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SUPREME COURT
STATE OF WASHINGTON

2008 MAY 23 P 12:12 NOS. 80357-9 and 80366-8 (Consolidated)

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

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

Respondent,

v.

FARMERS INS. CO. OF WASHINGTON, a domestic insurance
company, and CREDIT CONTROL SERVICES, INC. d/b/a Credit
Collection Services

Petitioners.

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY RONALD R. CARPENTER
CLERK

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

Respondent,

v.

OMNI INS. CO., a foreign insurance company, and CREDIT CONTROL
SERVICES, INC. d/b/a Credit Collection Services

Petitioners.

**BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF WASHINGTON**

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I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of *amicus curiae* briefs on matters affecting the public interest.¹ These consolidated cases concern three issues necessary to the effectiveness of the Consumer Protection Act (CPA), RCW 19.86. First, the cases present the issue of whether the CPA applies to collection notices for insurance subrogation claims where the notices are alleged to be unfair or deceptive. Second, the petitioners ask this Court to hold that a private action under the CPA can be brought only if there is a consensual business relationship between the plaintiff and defendant. Third, the cases raise the issue of whether the Collection Agency Act, RCW 19.16, permits the collection practices, and therefore precludes an action under the CPA. These questions affect the public interest because they will influence the extent to which the CPA protects individuals from unfair or deceptive practices that occur in trade or commerce.

The Attorney General enforces the CPA on behalf of the public,² and has an interest in the development of CPA case law. The Legislature intends that the Attorney General have the opportunity to participate in

¹ See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

² RCW 19.86.080.

private CPA cases, as evidenced by the statutory requirements that the Attorney General be served with any complaints and appellate briefs addressing the CPA.³

II. ISSUES PRESENTED BY AMICUS

(1) May the plaintiffs pursue their claims under the CPA meeting the elements of *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792-93, 719 P.2d 531 (1986) when the alleged deceptive conduct involves collection notices for insurance subrogation claims?

(2) Is a plaintiff required to prove a consensual business relationship with the defendant in order have standing to bring a private CPA action pursuant to RCW 19.86.090?

(3) Does the Washington Collection Agency Act preclude applicability of the CPA where the alleged deceptive conduct involves collection notices for insurance subrogation claims?

III. STATEMENT OF THE CASES

The cases below are *Panag v. Farmers Ins. Co.* and *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 10 (2007).

The respondents, Panag and Stephens, each were involved in a motor vehicle accident with an insured of the appellant insurance

³ RCW 19.86.095.

companies, Omni and Farmers. In each case, the insurance companies believed Stephens and Panag to be uninsured and paid their insureds under underinsured motorist coverage.⁴ Omni attempted to recover its payments from Stephens.⁵ When Omni's demands were not successful, it arranged to have its subrogation claim pursued by Credit Control Services, Inc. (CCS).⁶ CCS is a collection agency licensed to collect debt in the state of Washington. Farmers also retained CCS to collect its subrogation claim against plaintiff Panag.⁷

CCS sent various formal collection notices to both Stephens and Panag. The notices stated that the Stephens and Panag owed the insurance companies the amount the companies had paid to their insured pursuant to their underinsured motorist coverage.⁸ Stephens and Panag alleged these notices were deceptive and filed actions against Omni, Farmers and CCS under the CPA. This litigation followed.

⁴ *Omni*, 138 Wn. App. at 160, n.4 (citing CP at 214) & 163 n.12 (citing CP at 168).

⁵ *Id.* at 159 n.2 (citing CP at 208, 210), 160 n.3 (citing CP at 212) & n.4 (citing CP at 214).

⁶ *Id.* at n.5 (citing CP at 21).

⁷ *Id.* at 163 n. 6 (citing CP at 74).

⁸ *Id.* at 160 & n.10 (citing CP at 77), 163 n.12 (citing CP at 168).

IV. ARGUMENT

A. The Consumer Protection Act Applies in These Cases.

1. The CPA Serves the Public Interest.

The Legislature enacted the CPA to fulfill a public policy for a fair and non-deceptive marketplace. The CPA's purpose "is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition."⁹ Washington courts shall liberally construe the CPA to serve its beneficial purposes.¹⁰

The Legislature has expressly authorized private citizens to bring actions under the CPA. RCW 19.86.090. RCW 19.86.090 provides, in relevant part:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, . . . may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars

⁹ RCW 19.86.920; *see also Fisher v. World Wide Trophy*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976) (purpose of the CPA is to protect the public by prohibiting and eliminating injurious acts or practices).

¹⁰ RCW 19.86.920.

This Court has held that the purpose of the private right of action is “to enlist the aid of private individuals to assist in the enforcement of the [CPA].”¹¹ Private actions further the public interest because the plaintiffs may obtain injunctive relief against unfair or deceptive practices in addition to recovering their damages, even if the injunction would not directly affect their private interests.¹² Private actions also serve the public interest because they prevent fraudulent practices from continuing unchecked.¹³

In *Hangman Ridge*, the Washington Supreme Court interpreted RCW 19.86.020 and 19.86.090 to require that a plaintiff must establish five elements in order to prevail on a private CPA claim.¹⁴ The five elements are: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that affects the public interest; (4) injures the plaintiff or property; and (5) a causal link between the unfair or deceptive act and the injury suffered.¹⁵

The courts consistently have rejected overly narrow interpretations of the CPA and have instead interpreted it liberally, as the Legislature intended. For example, actual deception is not required; rather, the CPA

¹¹ *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976).

¹² *Hockley v. Hargitt*, 82 Wn.2d 337, 349-50, 510 P.2d 1123 (1973).

¹³ *Id.* at 350.

¹⁴ 105 Wn.2d at 784-85.

¹⁵ *Id.*

requires only that the act or practice has a capacity to deceive a substantial portion of the public.¹⁶ Likewise, the CPA does not require a plaintiff to prove monetary damages in order to satisfy the injury element; rather, a plaintiff may prevail on a more broadly defined injury, however minimal.¹⁷

This Court also requires a CPA plaintiff to prove a “public interest” element in order to prevail. This element makes sense because the CPA is not a vehicle for resolving purely private disputes, but is intended to benefit the public interest.¹⁸

CCS, Omni, and Farmers contend the CPA does not apply because there is no consensual business relationship between the parties,¹⁹ and because the CPA does not apply to adversarial tort disputes.²⁰ To the contrary, the plain language of the CPA and prior case law confirm a broader application of the CPA.

¹⁶ *Hangman Ridge*, 105 Wn.2d at 785.

¹⁷ *Hangman Ridge*, 105 Wn.2d at 792; *see also Nordstrom v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987)(loss of goodwill)

¹⁸ *Lightfoot* at 86 Wn.2d 334; *Hangman Ridge*, 105 Wn.2d at 788-89.

¹⁹ *See CCS's Supp. Br.* at 6-9.

²⁰ *See id.* at 6-14.

2. The CPA Does Not Require a Threshold Showing of a Consensual Business Relationship Between Plaintiff and Defendant.

The CPA provides that “any person who is injured in his business or property” may bring an action for violations of RCW 19.86.020.²¹ RCW 19.86.020 prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.” Therefore, by its plain language, the CPA is not limited to situations where the plaintiff has a consensual business relationship with the defendant.

Washington courts have interpreted the CPA broadly and have held that individuals have standing to maintain private CPA actions even without a “consensual business relationship” between the parties. In *Washington State Physicians Insurance Exchange v. Fisons*,²² this Court rejected the argument that a physician does not have standing to bring a private CPA claim to redress damage to his reputation caused by the defendant drug company’s failure to warn about the drug’s dangers.²³ This Court held that neither the Washington CPA nor *Hangman Ridge* “include[s] a requirement that a CPA claimant be a direct consumer or user of goods or in a direct contractual relationship with the defendant.”²⁴

²¹ RCW 19.86.090.

²² 122 Wn.2d, 299, 858 P.2d 1054 (1993).

²³ *Id.* at 312-13

²⁴ *Id.*

Similarly, in *Holiday Resort Community Ass'n v. Echo Lake Assocs. LLC*,²⁵ the Court of Appeals ruled that the CPA does not require privity of contract in order to bring an action for unfair or deceptive practices. In that case, an association of manufactured home tenants had standing to sue the landlord's association that had *drafted* an unfair or deceptive contract, even though the tenants had no contractual relationship with the landlord's association.²⁶ In reaching its decision, the court noted the breadth of the CPA: "The CPA is 'a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.'"²⁷

The CPA also provides a cause of action for third party beneficiaries to an insurance policy even though they (passengers in a vehicle covered by the defendant insurance company) had no consumer relationship with the insurance company.²⁸ Washington courts also have held that infringement on a trade name is actionable under the CPA.²⁹ In such cases, no consensual business relationship exists between the parties.

²⁵ 134 Wn. App. 210, 219-220, 135 P.3d 499 (2006), *review denied*, 160 Wn.2d 1019, 163 P.3d 793 (2007).

²⁶ *Id.* at 220-21.

²⁷ *Id.* at 220 (citing *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

²⁸ *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 743 P.2d 832 (1987), *disapproved on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001).

²⁹ *Nordstrom*, 107 Wn.2d 735.

Plainly, Washington courts do not require a plaintiff to first establish a “consensual business relationship” with a defendant as a threshold requirement to maintaining a CPA action. Indeed, as the Court of Appeals recognized below, the concerns that typically underlie the “standing” issue are addressed by the five *Hangman Ridge* elements.³⁰ There is no reason for this Court to add a sixth element.

In addition to arguing that the ability of private persons to bring actions under RCW 19.86.090 should be restricted, CCS and Farmers appear to advocate that even the Attorney General would be precluded from bringing CPA actions pursuant to RCW 19.86.080 on behalf of the public if the underlying conduct did not involve a consensual business transaction. This would significantly impact the Attorney General’s ability to stop unfair and deceptive practices in situations where the practices are alleged to be “unauthorized,” such as “cramming” (where a third party imposes unauthorized charges on a person’s telephone bill) because the putative defendant would not have a consensual business relationship with the injured person.

³⁰ *Omni*, 138 Wn. App. at 176.

3. An “Adversarial Tort Dispute” Between Parties Does Not Preclude a CPA Claim.

CCS contends the CPA should not apply in this case because CCS was “simply an adverse party disputing a tort claim with the opposing drivers.”³¹ However, these cases are not about liability for damages sustained in a motor vehicle accident. If this were simply a dispute between the two drivers about who was at fault for the accident, or how much the liable driver owed in damages, the CPA would not apply. But that is not the issue here. These cases involve the conduct of a collection agency and whether its collection tactics are actionable under the CPA. These cases are not, as CCS contends, simply adversarial tort disputes between individual motor vehicle drivers. Nor are these cases about whether or to what extent uninsured motorists are liable for damages arising from a motor vehicle accident; rather, the issue is whether the CPA applies to collection agencies (or others) that send allegedly deceptive collection notices to those motorists.

CCS relies on *Marsh v. General Adjustment Bureau*³² and *Green v. Holm*³³ to support its contention that the CPA does not apply “to disputes

³¹ CCS Supp. Br. at 12

³² 22 Wn. App. 993, 592 P.2d 676 (1979).

³³ 28 Wn. App. 135, 622 P.2d 869 (1981).

that originated between tort adversaries.”³⁴ However, these cases do not support CCS’s argument.

In *Marsh*, the Court of Appeals held that the plaintiff could not bring a CPA unfairness claim against an insurance company for failing to advise her, before the expiration of the statute of limitations, that it had denied her claim.³⁵ The court concluded that because the insurance company stood in the shoes of its insured, its relationship to the plaintiff was adversarial and not subject to the CPA.³⁶ However, the court’s reasoning was based on its interpretation of the CPA that it only applied where there was a “consumer relationship.”³⁷ This Court subsequently has held that the CPA does not require a direct consumer relationship.³⁸

Green is distinguishable because the issue was whether an insurance company was liable under the CPA for violating its duty to exercise good faith.³⁹ The plaintiff was not the insurance company’s insured, so it owed no duty to the plaintiff; therefore, plaintiff could not allege a per se violation of the CPA.

³⁴ CCS Supp. Br. at 9.

³⁵ *Marsh*, 22 Wn. App. at 936.

³⁶ *Id.*

³⁷ *Id.* (citing *Salois v. Mutual of Omaha*, 90 Wn.2d 355, 581 P.2d 349 (1978)). The *Marsh* court also relied on *Bowe v. Eaton*, 17 Wn. App. 840, 565 P.2d 826 (1977), in which the Court of Appeals held that the CPA “deal[s] solely with consumer transactions in which there is an actual sale of goods or services involving a buyer, a seller, and the goods or services.” *Id.* at 846. This Court rejected this reasoning in *Hangman Ridge and Fisons*. See *Fisons*, 122 Wn.2d at 312-13.

³⁸ See *supra* n.32.

³⁹ *Green*, 28 Wn. App. 135, 137.

Marsh and *Green* in no way limit the applicability of the CPA over allegations of deceptive conduct in the collection of subrogation claims.

CCS's "adversarial relationship" argument would exempt many unfair and deceptive practices from the CPA in a manner the Legislature plainly did not intend. For example, if a real estate agent failed to disclose to purchasers the history of illegal drug manufacturing at a property, the CPA would not apply because the purchaser and real estate agent had a tort-based adversarial dispute over whether the failure to disclose was negligent.⁴⁰ An insured would not be able to bring a CPA claim against his insurance company and agent when the insurance agent failed to follow the insured's instructions in writing a property insurance policy or misrepresented the scope of coverage because the insured and his insurance agency and agent would have an adversarial tort-based dispute over the agent's conduct.⁴¹

Farmers contends the Court of Appeals' decision will invite "multitudes of other wrongdoers" to file CPA actions when they receive letters demanding them to stop their wrongful conduct: "If allowed to stand, the decision will soon invite class actions for treble damages by plaintiffs who pirated cable programming, illegally downloaded music

⁴⁰ See, e.g., *Bloor v. Fritz*, __ Wn. App. __, 180 P.3d 805 (2008).

⁴¹ See, e.g., *Shah v. Allstate Ins. Co.*, 130 Wn. App. 74, 121 P.3d 1204 (2005), review denied, 157 Wn.2d 1006, 136 P.3d 759 (2006).

files or failed to pay child support, and disliked the demand letters prompted by their wrongdoing.”⁴² CSS also argues that the Court of Appeals decision will punish those who attempt to resolve tort disputes by sending demand letters.⁴³ These contentions fail.

As a preliminary matter, the Court of Appeals expressly did not hold that sending demand letters is a deceptive practice.⁴⁴ Instead, the court held that the specific collection notices sent by CCS were deceptive because:

[W]hen a notice from a credit collection agency arrives with the message that it is a “Formal Collection Notice” for an “amount due,” a recipient can reasonably be expected to perceive it as a notice of a debt that must be paid. The increasingly urgent tone (“ATTENTION!”) and message (“ACTIVITY PENDING TEN (10) days”) suggests that the recipient’s situation is becoming worse with each passing day when in fact there is no urgency. The basis of the alleged “amount due” is an unliquidated tort claim, not an unpaid consumer debt.⁴⁵

Plainly, the Court of Appeals was not troubled by demand letters as a whole, but by deceptive collection notices. The former are unlikely to give rise to a CPA claim, but the latter are squarely within the CPA’s reach.

⁴² Farmers’ Supp. Br. at 2; *see also id.* at 8.

⁴³ CCS’s Supp. Br. at 15-16.

⁴⁴ *Omni*, 138 Wn. App. at 167.

⁴⁵ *Id.*

In addition, CCS's and Farmers' policy concerns about expanding the scope of the CPA are addressed by application of the *Hangman Ridge* factors. The CPA will apply to demand letters only if they (1) are unfair or have the capacity to deceive a substantial portion of the public; (2) occur in trade or commerce; (3) affect the public interest; (4) injure the plaintiff's business or property; (5) and the injury is caused by the unfair or deceptive acts. No one sending non-deceptive demand letters should have any reason to fear liability under the CPA.

B. The Washington Collection Agency Act Does Not Preclude Application of the CPA.

In its briefing before this Court, Farmers contends that the application of the CPA to these cases is improper because the Washington Collection Agency Act, RCW 19.16, permits a collection agency to collect subrogation claims by referring to such claims as “debts.”⁴⁶ However, a careful reading of the Collection Agency Act shows that the conduct is neither permitted nor regulated by that Act, and therefore the CPA applies.

The Collection Agency Act defines a “debtor” as “any person owing or alleged to owe a *claim*.”⁴⁷ A “claim” is “any obligation for the payment of money or thing of value *arising out of any agreement or*

⁴⁶ Farmer's Supp. Br. at 12-13.

⁴⁷ RCW 19.16.100(11) (emphasis added).

contract, express or implied.”⁴⁸ A subrogation claim does not arise out of an agreement or contract; therefore, it is not a claim for purposes of the Washington Collection Agency Act, and the Act does not apply to collection practices of subrogation claims. Therefore, the Act does not permit the debt collection notices at issue in this appeal.

The CPA does not apply to “actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state.”⁴⁹ Because the Collection Agency Act does not permit the collection practices at issue, they are subject to the CPA.

As a matter of public policy, collection activity is not categorically exempt from the CPA. The Legislature has decided that violations of certain provisions of the Collection Agency Act, RCW 19.16.100 and 19.16.250, are per se violations of the CPA.⁵⁰

V. CONCLUSION

The Court should decline the invitation to limit the Consumer Protection Act to acts or practices that occur within consensual business relationships, and instead adhere to the plain language of the CPA and *Hangman Ridge* that set forth the requirements for bringing a CPA claim under RCW 19.86.090. The Court also should hold that the CPA applies

⁴⁸ RCW 19.16.100(5) (emphasis added).

⁴⁹ RCW 19.86.170.

⁵⁰ RCW 19.16.440. *See also, Evergreen Collectors v. Holt*, 60 Wn. App. 151, 154-57, 803 P.2d 10 (1991).

in this case irrespective of whether there is an adversarial tort-based dispute between the involved drivers. Finally, the Court should hold that the Collection Agency Act does not permit the collection practices at issue and therefore does not preclude application of the CPA.

Respectfully submitted this 23rd day of May, 2008.

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DECLARATION OF
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CLERK

BY RONALD R. CARPENTER

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LESLI ASHLEY declares as follows:

I certify that on May 23, 2008, I cause to be filed with the Supreme Court, via electronic filing, the foregoing Brief of *Amicus Curiae*, and caused to be delivered, via legal messenger and/or electronic service, true and accurate copies to:

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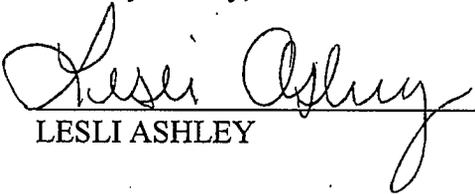
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, WA, this 23rd day of May, 2008.


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**FILED AS ATTACHMENT
TO E-MAIL**

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To: Ashley, Lesli (ATG)
Cc: AMICUSWSTLAF@winstoncashatt.com; mjide@yahoo.com; Smith, Shannon (ATG)
Subject: RE: Attorney General's Amicus Curiae Brief in the Panag v. Farmers Ins Co of Wash and Stephens v. Omni

Rec. 5-23-08

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Sent: Friday, May 23, 2008 12:14 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: AMICUSWSTLAF@winstoncashatt.com; mjide@yahoo.com; Smith, Shannon (ATG)
Subject: Attorney General's Amicus Curiae Brief in the Panag v. Farmers Ins Co of Wash and Stephens v. Omni

Attached is the Attorney General's *Amicus Curiae* Brief in the *Panag v. Farmers Ins Co of Wash and Stephens v. Omni* case, Cause Nos. 80357-9 and 80366-8 (Consolidated).

The attorney filing this document is Shannon E. Smith, WSBA #19077, email address: Shannons@atg.wa.gov.

If you have any questions or concerns, please feel free to call or email me. Thank you for your time and consideration in this matter.

<<DeclarationofServiceAttorneyGeneral.pdf>> <<PanagVFarmersAttorneyGeneralAmicusBrief.pdf>>

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