Instead, they assert that the injury (and damages) Ms. Panag has established should simply not “count” for purposes of the CPA.

The argument that out-of-pocket expenses Ms. Panag incurred should not “count” rests on mischaracterization. According to defendants, the amounts should not count because attorneys’ fees do not constitute “damages” under the American Rule on attorneys’ fees. Then, they stretch the rule and assert that “attorneys’ fees” also includes any costs remotely associated with litigation. Finally, they stretch it a bit further,

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<sup>30</sup> See, e.g., CP 119 (complaint that CCS indicated a lack of insurance equated with fault); CP 121 (complaint that CCS was abusive, threatening and harassing); CP 127 (complaint that CCS wouldn’t provide underlying information unless person had a lawyer).

<sup>31</sup> The fourth CPA element, causation, is subsumed within this discussion of the fifth element, injury to business or property.

and claim that even expenses incurred *before* litigation was instituted are also “attorneys’ fees.”

Regardless of the faults in the argument itself (discussed below), this mischaracterization cannot stand. Attorneys’ fees are the monies charged by or paid to the attorneys, and money spent by Ms. Panag from her own pocket for her own expenses – such as the postage, local travel, parking expenses – are simply not attorneys’ fees. Neither do her out-of-pocket expenses constitute costs of litigation. This is especially true with regard to the expenses she incurred well before litigation commenced.

Defendants also mischaracterize the nature of the credit report as an element of injury. Ms. Panag is not trying to recover for “fear” that her credit standing might have been damaged. Ms. Panag seeks to recover the money she spent on the credit report, which she was forced to obtain to protect her interests as a result of the “collection” activities targeted at her.<sup>32</sup> Moreover, there is nothing “anticipatory” about the cost of the credit report – Ms. Panag paid the \$9 to obtain it. That the report did not indicate the bogus “debt” as yet being reported is beside the point.<sup>33</sup>

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<sup>32</sup> Ms. Panag’s concerns are not unusual. When a member of the Spokane Public Defender Office wrote the OIC about an apparently similar matter, she asked what to do in order “to protect [the client’s] *credit* from this [CCS] agency.” See CP 119.

<sup>33</sup> Just as it would be meaningless that an x-ray performed on a personal injury plaintiff ultimately showed that a bone wasn’t broken – the cost of the x-ray to find out that fact would still constitute damages.

In *Goins v. JBC & Associates*, in a case involving Connecticut's

Unfair Trade Practices Act, the court specifically noted that:

a letter of the kind sent to plaintiff [demanding an amount not reduced to judgment] could cause injury *in a variety of ways*. A consumer may respond to the letter by actually paying an amount far greater than what is actually owed, *or may incur other expenses in challenging the debt collection effort*.

352 F. Supp. 2d 262, 275 (D. Conn. 2004) (emphasis added).

Furthermore, the fact that some of the expenses Ms. Panag incurred while responding to the "collection" notices were in connection with consulting with an attorney is also of no significance. These were all investigative costs necessitated by the deceptive notices, and the fact that an attorney<sup>34</sup> was the logical professional for her to seek does not change that fact. Indeed, in *State Farm v. Hurnyh*, 92 Wn. App. 454, 962 P.2d 854 (1998), the investigatory costs incurred by State Farm specifically included costs for *attorneys* and other experts.<sup>35</sup> *See id.* at 458.

Moreover, treating costs incurred to investigate a potentially fraudulent matter differently just because the plaintiff consults with an attorney makes no sense. What if Ms. Panag had, instead of mailing

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<sup>34</sup> Contrary to CCS's statement, Ms. Panag did not already have an attorney for this matter – she only had an attorney for her personal injury claim against Mr. Hamilton.

<sup>35</sup> CCS tries to distinguish *State Farm* by asserting State Farm had a "statutory duty" to investigate. CCS Br. at 17. This is nonsense. State Farm could have simply paid the fraudulent bills, just as Ms. Panag could have paid the fraudulent "debt." Instead, State Farm, *just like Ms. Panag*, chose to investigate the matter and consult with counsel.

documents to an attorney for consultation, mailed a package of documents to CCS in order to dispute the alleged debt? Or if Ms. Panag had traveled to CCS's local office and paid to park in its lot? In those situations, the expenses incurred plainly would constitute injury. The fact that Ms. Panag decided to investigate the alleged debt by obtaining outside assistance is substantively no different.<sup>36</sup>

CCS argues that recognizing attorneys' fees as "injury" would not only violate the American Rule, but would also render meaningless the attorneys' fees provision of RCW § 19.86.090. CCS Br. at 16. The argument fails. Even if attorneys' fees do not constitute "damages," this does not mean they cannot constitute "injury," as injury is substantively distinct from "damages," and the injury established need not be quantifiable or otherwise a recoverable amount.

Finally, as for causation, the "collection notices" clearly made threats and demanded action; CCS and Farmers can hardly now be heard to complain that Ms. Panag took action just because it was not the action they most desired (*i.e.*, send them money).

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<sup>36</sup> Of course, this would suit CCS, as it would tend to keep people dealing directly with it instead of seeking outside assistance. This would be particularly ironic given the complaint in at least one instance that CCS allegedly wouldn't provide information unless the person had a lawyer. *See* CP 127.

#### D. EVEN BY ANALOGY, FDCPA DOESN'T HELP DEFENDANTS

Farmers retreats from the position that the FDCPA is directly applicable here, and now contends that FDCPA case law provides “precedent” for our CPA. Farmers Br. at 4-5. This is inaccurate in two regards. First, neither FDCPA case law or any other federal statute case law provide “precedent” for our CPA – such cases merely provide “guidance” to our courts in construing the CPA. *See* RCW § 19.86.920 (courts should be “guided” by federal court decisions). Obviously, mere “guidance” cannot serve to overrule established Washington precedent where our courts have spoken on the matter. Second, the courts can only be “guided” if the federal cases are construing similar provisions. As discussed in Ms. Panag’s opening brief, however, because the FDCPA has different defined terms and requirements from those in the CPA,<sup>37</sup> it is an inherently unhelpful apples to oranges endeavor.<sup>38</sup>

Even were the Court to look to FDCPA case law, however, it does not help Farmers. For example, in the Ninth Circuit, the determination of deceptiveness sets a considerably low threshold, as it is made using a

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<sup>37</sup> *E.g.*, FDCPA defines “debt,” which requires a “transaction,” with a “consumer,” *etcetera*. *See* 15 U.S.C. § 1692a.

<sup>38</sup> The CPA is actually closer to “[S]ection 5 of the Federal Trade Commission Act ... which was adopted by Congress to protect United States *citizens* against *unfair trade practices*.” *Hangman Ridge*, 105 Wn.2d at 783 (emphasis added).

hypothetical “least sophisticated debtor.” See, e.g., *Dunlap v. Credit Protection Ass’n, L.P.*, 419 F.3d 1011, 1012 (9th Cir. 2005); *Wade v. Regional Credit Ass’n*, 87 F.3d 1098, 1100 (9th Cir. 1996). In addition, the FDCPA plainly prohibits any misrepresentation as to “the character, amount, or legal status of any debt,” 15 U.S.C. § 1692e(2)(A), which is precisely what Farmers and CCS did here. Moreover, if we are looking to the FDCPA for guidance, it is notable that under FDCPA, *no injury at all* need be proven, and statutory damages can be awarded instead.<sup>39</sup> See 15 U.S.C. § 1692k. Finally, if we are to look to the FDCPA, we find the following particularly pertinent guidance on the issue of standing:

A debt collector’s liability [under the FDCPA] is not predicated upon that person having *actually paid any amount demanded*. Receiving communications that violate the terms of the FDCPA is sufficient injury to confer standing. . . . By setting forth that she received a letter from a debt collector that violated the provisions of the FDCPA, *plaintiff has sufficiently alleged a personal injury that is fairly traceable to the challenged action*.

*Palmer v. Stassinis*, 348 F. Supp. 2d 1070, \_\_\_, U.S. Dist. Lexis 25566, at \*44-45 (N.D. Cal. 2004) (emphasis added) (citing *Baker v. G.C. Services Corp.*, 677 F.2d 775, 777 (9th Cir. 1982)).

In contrast, the cases Farmers cites cannot support the propositions

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<sup>39</sup> The no injury requirement is not all that unusual. For example, until its 2004 amendment, California’s version of the CPA, Bus. & Prof. Code § 17200, *et seq.*, was a “no injury” statute. E.g., *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086 (Cal. 1998) (discussing standing under the California statutes).

it tries to place on them, as the overriding distinguishing theme is that in those cases, an actual debt is at issue. This is altogether different from here, where there is no plausible claim of any current obligation. For example, Farmers relies on *Wade* for the proposition that a notice merely stating that the creditor's records show "this amount owing" is not a "false, deceptive or misleading means of collecting *debts*." Farmers Br. at 6 (emphasis added). But, as indicated above, *Wade* involved an actual debt, and so is inapposite here where no such debt existed.<sup>40</sup>

*Bleich v. The Revenue Maximization Group*, 233 F. Supp. 2d 496 (2002), is no different. Farmers cites to language indicating a mere "allegation that the debt sought to be collected is not owed, standing alone, cannot form a basis for a 'false and misleading practices' claim under the FDCPA." *Id.* at 500. But, again, at issue in *Bleich* was an actual debt, and the plaintiff's complaint was that she already paid it, not that no such debt ever existed. *See id.* at 498. Farmers also cites *Ferguson v. Credit Management Control, Inc.*, 140 F. Supp. 2d 1293 (2001), but that case is unhelpful for the same reason – the matter involved an actual debt.<sup>41</sup> This

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<sup>40</sup> *Wade*, however, does support the argument that acts that do not violate the FDCPA nonetheless may violate a state's consumer protection act. *See id.* at 1100.

<sup>41</sup> Also, Farmers misstates the language of the collection notice in *Ferguson*. It did not state "this amount," it stated "this debt" and then provided for the "amount." *See id.* at 1296. The "this amount owing" reference was actually citing the notice in *Wade*. *See id.*

is true for *Kramsky v. Trans.-Continental Credit Collection Corp.*, 166 F. Supp. 2d 908 (2001), as well. *Kramsky* is notable, however, for pointing out the procedures for providing proper notice concerning a debt “was created to protect consumers from harassing and unscrupulous practices of debt collectors, *including misleading representations.*” *Id.* at 912.

Farmers’ citation to *Fields v. Wilber Law Firm*, 383 F.3d 562 (7<sup>th</sup> Cir. 2004), actually bolsters Ms. Panag’s assertions in this case. There, the court found the addition of \$250 as attorney fees to a contractual debt, where the contract specifically provided for recovery of attorney fees, was not an unfair practice. The court sharply distinguished that circumstance, however, from *Veach v. Sheeks*, 316 F.3d 690 (7<sup>th</sup> Cir. 2003), which is far more analogous. In *Veach*, plaintiff, who had no contractual (or *any*) relationship with the creditor tried to prevent repossession of his debtor-friend’s auto by sending the creditor a check for \$350. When the creditor repossessed the vehicle anyway and Veach stopped payment on the check, the creditor hired an attorney to sue Veach. The attorney sent a notice to Veach listing the debt balance as \$1050 (\$350, trebled per an Indiana statute), plus attorney’s fees and costs as permitted by law. The *Veach* court held the notice violated the FDCPA because the amount set forth in

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at 1301 n.18. In any event, contrary to the implication in Farmers’ parenthetical, *see* Farmers Br. at 7, the “amount” language played no part in the resolution of the case.

the notice, in effect, represented “an *estimate of future liability in a court action*” as the “debt.” 316 F.3d at 690-93 (emphasis added in part).<sup>42</sup> See also *Shula v. Lawent*, 359 F.3d 489, 491-93 (7<sup>th</sup> Cir. 2004) (impermissible to claim as debt costs that have not been reduced to judgment).

#### E. TRIAL COURT RETAINED POWER TO PROTECT THE CLASS

Farmers and CCS attempt to avoid the holdings of *Goodman v. Schlesinger*, 584 F.2d 1325 (4th Cir. 1978) and *Cox v. Babcock & Wilcox Company*, 471 F.2d 13 (4th Cir. 1972). But while *Goodman* and *Cox* did not discuss discovery, both stand for the proposition that a “headless” class action, initially prosecuted by one without “standing” whose claim is dismissed, should be held open to allow a class claimant *with standing* to intervene. *Goodman*, 584 F.2d at 1332; *Cox* 471 F.2d at 16. Whether the other claimant is identified by discovery, advertising or through some other mechanism is a distinction without a difference: under CR 23(e), courts have the discretion to fashion such orders. Thus, while *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 200 S. Ct. 1202, 63 L.Ed.2d 479 (1980) and *Alexander v. Gino’s, Inc.*, 621 F.2d 71 (3d Cir. 1980), involved appeals of class certification denials, that is not the determinative criterion: Rule 23(e) “presumptively applies to all complaints containing

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<sup>42</sup> The *Veatch* court noted the impermissibility arose from the fact that the “amount of debt” provision is designed to inform the debtor of the *actual* obligation – not what the possible “worst-case scenario” might be. *Id.*

class allegations, including proposed class actions not yet certified by the district court.” *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 626 (7th Cir. 1986) (citations and internal quotation omitted).

In *Glidden*, plaintiff filed suit as a class action, and then sought to appeal the entry of summary judgment solely against him (court had not yet ruled on class certification). Because the case had been filed as a class action the court dismissed the appeal of the individual summary judgment ruling, holding that Rule 23(e) required notice. *Id.* at 628 (“what may not be dispensed with is the district court’s approval of the elimination of an uncertified class claim”). The court also made several observations that are informing here, including that Rule 23(e) applies as soon as a class action complaint is filed, that cases filed as class actions have class properties in advance of certification, and that dismissal of a class action without notice to putative class members may injure the class in a meritorious case and disrupt tolling the statute of limitations.<sup>43</sup> *Id.* at 625-27 (citations omitted). Indeed, in *Brewton v. City of Harvey*, 285 F. Supp.

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<sup>43</sup> In *Crown, Cork & Seal Co. Inc. v. Parker*, the Supreme Court stated:

The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. Once the statute of limitations has been tolled, it remains tolled as to all members of the putative class until class certification is denied.

62 U.S. 345, 353-54, 103 S. Ct. 2392, 76 L.E.2d 628 (1983) (citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L.Ed.2d 713 (1974)).

2d 1121 (2003), cited by Farmers, the Court held that limitations periods are tolled throughout the liability phase as well:

[n]ot permitting tolling of the statute of limitations... during the liability phases would frustrate the purposes of the class action device ... [as] each class member would be forced to intervene in the class action or file individual protective suits to prevent the running of the statute.

*Id.* at 1126 (citations omitted).<sup>44</sup>

In short, the trial court did not lose jurisdiction to act in this class suit despite the individual summary judgment ruling as to Panag,<sup>45</sup> and this Court should uphold the trial court's instinctively sound decision to allow for the identification of another class representative.<sup>46</sup>

As to *Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir. 1982), Farmers misconstrues Ms. Panag's position. There, the Court held that, for purposes of prosecuting a class action, plaintiff's injunctive relief claim stood apart and separate from his claim for damages. *See id.* at 1317. So it is here. Even if it were true that Ms. Panag suffered no damage,<sup>47</sup> she also has brought a separate claim for injunctive relief to

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<sup>44</sup> The fact that a class had been certified prior to the liability phase in *Brewton* is not determinative. *E.g., Glidden*, 808 F.2d. at 625-628.

<sup>45</sup> Contrary to CCS's assertion, the trial court never entered final judgment – and in fact, specifically declined to do so. *See* CP 389.

<sup>46</sup> CCS's assertion that no class member has been “put on notice” is incorrect. The filing of a class action lawsuit is a matter of public record.

<sup>47</sup> Which it is not only untrue, but irrelevant, since she need only establish “injury.”

cease conduct that is capable of repetition against her and others. Because she possesses this claim for injunctive relief, and any such relief would accrue to her benefit as well, Ms. Panag, like plaintiff Jordan, retains a stake in the outcome of the litigation. *See id.* at 1317-18.

Farmers asserts that citation to the *IBEW* case<sup>48</sup> is improper. By its terms, however, RAP 10.4(h) only applies to unpublished opinions of this Court, and nothing indicates that Division I reads the rule as broadly as Division III did in *Mendez*.<sup>49</sup> Furthermore, although Ms. Panag does not extensively rely on *IBEW*, the case is informing because there appears to be little case law on the issue and *IBEW* is on point.<sup>50</sup> As to Farmers and CCS's discussion of the case, Ms. Panag notes that they mischaracterize it in critical respects (*e.g.*, no plaintiff of record possessed a viable cause of action at the time the Court ruled), and that it has never been overruled.

#### F. THE SKY WILL NOT FALL IF DECEPTIVE CONDUCT IS PROHIBITED

CCS and Farmers sound the alarms and claim that if Ms. Panag has her way and subrogation claims can only be asserted through litigation, then the courts will necessarily be flooded with thousands of such cases.

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<sup>48</sup> *Int'l Broth. of Elec. Workers v. Westinghouse Elec. Corp.*, 25 Fair Empl. Prac. Cas. (BNA) 1093, 20 Empl. Prac. Dec. (CCH) P 30082, 1979 WL 245 (D. Md. 1979).

<sup>49</sup> *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 608-09, 45 P.3d 594 (2002).

<sup>50</sup> District court opinions like *IBEW*, even though not selected for the official reporter, are routinely cited in federal courts.

But like Chicken Little, their claimed fears of a falling sky are unfounded.

Ms. Panag's position is not that subrogation claims can only be pursued through litigation (we suspect Farmers and CCS actually know this). Indeed, Farmers can pursue its unliquidated, unadjudicated potential tort claims just like everyone else: try to negotiate a resolution,<sup>51</sup> or institute litigation and let a jury decide the claim. This is what Ms. Panag had to do with her personal injury claim – she did not simply value her damages and send it out for collection. Indeed, this is what *Mr. Hamilton* would have had to do to pursue *the exact same claim* that Farmers claimed to pursue as subrogee, and *in whose shoes* Farmers claimed to stand.<sup>52</sup> The fact that this may be more expensive than simply defrauding people out of money they do not owe is not much of a justification for the shortcuts defendants took here.

Finally, Farmers argues that the CPA should not prohibit acts that are reasonable in relationship to the development of business, or which are not injurious to the public interest. While taking no issue with this general

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<sup>51</sup> Without the use of deceit and misrepresentation.

<sup>52</sup> Cases cited by Farmers are not to the contrary. For example, Farmers uses *Bierce v. Grubbs*, 84 Wn. App. 640, 929 P.2d 1142 (1997), to argue that because insurers routinely provide notice of subrogated claims, its and CCS's actions here are protected. But *Bierce* merely points out that Safeco "wrote a letter to Ms. Bierce's attorney and to Liberty [another insurer] advising of its subrogation interest and *intent to seek* reimbursement of PIP advances." *Id* at 642-43 (emphasis added). Unlike the instant case, they did not mischaracterize the contingent claim as a debt.

principle, Ms. Panag would point out that it is never a “reasonable” business practice to misrepresent the nature of alleged obligations, to pursue people by falsely claiming an non-existent obligation is an “Amount Due,” or to use the threat of “collection activity” to obtain money that doesn’t belong to you, and that obtaining huge sums of money from numerous citizens is severely injurious to the public interest.

### III. CONCLUSION

Farmers hired a debt collector to send deceptive, threatening, self-styled “collection notices” to Ms. Panag for a purported obligation that was allegedly an “Amount Due.” Through CCS, Farmers claimed Ms. Panag owed it more than six thousand dollars, and had CCS try to extract it from her. Farmers and CCS completely ignored the fact that Ms. Panag legally owed nothing, representing to her that she indisputably owed the money, it was an amount certain, “Due” now, and she was in collections on it. Defendants’ response to this is essentially “so what, we believed we were ultimately ‘entitled’ to the money.” Although this “ends justifies the means” argument is patently unavailing in any event, it is also simply not true: Ms. Panag lawfully owed nothing, and Farmers was lawfully “entitled” to nothing. That Farmers itself believed the value of the *claim* it might make was actually several thousand dollars less than the amount it had CCS pursue only makes this more egregious.

There are at least two reasons for Farmers and CCS's "collection notice" scheme. First, it is plainly cheaper than complying with the law. Establishing through the legal process that an individual obligation truly exists obviously costs more than mass mailing form dunning letters to unsuspecting laypersons. But this cannot serve as an excuse for their misconduct. Indeed, it is no different from the economic choices Ms. Panag faced for her own claim.

The second reason is that it provides an extraordinary opportunity for windfall. Of course, since no money is actually owed, any money collected is windfall. But even where an insurance company might actually seek to establish liability and an amount owed, that amount might end up to be far less than the sum paid for or to their insureds (given, *inter alia*, allocation of fault, whether medical care was reasonable, necessary and related, the value of pain and suffering, etc.). Indeed, this case presents the perfect example, where defendants tried to collect nearly *three times* the value Farmers itself put on its claim. Such mischief highlights why insurance companies and debt collectors cannot be left as self-appointed judge, jury and executioner.

Finally, the Court should be clear on the full implication of the defendants' position: they believe there are essentially *no limitations* on what they can do to try to extract money from persons in these matters.

They are utterly unrestrained by such things as the truth, because the law is simply "not applicable." No matter how blatant the deception or how egregious the threats, Washington law provides *no protection*. This Court should dispel them of this belief. Indeed, it is almost as if Farmers and CCS thought of things they could not do if Ms. Panag actually owed a debt, and then did them precisely because she did not owe anything.

Wherefore, Respondent/Cross Appellant Rajvir Panag requests that this Court affirm that portion of the Trial Court's July 1, 2005 order directing CCS and Farmers to provide contact information for putative class members, and to reverse and vacate that portion of the July 1, 2005, order granting summary judgment in favor of the defendants/appellants, and to remand this case to the trial court for further proceedings.

April 28, 2006.



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DECLARATION OF SERVICE

I certify that on April 28, 2006, I caused to be filed with the Court of Appeals, Division I, via first class mail, postage prepaid, the original and one copy of the foregoing Reply Brief of Respondent/Cross-Appellant Rajvir Panag, and caused to be delivered, via first class mail, postage prepaid, true and accurate copies to:

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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.

Executed in Seattle, Washington, this 28th day of April, 2006.

  
\_\_\_\_\_  
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