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No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 56625-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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

Respondent,

v.

FARMERS INSURANCE COMPANY, a domestic insurance company,
and CREDIT CONTROL SERVICES, INC. d/b/a Credit Collection
Services,

Petitioners.

**CREDIT CONTROL SERVICES, INC.'S
PETITION FOR REVIEW**

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I. IDENTITY OF PETITIONER

Petitioner is Credit Control Services, Inc. d/b/a Credit Collection Services (“CCS”), a defendant in the Superior Court and an Appellant/Cross-Respondent in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued its *Panag* decision in an opinion addressing this case as well as the decision in the linked case of *Stephens v. Omni and CCS*, Cause No. 57068-4-I.¹ The published combined opinion is captioned *Stephens v. Omni & Panag v. Farmers*, Nos. 57068-4-I & 56625-3-I, --- Wn. App ---, 2007 WL 1180497 (Slip Op., Apr. 23, 2007), and is set forth in the Appendix at pages A-1 through 36. (“Slip Op.”). CCS filed a timely motion for reconsideration that was denied on May 25, 2007. A copy of the order appears in the Appendix at page A-37.

III. ISSUE PRESENTED FOR REVIEW

Whether adversarial parties with no consumer relationship between them whatsoever (neither would-be nor actual, direct or indirect) can be held liable under the Consumer Protection Act, a statute that proscribes extraordinary remedies – including treble damages and attorney fees – to penalize and prevent unfair or deceptive consumer practices.

¹CCS has presented the same argument why review should be accepted in its Petition for Review in the linked case of *Stephens v. Omni and CCS*, Cause No. 57068-4-I. The *Panag* and *Stephens* Petitions for Review filed by CCS are identical save for the specific factual references unique to each case.

IV. STATEMENT OF THE CASE²

Rajvir Panag and Deven Hamilton were involved in an automobile accident. CP 3, 681. At the time of the accident, Panag was uninsured in violation of Washington law.³ CP 468, 766. Hamilton was insured with Farmers Insurance Company. Farmers collected Hamilton's deductible and made payments for repairs under Hamilton's uninsured motorist ("UIM") coverage. CP 485-86. Farmers was then subrogated to (*i.e.* stepped into the shoes of Hamilton for the purpose of) Hamilton's recovery claims.⁴

Farmers retained CCS, a subrogation recovery specialist, to assist in its efforts to recover sums paid by Farmers that were attributable to Panag. CP 494-96. Acting in that capacity only, and based upon a fault and damages assessment provided by a licensed adjuster at Farmers, CCS sent three letters to Panag. CP 454-61, 751. These letters sought to obtain any insurance coverage that might be available to Panag or, in the alternative, to recover the amounts paid by Farmers and Hamilton.

CP 454-61. At issue in this case is whether the letters sent by CCS

² For the purposes of this Petition only, CCS incorporates by reference the Statement of Facts presented in the Petition for Review filed on June 19, 2007, by Farmers Insurance Company in the *Panag* case ("Farmers' Petition"), and the underlying facts as recited by the Court of Appeals in its opinion. Slip Op. at 2-10.

³ See RCW 46.30 (Mandatory Liability Insurance Act); RCW 46.29 (Financial Responsibility Act)

⁴ See *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 422, 869 P.2d 1097 (1994) (explaining that the subrogating insurer "steps 'into the shoes'" of its insured).

triggered the provisions of the Consumer Protection Act (“CPA”), despite the indisputable fact that Panag and CCS are adversaries with no consumer relationship between them.

The trial court dismissed Panag’s claim, but the Court of Appeals reinstated it. The Court of Appeals published its opinion, making its exceptional application of the CPA to a purely adversarial relationship new precedent throughout Washington State.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED⁵

The decision by the Court of Appeals substantially broadens the reach of the CPA to matters far beyond its intended province. The Court of Appeals found a business liable under the CPA for its efforts in attempting to recover against a non-consumer adversary. If the underlying published opinion is allowed to stand, parties with no consumer relationship and who are disputing an unlimited array of matters will be able to pursue and collect exceptional benefits properly reserved for victims of deceptive consumer practices. As a direct consequence, longstanding legitimate business practices will be inappropriately impaired.

⁵ CCS hereby expressly incorporates by reference the issues, arguments, and appendices in the Farmers’ Petition. With regard to Farmers’ second issue presented for review, as a point of clarification the CCS letters never used the term “debt.” *See* CP 454-61.

CCS respectfully requests that this Petition be granted because the decision of the Court of Appeals is in conflict with previous decisions of this Court and the Court of Appeals, as well as express directions of legislative intent. In addition, the Petition involves an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b)(1), (2) & (4).

A. The Court of Appeals' Application of the CPA to Non-Consumer Adversaries Conflicts With Washington Law.

1. The Court of Appeals' Determination that the CPA Applies to a Non-Consumer Transaction.

The published Court of Appeals decision holding that the practice of sending letters between adversaries violates the CPA conflicts with Washington precedent and legislative mandates. It is undisputed that Hamilton and Panag were adversaries. They were never even remotely involved in a common consumer relationship or in competition or trade. Indeed, the absence of a consumer transaction was expressly noted by the Court of Appeals. *See* Slip Op. at 24. The only relationship between Hamilton and Panag is their private dispute over who was at fault for the automobile accident between them. Although the practice of subrogation resulted in the substitution of entities (Farmers and its agent, CCS, for Hamilton), the genesis of this case has nothing to do with consumers; rather, it is merely a dispute between two drivers involved in a collision.

As support for its conclusion that this dispute is cognizable under the CPA, the Court of Appeals pointed to the business relationship between CCS and Farmers. Slip Op. at 24. Admittedly, a commercial transaction took place between CCS and Farmers when Farmers hired CCS to assist in the recovery efforts, but this does not supply the missing consumer transaction that is at the heart of CPA protection. Panag is the plaintiff in this case, and she had no would-be or actual, direct or indirect consumer relationship with Hamilton, Farmers, or CCS. There was not even the potential for any sort of consumer transaction between Panag and CCS. By the Court's reasoning, any activity whatsoever could be actionable as long as someone, somewhere, somehow was involved in a consumer transaction no matter how distant from the facts of the case.

2. Conflicting Decisions from this Court and the Court of Appeals.

“The CPA exists to protect consumers.” *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 970, 904 P.2d 767 (1995); *see also* RCW 19.86.910 (“This act shall be known and designated as the ‘Consumer Protection Act.’”) This Court has described the purpose of the CPA as follows:

The purpose of the CPA was set forth in RCW 19.86.920. That section reveals the Legislature's intent “to protect the public and foster fair and honest competition.”

Hangman Ridge v. Safeco Title Ins. Co., 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986) (quoting RCW 19.86.920). In accordance with the laudable objectives of penalizing and preventing unfair or deceptive consumer transactions, strict penalties of treble damages and attorney fees are imposed upon violators, and extraordinary compensation is awarded to victims of deceptive consumer-based transactions. RCW 19.86.090.

Given the CPA's purpose and the high stakes associated with CPA claims, it is not surprising that every published Washington case interpreting the CPA since the 1986 seminal case of *Hangman Ridge* has involved either parties with direct or indirect consumer relationships between them or private contractual (as contrasted to tort-based) disputes.⁶ The consumer transaction context is typically evidenced by the sale or purchase of goods or services, mass advertising, warranty offers, public offering or solicitation, or any act or practice that impacts Washington's consuming public with regard to the products and services at issue. Adversarial relationships are not consumer relationships or private contractual disputes. Therefore, they have not been and should not be subject to the CPA.⁷

⁶ See Appendix to Farmers' Petition, Ex. B (listing case citations and holdings in 17 consumer transaction CPA cases and 79 private contractual dispute CPA cases published since 1986).

⁷ This Court established two different tests to satisfy the "public interest" element of the CPA – one applicable to consumer transactions and another applicable to private disputes

Washington courts have consistently rejected efforts by third parties to bring CPA actions against an adverse party's insurer or the insurer's agent. *See, e.g., Green v. Holm*, 28 Wn. App. 135, 137, 622 P.2d 869 (1981); *Marsh v. Gen. Adjustment Bureau, Inc.*, 22 Wn. App. 933, 936-37, 592 P.2d 676 (1979). Green involved an automobile accident between Green and Holm, caused by Holm's negligence. Green asserted a CPA action against Holm and his insurer based upon a dispute over payment of certain medical bills. The Court of Appeals concluded that Green "cannot assert a claim under the [CPA] because [the CPA] does not apply to a relationship that is adversarial in nature." *Green*, 28 Wn. App. at 137.

Addressing facts very similar to those at issue here, in *Marsh*, a dispute arose after a private adjuster, *i.e.*, an agent of an insurer, provided a claimant with inadequate information regarding her claim. The claimant fell on a staircase at Whitman College. *Marsh*, 22 Wn. App. at 934-35. Whitman notified its insurer, which assigned an adjuster to investigate the

involved in a contractual dispute. *See Hangman Ridge*, 105 Wn.2d at 789-91 (listing factors to consider when acts are "essentially a consumer transaction," and separate factors to consider when the "transaction was essentially a private dispute" over a contract or other fiduciary relationship between the parties, *e.g.*, attorney-client, insurer-insured, realtor-property buyer, or escrow agent-client). The Court of Appeals in the underlying decision first determined that the parties were not consumers, and then went on to apply the consumer test. As Panag was not involved in a consumer transaction with CCS and not involved in a private dispute with CCS, neither test should apply. This analytical problem provides further support for the conclusion that the circumstances presented in this case simply do not fit into a CPA cause of action.

matter. The claimant brought suit against the adjusting company and the insurer for violation of the CPA. The *Marsh* court confirmed that the insurer and its adjuster stood in the shoes of their insured in an adversarial relationship with the claimant, and as such, the CPA did not apply:

Here, a consumer relationship never existed between the parties. When the insurance company dealt with Ms. Marsh, through its adjuster, it stood in the shoes of its insured Thus, its relationship with Mrs. Marsh was adversarial in nature. In these circumstances, the Consumer Protection Act is not applicable.

Id. at 936-37.

Although the application of the CPA has undoubtedly been expanded over time,⁸ it has never been applied to a non-consumer in a dispute with an adversary. For example, in *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), this Court stated that a plaintiff need not be a direct consumer in order to bring a claim under the CPA. *Id.* at 312-13. However, in *Fisons*, the plaintiff was tied to the chain of commerce at issue. There, a prescribing physician had standing to assert a CPA violation against a drug company based upon the following explanation:

⁸ See, e.g., *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 743 P.2d 832 (1987) (holding that despite the lack of a direct consumer relationship, a passenger in an insured automobile was a third-party beneficiary entitled to benefits under the policy and therefore had standing under the CPA), *disapproved on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003); *Holiday Resort Cmty. Ass'n v. Echo Lake Associates, LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006) (holding privity of contract not required to bring CPA claim [note: the *Holiday Resort* case is also subject to a pending Petition for Discretionary Review]).

[I]n examining the nature of the relationship between a drug manufacturer, a prescribing physician and a patient, it is the physician who compares different products, selects the particular drug for the ultimate consumer and uses it as a tool of his or her professional trade.

Fisons, 122 Wn.2d at 313. Thus, under *Fisons*, a plaintiff can sue under the CPA if he or she is sufficiently ensconced in the chain of commerce between the manufacturer and the “ultimate consumer” such that he or she becomes the “logical person to be the ‘private attorney general’” and “stand[] in the shoes of the ‘ordinary consumer.’” *Id.* at 313. Unlike the physician in *Fisons*, however, Panag cannot stand in the shoes of the ordinary consumer in a consumer-based transaction. There is no chain of commerce that could ultimately connect her to either CCS or Farmers, and therefore she is not a “logical person” to bring a CPA action as a “private attorney general.” As Panag and CCS were not involved in any consumer-based transaction with one another, the CPA cannot apply.

3. Complementary Federal Law “Guides” Washington State Courts in Interpreting the CPA.

The CPA explicitly directs Washington courts interpreting the CPA to be guided by federal decisions construing complementary federal statutes. RCW 19.86.920; *Boggs v. Whitaker, Lipp & Helea, Inc., P.S.*, 56 Wn. App. 583, 587 n.6, 784 P.2d 1273 (1990) (citing *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984)). The CPA was designed to complement federal law addressing competition and trade. In the context

of supporting reasonable acts and practices related to the development and preservation of business, it is significant to note that federal decisions decline to restrict business practices absent the threshold requirement of some type of consumer transactional relationship between the parties.

In the realm of collections, the federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1601 *et seq.*, is the statute predominantly used to enforce the rights of consumers. In a very instructive decision involving facts nearly identical to those in this case, the U.S. Court of Appeals for the Eleventh Circuit held that the FDCPA was inapplicable. *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371-72 (11th Cir. 1998). As here, that case also involved a challenge to letters sent to a tortfeasor seeking to collect amounts paid by the insurance company for the tortfeasor’s liability. The Eleventh Circuit stated that not all obligations to pay are “debts” subject to the FDCPA; for instance, automobile accidents caused by the negligence of a party do not constitute a “transaction,” *i.e.*, a consensual or contractual arrangement. *Id.* Consequently, the Eleventh Circuit concluded that the FDCPA did not apply because the tortfeasor’s liability arose from a tort. *Id.*

The *Hawthorne* court dismissed the consumer protection claim because her “alleged[] neglig[en]ce . . . precipitated [the] accident” giving rise to her payment obligation. *Id.* The reasoning in *Hawthorne* has been

followed by federal courts in the Ninth Circuit. *See Turner v. Cook*, 362 F.3d 1219, 1228 (9th Cir. 2003) (holding the dismissal of an FDCPA claim is appropriate when a party seeks to collect damages arising from a commercial tort); *Betts v. Equifax Credit Information Serv., Inc.*, 245 F.Supp.2d 1130, 1134 (W.D. Wash. 2003) (finding that because no transaction took place, the claim falls outside scope of FDCPA).

4. Persuasive Authority From Other States Addressing Similar Circumstances Reasons That Consumer Protection Statutes Should Not Apply.

In *Camacho v. Automobile Club of S. Cal.*, 142 Cal. App. 4th 1394, 48 Cal. Rptr. 3d 770 (Cal. Ct. App. 2006), the California Court of Appeal recently addressed the very arguments presented in this case. The *Camacho* case was mentioned by the Court of Appeals in the underlying opinion, and even described as involving “a virtually identical practice under California’s law against unfair competition.” Slip Op. at 14.

Camacho dismissed the claim after thoughtful discussion of the important policy interests at issue. *Camacho*, 142 Cal. App. 4th at 1400. The *Camacho* court highlighted the “countervailing benefit” of making sure that an uninsured driver at fault “responds to his or her obligations” and the chance for that driver to “avoid being the recipient of dunning letters by obtaining insurance.” *Id.*

Significantly, the Court of Appeals in this case did not take issue with *Camacho*'s substantive analysis or its public policy discussions. The only discussion of the case focused on one alleged difference between California and Washington laws, *i.e.*, the erroneous conclusion that the California statute focused on unfair competition only, as contrasted with unfairness and deception addressed by the Washington CPA. Slip Op. 14-16. This finding misstates the scope of the California statute, which – like the Washington CPA – deals both with unfairness and deception, both of which were considered by the *Camacho* court.⁹ Setting aside the incorrect distinction raised by the Court of Appeals, the persuasiveness of the *Camacho* opinion is self evident based upon the strong public policies in both Washington and California to require vehicle insurance of all drivers.

Like California, Illinois has similarly disallowed the type of consumer protection application being asserted in this case. In *McCarter v. State Farm Mut. Auto Ins. Co.*, 113, Ill.App.3d 97, 101, 473 N.E.2d 1015, 1018 (Ill. App. 1985), the Illinois Court of Appeals affirmed the dismissal of a non-consumer's claim. In *McCarter*, a motorcyclist

⁹ The California statute states: “As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.” *Camacho*, 142 Cal. App. 4th at 1400 n.8 (quoting Cal. Business & Professions Code, § 17200); *see also Camacho*, 142 Cal. App. 4th at 1403 n.11 (noting that most “unfair” practices claims in California arise in “a ‘deceptive’ practice framework” and that the California statute was intentionally “framed in its broad, sweeping language” to deal with such schemes).

collided with a vehicle driven by an insured of State Farm Insurance Company. State Farm settled the motorcyclist's third party claim against State Farm's insured, and the motorcyclist sued State Farm. In dismissing the case, the *McCarter* court explained that "the transaction complained of . . . does not involve a sale of insurance. In fact, the plaintiff is not even a consumer under these circumstances" *Id.*

B. The Court of Appeals' Vast Expansion of the CPA to an Adversarial Transaction is an Issue of Substantial Public Interest Because It Impairs Legitimate Business and Encourages Abuses.

1. The CPA Cannot Be Used To Prohibit or Impair Reasonable Business Practices.

It is the potential for both an attorney fee award and the trebling of actual damages that increases the power and severity of CPA claims as compared to other types of lawsuits. If the Court of Appeals' published opinion (holding that the practice of sending letters between adversaries violates the CPA) is allowed to stand, parties disputing a potentially unlimited array of adversarial matters will be able to pursue and collect exceptional benefits reserved for victims of deceptive consumer practices. In addition, acts or practices which are reasonable in relation to the development and preservation of business, including but not limited to practices already regulated by the Insurance Commissioner, will be impaired. As the specific examples below illustrate, this case involves an

issue of substantial interest that should be determined by this Court. *See* RAP 13.4(b)(4).

The purpose of the CPA is not to protect the public from any harm having to do with any business transaction whatsoever. Of critical importance are the legislative mandates that fair and honest competition be fostered by the CPA. *See* RCW 19.86.920. The CPA itself explains that reasonable business practices shall not be prohibited:

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest

RCW 19.86.920.

2. Adverse Impact on Subrogation Recovery Efforts.

Based upon the specific facts and circumstances presented in this case, of paramount concern is the chilling effect of the unnecessary application of the CPA upon the business of subrogation. After expressly concluding that letters sent by a collection agency (CCS) on behalf of an insurer (Farmers) to recover subrogated amounts trigger the CPA, the Court of Appeals offers the following attempt at assurance: “Our holding does not infringe on the right of insurance companies to recover subrogation interests or to employ collection agencies to do so.” Slip Op. at 17. From this statement, it is clear that the impairment to subrogation created by the Court of Appeals was not an intended result.

Nonetheless, the Court of Appeals opinion does exactly what it states it does not do (*i.e.*, infringe on subrogation practices), while promoting a goal that is already being promoted and closely monitored under the existing regulated process of subrogation involving uninsured motorists. *See, e.g.*, RCW 48.17.090; WAC 287-17.

A brief explanation of the procedures employed and the context of the subrogation recovery efforts illustrates the problems created by the Court of Appeals opinion. The subrogation efforts by the subrogating insurers and CCS are consistent with the strong public policy of the Legislature to require that all registered drivers carry liability insurance. *See* RCW 46.30.010 (Mandatory Liability Insurance Act). The importance of an insurer's subrogation rights is not disputed. Insurers clearly have the obligation to the insurance-consuming public to keep their insurance premium rates at a minimum by pursuing justifiable subrogation practices. They also have the duty by insurance regulation to collect the deductibles for their paying policyholders – policyholders who are required to purchase uninsured motorist insurance, and then pay a deductible to obtain UIM coverage. WAC 284-30-390(4). When coupled with the clear legislative mandate that every driver carry liability insurance, there can be no doubt that the aggressive pursuit of subrogation

claims against uninsured motorists constitutes a reasonable business practice (and is, in fact, required to further the public interest).

Neither is there any doubt that strict laws and regulations already govern the subrogation process. The sequence of events that took place between the automobile accident involving Hamilton and Panag, and issuance of the CCS letters to Panag are critical to understanding the overall context of this case and significant regulatory background that pervades these practices:

- A licensed insurance adjuster for Farmers (Hamilton's insurer) reviewed the facts of the automobile accident.
- The subrogation evaluation by Farmer's licensed adjuster was regulated by the Washington Insurance Commissioner under the licensure provisions of the RCW 48.17.090 and the implementing Washington Administrative Code provisions found in WAC 287-17, which require licensure of such adjusters based upon examination (WAC 284-17-120), a supervised period of training (WAC 284-17-123), and continuing education requirements (WAC 284-17-220).
- Upon payment to Hamilton, both Farmers and the agency it hired to assist with subrogation recovery (CCS) stepped into the shoes of Hamilton with the right to subrogate for both the payments made and his deductible amount. WAC 284-30-395(4).
- Following this regulated process, Farmers' licensed insurance adjuster provided CCS with the liability and damages assessment used by CCS for its follow-on recovery collection efforts.

After evaluating the appropriate context of the subrogation efforts employed in this case, it becomes apparent that the Court of Appeals' stated concern about protecting the rights of drivers involved in

automobile accidents (Slip Op. at 17) is being fully and carefully addressed under existing laws and regulations. Thus, the established and highly regulated subrogation practices present no motivating basis upon which to modify the elements of the CPA to allow for recovery of enhanced penalties.

Moreover, if the Court of Appeals decision stands, the CPA could then apply on a much more widespread basis. If it applies to the communications between a subrogating insurer's collection services agent and the uninsured responsible party being pursued for recovery, then it arguably must also apply both to: (a) a subrogating insurers' own communications with responsible tortfeasors; as well as (b) self-insureds' (such as government agencies and large corporations) communications with responsible tortfeasors. This purported application of the CPA presents a conflict with specific statutes governing the collection of the State's interest in claims, *e.g.*, RCW 74.09.180-185 (State's subrogation to rights of recipients of medical benefits); RCW 74.20A.030 (State's subrogation to rights of any child receiving public assistance); RCW 51.24.030,.050,.060 (State's subrogation to rights of injured workers receiving industrial insurance benefits where a third party tortfeasor caused the worker's injury).

These longstanding subrogation recovery practices that are reasonable in relation to the development and preservation of business are of substantial interest to policyholders and insurers throughout Washington State, and should not be disrupted, which is the effect of the present opinion.

3. The Court of Appeals Decision Encourages Abuses of the CPA.

The Court of Appeals decision broadly interpreting the CPA creates a plethora of opportunities for the CPA to be used by adversaries as an unfair weapon to gain an unreasonable advantage, both inside and outside the subrogation industry.

The possibilities from such an expansion of the application of the CPA would also appear to apply to any party who sends a letter on behalf of another demanding payment of an amount owed, perhaps to include letters from attorneys.¹⁰ Adversaries involved in a private mediation of a dispute would suddenly become subject to the CPA if any of the advocacy positions are reduced to writings. Examples of such a dispute could include disagreements among neighbors over fence lines or disputes among separating couples over custody or division of property.

¹⁰ Washington courts have not expressly prohibited a CPA action under these circumstances. *See Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984) (“[W]e hold that certain entrepreneurial aspects of the practice of law may fall within the ‘trade or commerce’ definition of the CPA There is no statutory exemption for lawyers.”).

Again, these disputes are not the appropriate province of the CPA. The broadly worded language appearing in the Court of Appeals' published opinion is certain to result in impairments to reasonable business development, thereby contradicting CPA express statements.

VI. CONCLUSION

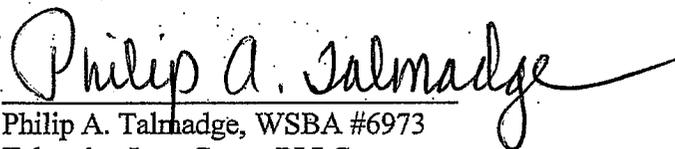
The Court of Appeals' holding that an adversary violated the CPA by sending letters to another adversary (unrelated to any would-be or actual, direct or indirect consumer relationship) conflicts with previous decisions of the this Court and the Court of Appeals, as well as express directions of legislative intent. If the published Court of Appeals decision is allowed to stand, parties disputing a potentially unlimited array of adversarial matters will be able to pursue and collect exceptional benefits previously reserved for victims of deceptive consumer practices. In addition, acts or practices which are reasonable in relation to the development and preservation of business (including but not limited to the important and highly regulated subrogation recovery practices) will be impaired.

In order to curb these unintended consequences and provide much-needed guidance regarding who can and who cannot sue under the CPA,

CCS urges this Court to accept review for all the reasons set forth herein.

See RAP 13.4(b)(1), (2) & (4).

RESPECTFULLY SUBMITTED this 25th day of June, 2007.



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DECLARATION OF SERVICE

Dava Z. Bowzer states as follows:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

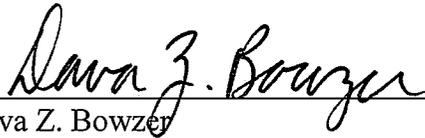
On this 25th day of June, 2007, I caused to be filed with the Court of Appeals of the State of Washington, Division I, the foregoing PETITION FOR REVIEW. I also served copies of said document on the following parties as indicated below:

Parties Served	Manner of Service
<i>Counsel for Panag:</i> Matthew J. Ide Ide Law Offices 801 Second Avenue, Suite 1502 Seattle, WA 98104-1500	<input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail
<i>Counsel for Panag:</i> Murray T. S. Lewis Lewis Law Firm 2400 E. Roy Street Seattle, WA 98112	<input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail
<i>Counsel for Farmers:</i> Stevan David Phillips Margarita Latsinova Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101	<input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail

FILED
 COURT OF APPEALS DIV. #1
 STATE OF WASHINGTON
 2007 JUN 25 PM 4:45

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 25th day of June, 2007.



Dava Z. Bowzer

SEATTLE\594650\3 154037.000

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MICHAEL STEPHENS, on behalf of) NO. 57068-4-1
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,)

Petitioners.)
_____)

RAJVIR PANAG, on behalf of herself) NO. 56625-3-1
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,)

) PUBLISHED OPINION

Appellants/
Cross-Respondents.)

) FILED: April 23, 2007

BECKER, J. – At issue here is a credit collection agency's practice of sending aggressive notices on behalf of insurance companies in an attempt to recover subrogation interests from uninsured drivers. In each of these linked cases, notices styled as "formal collection notices" demanded immediate payment of an "amount due". We conclude the notices are deceptive and hold that the practice of sending them violates the Consumer Protection Act.

FACTS

These two appeals have been linked for consideration because the core issue is the same. Credit Collection Services, Inc., was a defendant in each case below, and the focus of each appeal is the notices sent by Credit to the plaintiffs. Counsel for the plaintiffs is the same in each case.

Stephens

In the first case, Michael Stephens (respondent on appeal) was the plaintiff below. Stephens rear-ended Carrine York's vehicle on June 9, 2003. The damage to her car was appraised at \$544.09. York had underinsured motorist coverage with Omni Insurance Company. Omni subtracted the deductible of \$100 and sent York a check for \$444.09.¹

Omni sent several letters to Stephens on August 5, 2003 asking him to get in touch with an Omni representative. One letter said, "We have been notified of the captioned loss. In order to properly investigate the accident, it is important

¹ Clerk's Papers at 212.

that I obtain your version of what happened.” Another stated, “The investigation to date indicates that we may look to you for repayment of our insured’s damages. . . . If you do not have insurance to protect you for this accident, we advise you to contact us within 30 days Your failure to respond within 30 days may result in a judgment against you and the suspension of your driving privileges.”² Stephens did not respond to these letters.

Omni sent two similar letters to Stephens on October 10, 2003. The first letter stated that York had been paid \$444.09 for damage to her car and that Omni claimed a right to reimbursement from Stephens:

Our investigation into our insured’s loss has determined that your auto was at fault for this accident, and under the terms of our policy we are making a claim against you for reimbursement of the amount we paid.

. . . If you do not have insurance for this accident, please contact the undersigned as soon as possible so that arrangements can be made to amicably settle this matter in a manner agreeable to all parties and to avoid any unnecessary legal action.

You have a right to dispute any or all of our claims. If you do not dispute it within 30 days of receiving this letter, Omni Automobile will assume that it is valid. You have a right to receive a copy of the repair estimate, a copy of the check that Omni Automobile paid to its insured, or to the repairer of the auto and copies of any or all other documents that verify the existence of our rights of subrogation.[³]

The second letter reiterated that Omni was looking to Stephens for full reimbursement: “Since our investigation reveals that you are uninsured for this loss, we seek full reimbursement directly from you for all payments we have

² Clerk’s Papers at 208, 210.

³ Clerk’s Papers at 212.

made in this matter.”⁴ Stephens – who was not sure about his insurance coverage – responded to these letters by sending Omni his own check for \$444.09.

Six months passed. Omni made two more payments to York: \$5,112 for medical expenses and \$1,300 for bodily injury. Omni did not contact Stephens about these payments. Omni instead arranged to have its subrogation claim pursued by Credit Collection Services, Inc., a Delaware corporation licensed to collect debt in Washington.⁵ The notices sent by Credit constitute the practice alleged to be deceptive.

Credit began by sending a “formal collection notice” to Stephens on April 16, 2004. The notice specified \$6,412.00 as the “amount due”.⁶

	SUBROGATION CLAIM
REGARDING: OMNI INSURANCE	AMOUNT DUE: \$6,412.00

THIS IS A FORMAL COLLECTION NOTICE

You were involved in an incident which resulted in the above referenced damages being paid by our client. Please be advised that the amount reflected on this notice is an amount already incurred, and any further damages paid as a result of this incident will be added to this amount. Should this occur, you will be so advised.

Unless you can provide this office with evidence of insurance coverage that existed on the date of loss, our client will consider you financially responsible.

⁴ Clerk’s Papers at 214.

⁵ Clerk’s Papers at 21.

⁶ Clerk’s Papers at 74.

To avoid the possibility of legal action and/or license suspension (contingent upon applicable state law), you can make instant payment by check or credit card through our 24-hour toll-free touch tone service or by accessing our website @ www.ccspayment.com.

Stephens called Credit twice upon receiving this notice. "I did not understand how I could owe such a debt or why it was in 'collection'".⁷ Credit's telephone representatives told Stephens the notice represented amounts paid by Omni to York as a result of the accident. According to Stephens, one representative told him Credit had him in "collection" and "had the power to get money from me in a variety of different ways from whatever financial resources I had."⁸ Credit's notes reflect that Stephens "stated that he did not feel that he owed the balance stated in the letter."⁹

Credit sent Stephens a similar notice three weeks later. This second notice dated May 7, 2004 declared in large print: "ACTIVITY PENDING TEN (10) DAYS". The notice said: "You have failed to respond to our notice requesting full payment -or- evidence of insurance coverage that existed on the date-of-loss." The notice threatened consequences potentially including litigation and license suspension unless Stephens acted "immediately":

This office has been authorized to pursue full payment in accordance with both federal and state law(s) which could result in a law suit being filed against you and/or license suspension (contingent upon applicable state law). Be advised, state law

⁷ Clerk's Papers at 68.

⁸ Clerk's Papers at 69.

⁹ Clerk's Papers at 386.

requires that financial responsibility be maintained continuously throughout the registration period of your vehicle.

Act immediately, as your file is pending further action.^[10]

Soon after Stephens received the second notice, he wrote to Credit stating that he disputed the charges. He requested proof of payment showing the alleged amount due. Stephens also contacted his insurance company, GEICO. GEICO contacted Credit on May 19, 2004 to let them know that Stephens was insured on the loss. Thereafter Credit sent no more letters to Stephens.

Meanwhile, concerned that his credit rating was in jeopardy, Stephens consulted an attorney.¹¹ Stephens sued Omni and Credit in June 2004 for violating the Consumer Protection Act. He moved for summary judgment against both defendants. The court granted the motion as to liability and reserved ruling on the amount of damages. Appeal by Omni and Credit of the summary judgment ruling on liability is before this court on discretionary review.

Panag

In the second case, Rajvir Panag (respondent on appeal) was the plaintiff below. Panag was injured in a two car accident with Deven Hamilton on October 5, 2003. Panag was uninsured. Hamilton's insurer, Farmers Insurance Company, investigated and concluded that Panag was 40 percent at fault. Farmers paid Hamilton \$6,102.53 for property damage. There was a \$340 deductible. One month later Panag received from Credit Collection Services a

¹⁰ Clerk's Papers at 77.

¹¹ Clerk's Papers at 69.

“formal collection notice” on behalf of Farmers specifying the “amount due” as
\$6,442.53.¹²

SUBROGATION CLAIM	
REGARDING:	AMOUNT DUE:
FARMERS INSURANCE	\$6,442.53

THIS IS A FORMAL COLLECTION NOTICE

You were involved in an incident which resulted in the above referenced damages being paid by our client. Please be advised that the amount reflected on this notice is an amount already incurred, and any further damages paid as a result of this incident will be added to this amount. Should this occur, you will be so advised.

Unless you can provide this office with evidence of insurance coverage that existed on the date of loss, our client will consider you financially responsible.

To avoid the possibility of legal action and/or license suspension (contingent upon applicable state law), you can make instant payment by check or credit card through our 24-hour toll-free touch tone service or by accessing our website @ www.ccspayment.com.

A representative from Farmers later admitted that the purported “amount due” was a “mistake” as it should have been adjusted to reflect that Farmers’ determination of Panag’s liability was 40 percent.¹³

Three weeks later, Credit sent another notice of “Subrogation Claim Regarding: Farmers Insurance”, this one enclosed in a black border containing in large font the words, “ATTENTION – ATTENTION – ATTENTION –ATTENTION – Enclose Bottom Portion with Your Payment”. Again, the notice set forth

¹² Clerk’s Papers at 168.

¹³ Clerk’s Papers at 600.

\$6,442.53 as the "AMOUNT DUE". It declared in larger print: "ACTIVITY PENDING TEN (10) DAYS" and then stated, "You have failed to respond to our notice requesting full payment -or- evidence of insurance coverage that existed on the date-of-loss."¹⁴ The notice demanded immediate action to avoid litigation and license suspension:

This office has been authorized to pursue full payment in accordance with both federal and state law(s) which could result in a law suit being filed against you and/or license suspension (contingent upon applicable state law). Be advised, state law requires that financial responsibility be maintained continuously throughout the registration period of your vehicle.

Act immediately, as your file is pending further action.^[15]

Credit sent Panag a third notice on December 22, 2003. The words "Western Union" were printed at the top although the record does not indicate the notice was sent as a telegram. This notice threatened additional consequences for Panag should she fail to pay the "amount due" of \$6,442.53:

IF CREDIT COLLECTION SERVICES CANNOT EFFECT RECOVERY, A REPORT WILL BE SENT TO OUR CLIENT STATING "VOLUNTARY COLLECTION DEEMED IMPOSSIBLE".

FURTHER OPTIONS INCLUDE:

- 1) PERFORMING AN ASSET SEARCH IN AN EFFORT TO PROTECT OUR CLIENT'S LEGAL INTERESTS IN THIS MATTER.**
- 2) LITIGATION – WHICH COULD INCLUDE INTEREST, COURT COSTS AND SHERIFF FEES.**
- 3) NOTIFY THE DEPARTMENT OF MOTOR VEHICLES OF YOUR APPARENT FAILURE TO COMPLY WITH THE FINANCIAL RESPONSIBILITY LAW, WHICH CAN LEAD TO LICENSE SUSPENSION (CONTINGENT**

¹⁴ Clerk's Papers at 170.

¹⁵ Clerk's Papers at 170.

UPON APPLICABLE STATE LAW) UNDER THE
RULES AND REGULATIONS GOVERNED BY
STATUTE.

- 4) PURSUE COLLECTION THROUGH ANY OTHER
METHOD PERMITTED UNDER STATE OR FEDERAL
LAW.

*****TO ENSURE PROPER CREDIT, D-E-T-A-C-H THE
BOTTOM PORTION OF THIS NOTICE WITH YOUR PAYMENT
TO: *****

C.C.S.
PAYMENT PROCESSING CENTER
[Address in Boston, Massachusetts][¹⁶]

Panag was “scared” because she “wasn’t sure what the debt was about and what they were trying to collect and the amount.”¹⁷ She contacted the attorney who was already representing her in connection with her own personal injury claim arising from the accident. In May 2004, she filed a class action complaint alleging that Farmers and Credit had violated the Consumer Protection Act. Farmers and Credit both moved for summary judgment. The court granted their motions. The court concluded that although the notices were deceptive, Panag did not suffer an injury. She had not actually made payment in response to the notice, she had not shown that her credit was actually affected, and the minimal expense of contacting her attorney about the notices was insignificant because “she was already seeing an attorney” in connection with the accident.¹⁸ The court determined, however, that even after the entry of a final judgment of

¹⁶ Clerk’s Papers at 171.

¹⁷ Clerk’s Papers at 711.

¹⁸ Clerk’s Papers at 320-325, Court’s Oral Ruling, June 10, 2005.

dismissal as to Panag's claim, counsel for Panag should be given additional time to discover whether other persons who had received similar notices were interested in joining the action. Farmers and Credit appeal the ruling granting additional time to discover other potential plaintiffs. Panag cross-appeals the decision to dismiss her case on summary judgment.

CONSUMER PROTECTION ACT

The Consumer Protection Act declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce". RCW 19.86.020. A private plaintiff must prove five elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). These appeals put all five elements at issue.

Summary judgment is proper only when pleadings, depositions, admissions, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On review, we engage in the same inquiry as the trial court. We consider facts in the light most favorable to the nonmoving party. Review is de novo. CR 56(c); Fidelity Mortgage v. Seattle Times, 131 Wn. App. 462, 467, 128 P.3d 621 (2005).

Deceptive Act

The Act does not define the term “deceptive”, but implicit in that term is “the understanding that the actor misrepresented something of material importance.” Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), rev’d on other grounds, 138 Wn.2d 248 (1999). To prove that a practice is deceptive, neither intent to deceive nor actual deception is required. The question is whether the conduct has the capacity to deceive a substantial portion of the public. Hangman Ridge, 105 Wn.2d at 785-86. Whether particular actions are deceptive is reviewable as a question of law. Leingang v. Pierce County Medical Bureau, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

The plaintiffs contend Credit’s notices have the capacity to deceive because they look like debt collection notices, and the uninsured drivers who receive them may be misled into paying the “amount due” as if it were based on a debt they actually owed rather than a tort claim. The defendants respond that the notices are not deceptive because the information conveyed is accurate: the insurance companies had valid subrogation claims based on sums paid to their insureds.

A defendant need not affirmatively state an untrue fact to have committed a deceptive practice. For example, the practice of including miscellaneous service charges such as fax fees on a mortgage payoff statement has the capacity to deceive because it creates the misleading appearance that the

mortgage cannot be released unless the miscellaneous charges (unrelated to the mortgage) are paid. Dwyer v. J.I. Kislak Mortgage, 103 Wn. App. 542; 547, 13 P.3d 240 (2000). A closing agent's employment of a non-attorney to prepare closing documents is deceptive where the sellers could have reasonably believed the agents had legal expertise. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 592, 675 P.2d 193 (1983). Threatening debtors with imminent legal action in "Trans-O-Grams", a format designed to resemble telegrams, is deceptive because it misrepresents the urgency of the communication. Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 215-216 (9th Cir. 1979).

The plaintiffs do not allege, and we do not hold, that it is deceptive for a tort claimant or the claimant's agent to correspond with an alleged tortfeasor and demand payment of a specific sum. But when 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 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. Yet the notices from Credit do not even explain what the "amount due" is for or how it was calculated. There is no reference to the underlying accident, no supporting documentation, and no suggestion of a right

to dispute the claim.

Credit's notices demand payment for a "subrogation claim" – a technical term not easily understood – in a manner indicating that the driver's obligation to pay is already fixed beyond reasonable dispute and immediate payment is the only reasonable course of action. But when Credit found out that Stephens actually did have insurance through GEICO, Credit sent GEICO "a notice of subrogation" that took a different tone. "Their [Omni's] investigation indicates that liability rests with your insured. . . . kindly advise this office immediately of your position with regard to this claim. All necessary supporting documentation is attached. Thank you in advance for your anticipated cooperation."¹⁹ The letter to GEICO accurately reflects the reality that the demand is based on a one-sided assessment of tort liability. Credit's notice to Stephens about the same claim—"This is a formal collection notice" of an "amount due"—does not reflect that reality. The contrast illuminates the deceptive nature of the notices designed to be sent to uninsured drivers, who are presumably far less sophisticated about the handling of subrogation claims than an insurance company is, and far less aware of the many factual and legal variables that can affect the value of a tort claim and make it open to dispute.

¹⁹ Clerk's Papers at 539. Reinforcing the impression of debt collection, the "formal collection notices" were sent under the letterhead of "Credit Collection Services" and bore the seals of two collection agency associations. The notice to GEICO bore no seals and was sent under the letterhead of "The CCS Companies."

Panag's case in particular illustrates how characterizing an unliquidated claim as an "amount due" has the capacity to deceive. Although Farmers estimated Panag's comparative fault at 40 percent, the "amount due" demanded by Credit was 100 percent of the damage to the other vehicle. The notice included no information about how the "amount due" was calculated that would have made the recipient aware of this discrepancy.

Like the mortgage payoff statement in Dwyer that included charges unrelated to the mortgage, the escrow practices in Bowers that had the patina of legal expertise without the genuine article, and the "Trans-o-Grams" sent by the debt collection agency in Trans World Accounts, the notices sent by Credit were materially misleading even though they contained some accurate information. They created an impression of a debt owed and sent to collection when in reality all the "creditor" had was a tort claim. This was deceptive.

Our conclusion on this point is not changed by Camacho v. Automobile Club of Southern California, 142 Cal. App. 4th 1394 (Cal. Ct. App. 2006), a case defendants have cited as supplemental authority. The plaintiff in that case complained of a virtually identical practice under California's law against unfair competition. The trial court entered judgment for the defendants and the court of appeals affirmed.

The issue in Camacho was presented by a motion for judgment on the pleadings. The court assumed as factual the plaintiff's allegation that the collection agency had designed notices and threats "to dupe the recipient to pay whatever sums of money" the insurance company and collection agency said were owed. Camacho, 142 Cal. App. 4th at 1399. The Camacho court nevertheless concluded as a matter of law that the practice was not "unfair" under California's statute. Here, defendants suggest that Camacho is persuasive authority on the issue of whether the practice is "deceptive". We disagree.

The focus of California's statute is "unfair competition." See Camacho, 142 Cal. App. 4th at 1399-1400 (discussing § 17200 of California's Business and Professions Code). Our Consumer Protection Act more broadly attacks "unfair or deceptive acts or practices in the conduct of any trade or commerce". RCW 19.86.020 (emphasis added). As a result, California's consumer protection jurisprudence as set forth in Camacho is substantially different from Hangman Ridge. Whether a deceptive consumer practice is "unfair" is determined by the court using a three-part test borrowed from federal law defining the term: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." Camacho, 142 Cal. App. 4th at 1403. Considering these factors, the court determined the business practice was not unfair. First, because plaintiff

Camacho admitted that he was at fault, he was liable for the damages, so he could not be injured by efforts to collect them. Second, even if injury occurred, the desirability of collecting sums actually owed was a countervailing benefit. "The public is well served when an uninsured driver who was at fault responds to his or her obligations." And finally, Camacho could have reasonably avoided being the recipient of the dunning letters by obtaining insurance. Camacho, 142 Cal. App. 4th at 1406.

Camacho essentially holds that deceptive notices are not actionable in a case where the driver who complains about them admits to being at fault and uninsured. Under Hangman Ridge, however, a deceptive notice is actionable as long as the other four elements are established.

Washington's Act does incorporate a yardstick of reasonableness by providing that practices which are "reasonable in relation to the development and preservation of business or which are not injurious to the public interest" are not violations. RCW 19.86.920. The "reasonableness defense" is appropriately submitted as a jury question if there are material issues of fact about its application. See Travis v. Wash. Horse Breeders Ass'n, 111 Wn.2d 396, 408-09, 759 P.2d 418 (1988). It is not a factor used in deciding whether a practice is deceptive.

The Act is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. The "laudable purpose" of the Act is to protect

Washington citizens from unfair and deceptive trade and commercial practices. Dwyer, 103 Wn. App. at 547-48. The Dwyer court explained that its holding “protects Washington citizens by ensuring that they are clearly and accurately informed about the nature and extent of their obligations” under a mortgage agreement. “Our holding does not infringe on Kislak’s right to charge a fax fee. It merely forecloses the ability to do so in a deceptive manner.” Dwyer, 103 Wn. App. at 548. Similarly here, our conclusion that Credit’s notices are deceptive protects Washington citizens by ensuring that they are clearly and accurately informed about the nature and extent of their obligations arising from being involved in an accident while driving a motor vehicle. Our holding does not infringe on the right of insurance companies to recover subrogation interests or to employ collection agencies to do so. But they may not overreach by using deceptive means to accomplish that objective.

Farmers contends that as a matter of law, representing a subrogation interest as an “amount due” cannot be deceptive because the collection of “alleged” debt is specifically contemplated by the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692. This argument is unfounded. The federal act does not regulate the collection of subrogation interests, whether “alleged” or reduced to judgment. It specifically regulates only the collection of consumer debt or alleged debt arising from a “transaction”.²⁰ A transaction means a

²⁰ “The term ‘debt’ means any obligation or alleged obligation of a

consumer obligation arising out of “consensual or contractual arrangements, not damage obligations thrust upon one as a result of no more than her own negligence.” Hawthorne v. Mac Adjustment, 140 F.3d 1367, 1369-71 (11th Cir. 1998). The same is true of the consumer protection provided by Washington’s Collection Agency Act, which regulates the collection of “any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied.” RCW 19.16.100(5) (emphasis added). Unlike the collection of consumer debt, the collection of subrogation claims or tort claims is a type of activity that appears to be entirely unregulated.

Farmers complains generally that the plaintiffs are trying to use the Consumer Protection Act to make an end-run around regulatory statutes. The fact that a business operates in a highly regulated arena does not mean that its activities are exempt from liability under the Consumer Protection Act. That argument was made on behalf of mobile home park landlords in Ethridge v. Hwang, 105 Wn. App. 447, 457, 20 P.3d 958 (2001). The landlord argued that mobile home tenancies should be exempt from the Consumer Protection Act because of the specific regulations already found in the Mobile Home Landlord Tenant Act, RCW Ch. 59.20. We rejected this contention, noting that “other heavily regulated areas of trade and commerce, such as the legal profession and

consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. § 1692a(5).

the banking industry, are subject to the CPA". Ethridge, 105 Wn. App. at 457, citing Short v. Demopolis, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984). The area of debt collection is heavily regulated because of the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The absence of regulation specifically directed at collection of subrogation claims does not mean that debt collection practices used in the recovery of subrogation claims are exempt from suit under the Act, and it does not undermine our conclusion that the practice here is deceptive.

The Act does create a safe harbor for actions "permitted" by state and federal regulatory bodies and officers:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States.

RCW 19.86.170. But Farmers has not identified any regulatory entity that "permits" the collection practice at issue in this case. The most that can be said is that no regulatory entity has prohibited it. Farmers contends the collection scheme cannot be deemed deceptive because the insurance commissioner has not labeled it as such. This does not mean the commissioner has permitted it. In Leingang, the case on which Farmers relies, the claimant argued that a policy exclusion was necessarily an unfair trade practice because the insurance

commissioner had not affirmatively approved it. The Supreme Court rejected this argument, finding no significance in the commissioner's silence. Leingang, 131 Wn.2d at 154. The commissioner's silence is equally insignificant in the context of these cases.

TRADE OR COMMERCE

Deceptive acts "in the conduct of any trade or commerce" are unlawful. RCW 19.86.020. Trade and commerce "shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). The Legislature intended these terms to be construed broadly. Hangman Ridge, 105 Wn.2d at 785.

The defendants generally contend that the plaintiffs cannot satisfy the "trade or commerce" element because the plaintiffs were not involved in a consumer transaction. In support of this argument they cite the federal Fair Debt Collection Practices Act. But the federal statute, as noted above, does not apply here. It applies only when an effort is made to collect a debt, i.e., an obligation arising from bilateral agreement. In contrast, our Consumer Protection Act applies to "any" trade or commerce affecting the people of the state of Washington, directly or indirectly. RCW 19.86.010(2). It shows "a carefully drafted attempt to bring within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce." Short v. Demopolis, 103 Wn.2d at 61.

The sale of Credit's collection services to Omni and Farmers indisputably occurred in trade or commerce. Credit contends this commerce did not affect the "consuming public" because Stephens and Panag are not consumers and therefore they lack standing to invoke the protection the Act affords to consumers.

Neither the Act nor Hangman Ridge mentions "the consuming public" or the idea of consumption as a limitation on the definition of "trade or commerce". Indeed, it is well settled that a consumer relationship is not a prerequisite for standing. See, e.g., Escalante v. Sentry Ins. Co., 49 Wn. App. 375, 386-88, 743 P.2d 832 (1987) (estate of passenger in car accident had standing to sue the driver's insurer for bad faith in violation of the Act even though she had no consumer relationship to the company), disapproved on other grounds by Ellwein v. Hartford Accident & Indem. Co., 142 Wn.2d 76, 781, n.10, 15 P.3d 640 (2001). Escalante was cited with approval in Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 312, 858 P.2d 1054 (1993).

Credit contends that under Fisons, a plaintiff who is not a consumer must at least stand in the shoes of someone who is. In Fisons, a physician sued a drug company for unfair and deceptive practices in failing to disclose the dangers of a drug. The drug company argued that the physician lacked standing because he was not the purchaser of the drug. The Supreme Court flatly rejected this argument based on the plain language of the statute: "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.” Fisons, 122 Wn.2d at 313.

In the next paragraph, by way of a supplemental rationale, the court recognized that the physician was well situated to prosecute the drug company’s failure to give proper warnings:

Additionally, in examining the nature of the relationship between a drug manufacturer, a prescribing physician and a patient, it is the physician who compares different products, selects the particular drug for the ultimate consumer and uses it as a tool of his or her professional trade. Under the learned intermediary doctrine, a drug company fulfills its duty by giving warning regarding prescription drugs to the physician rather than to the patient. This unique relationship results in the physician being comparable to the ordinary consumer in other settings. Some cases have concluded that it is the physician who stands in the shoes of the “ordinary consumer” of the drug. Because of this unique relationship, the drug company targets its marketing efforts toward the physician, not toward the patient. The physician, therefore, is a logical person to be the “private attorney general” under RCW 19.86.090. We therefore conclude that Dr. Klicpera did have standing to bring a CPA claim, and that the trial court did not err in submitting this claim to the jury.

Fisons, 122 Wn.2d at 313 (footnotes omitted). Credit argues that the paragraph quoted above implicitly requires that a plaintiff who is not a consumer must at least be in a position to represent the interests of an “ordinary consumer”.

This court has cited the second Fisons rationale in State Farm Fire & Cas. Co. v. Huynh, 92 Wn. App. 454, 460, 962 P.2d 854 (1998) (“an insurance company is a logical party to be the private attorney general because it stands in the shoes

of its premium-paying consumers who are affected by false billings from doctors.”).
See also First State Ins. v. Kemper Nat'l Ins., 94 Wn. App. 602, 609-10, 971 P.2d
953 (1999) (excess insurer may assert a Consumer Protection Act claim which the
insured could have brought against the primary insurer). But no case has held it
indispensable for a plaintiff to be a representative of someone who has a
consumer relationship with the defendants. Such a holding would be inconsistent
with our recent decision in Holiday Resort Community Association v. Echo Lake
Associations, LLC, 134 Wn. App. 210, 219-220, 135 P.3d 499 (2006). The
defendant in that case had no contractual or statutory relationship with the tenant
plaintiffs. This court, citing the Act's rule of liberal construction as well as Short,
Fisons, Escalante, and Huynh, concluded that it was error to dismiss the case for
lack of standing. “As a general rule, and as a matter of legislative intent, neither
the CPA nor case law require privity of contract in order to bring a CPA claim
alleging an unfair or deceptive act or practice.” Holiday Resort, 134 Wn. App. at
219. See also Northwest Airlines, Inc. v. The Ticket Exchange, Inc., 793 F. Supp.
976, 979 (W.D.Wash. 1992) (holding that once Northwest Airlines established all
Hangman Ridge elements, it “need not prove it was a consumer”).

The Act simply does not require a consumer relationship as a prerequisite
for standing. It does not identify the “consuming public” as the entity to be
protected. “Any person who is injured in his or her business or property by a
violation of RCW 19.86.020 . . . may bring a civil action in the superior court”.

RCW 19.86.090 (emphasis added). In Hangman Ridge the Supreme Court described a “successful plaintiff” as “one who establishes all five elements of a private CPA action.” Hangman Ridge, 105 Wn.2d at 795 (emphasis added).

The concerns that typically underlie the issue of “standing” are already addressed by these elements, particularly the limitations imposed by the need to prove injury and public interest impact. Fisons did not add a sixth element requiring proof of an underlying consumer transaction.

In this case, it is the absence of an underlying consumer transaction that makes Credit’s notices deceptive. They tend to create the impression that the recipient is a debtor when that is not so. The recipient is a logical “private attorney general” to argue that such deception is injurious to the public interest.

Because Credit conducts commerce with Omni and Farmers, and their commerce directly or indirectly affects people of the State of Washington including uninsured drivers, we conclude that Credit’s practice of sending the notices is one that occurred in trade or commerce.

PUBLIC INTEREST IMPACT

Even a private plaintiff must “show that the acts complained of affect the public interest.” This element fulfills the legislative statement of purpose, that the Act “shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest”. Hangman Ridge, 105 Wn.2d at 788; RCW 19.86.920.

This is not a case where the public interest element is satisfied per se by a showing of conduct in violation of a statute containing a specific legislative declaration of public interest impact. Whether the public has an interest is therefore an issue to be determined by the trier of fact. The factors to be considered will depend upon the context in which the alleged acts were committed. Hangman Ridge, 105 Wn.2d at 789-790. For example, where the acts complained of involve “essentially a consumer transaction” such as the sale of goods, the following five factors are relevant:

- (1) Were the alleged acts committed in the course of defendant's business?
- (2) Are the acts part of a pattern or generalized course of conduct?
- (3) Were repeated acts committed prior to the act involving plaintiff?
- (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff?
- (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Hangman Ridge, 105 Wn.2d at 790. Where the complaint involves “essentially a private dispute” such as the provision of professional services, different factors are involved:

- (1) Were the alleged acts committed in the course of defendant's business?
- (2) Did defendant advertise to the public in general?
- (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
- (4) Did plaintiff and defendant occupy unequal bargaining positions?

Hangman Ridge, 105 Wn.2d at 790-791. No one factor is dispositive, nor is it necessary that all be present. Hangman Ridge, 105 Wn.2d at 791. In some cases the public interest element may be satisfied even though “a neat distinction

between consumer and private dispute is not workable.” Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 742, 733 P.2d 208 (1987).

The defendants would prefer to characterize these cases as private disputes. But even though the plaintiffs were not consumers, the relevant factors are those used for evaluating consumer transactions because they show how the practice has the potential of affecting large numbers of people. However the dispute arises, “it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” Hangman Ridge, 105 Wn.2d at 790.

The defendants do not and cannot seriously dispute that the sending of “formal collection notices” overstating subrogation claims as “amounts due” is a practice with a real and substantial potential for repetition. Nothing in the record suggests that these two cases are unique or isolated. The use of an identical scheme in California is reflected in Camacho. The notices received by Stephens and Panag appear to be form letters. Evidence in the record shows that Omni and Farmers frequently contract with collection agencies to collect money from drivers who have been involved in accidents with their insureds. Credit made a power point presentation to Farmers soliciting this type of business and representing that Credit’s “subrogation coverage services” had been effective in

realizing recoveries.²¹ The presentation included the display of samples of a “formal collection notice” and a notice with a Western Union logo.

We conclude the practice complained of by Panag and Stephens satisfies the public interest impact element.

INJURY AND CAUSATION

The plaintiff must have been “injured in his or her business or property” by the deceptive act. RCW 19.86.090. The defendants generally contend Panag and Stephens cannot satisfy this element because neither one of them was actually induced to pay the “amount due” demanded by Credit’s notices. Each responded to Credit’s notices by obtaining advice of counsel. GEICO eventually made payment on behalf of Stephens. Panag was able to receive payment for her own injuries.

Stephens attributes several types of injury to the receipt of the “formal collection notice” from Credit—time lost from work and travel costs involved in consulting an attorney, the expense of purchasing a credit report (\$49.95), and \$9.95 per month he spent to sign up for a credit watch service after he filed suit.²² The trial court found Stephens had established the injury element as a matter of law, but reserved ruling on the precise amount of damages. When Panag received the notices from Credit, she already had an attorney who was representing her in matters connected with the underlying accident. She alleged

²¹ Clerk’s Papers at 592-595.

²² Clerk’s Papers at 71.

that she incurred expense to obtain a credit report and to mail Credit's notices to her attorney. A different trial court dismissed Panag's claim on summary judgment on the basis that these expenses were insufficient to establish the element of injury.

The Supreme Court has explained that the element of injury does not require proof of monetary damages:

In Hangman Ridge we held that while the injury need not be great, it must be established. In Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987), we distinguished between the terms "injury" and "damages" and held that "[t]his distinction makes it clear that no monetary damages need be proven, and that nonquantifiable injuries, such as loss of goodwill would suffice for this element of the Hangman Ridge test." The fact that the Act allows for injunctive relief bolsters the conclusion that injury without specific monetary damages will suffice. A loss of use of property which is causally related to an unfair or deceptive act or practice is sufficient injury to constitute the fourth element of a Consumer Protection Act violation.

Mason v. Mortgage Am., Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990)

(citations in footnotes omitted).

The Act speaks of injury to "business or property". Thus, mental distress, embarrassment and inconvenience alone do not establish injury. But the scope of injury to "property" is especially broad and is not restricted to commercial or business injury. Keyes v. Bollinger, 31 Wn. App. 286, 296, 640 P.2d 1077 (1982). When a misrepresentation causes inconvenience that deprives the claimant of the use and enjoyment of his property, the injury element is satisfied. See Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wn. App. 90, 93-94, 605

P.2d 1275 (1979), cited in Mason, 114 Wn.2d at 854 n.19.

Credit inaccurately contends the plaintiffs are claiming only emotional injury, i.e. fear of damage to their credit records. The injury they claim is the time and expense of investigating their fear of damaged credit, not the fear itself. "The injury element will be met if the consumer's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." Mason, 114 Wn.2d at 854. Costs incurred in investigating the effect of an unfair or deceptive act are sufficient to establish injury. See Huynh, 92 Wn. App. at 470.

The defendants contend the plaintiffs' expenses related to obtaining legal advice did not constitute injury because the advice they received was in the context of the present litigation. They rely on Sign-O-Lite Signs v. DeLaurenti Florists, 64 Wn. App. 553, 564, 825 P.2d 714 (1992). In that case a maker of signs deceptively induced a florist to sign a six-year lease for a sign and then sued her for the entire inflated cost when she refused to make the monthly payments. The florist counterclaimed and the jury found a violation of the Consumer Protection Act. On appeal the signmaker unsuccessfully argued that the florist had not established an injury. This court found the injury element established by evidence that dealing with the dispute took up so much of the florist's time that she was unable to tend to her store the way she normally would have. Sign-O-Lite, 64 Wn. App. at 564. But if she had relied solely on her

involvement with the litigation precipitated by the dispute, the evidence would have been insufficient:

Here, DeLaurenti's mere involvement in having to defend against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property, contrary to the trial court's conclusion. To hold otherwise would be to invite defendants in most, if not all, routine collection actions to allege CPA violations as counterclaims.

Sign-O-Lite, 64 Wn. App. at 564.

The concerns underlying this holding in Sign-O-Lite are not present here because the collection Credit was attempting was not "routine" and the plaintiffs were not already defending a collection suit when they received the deceptive notices. The expenses Panag incurred in consulting her attorney were caused by her receipt of the notices, not by the accident itself, and thus cannot be seen as inhering in her personal injury claim. In addition, both Panag and Stephens paid for credit reports. However minimal these costs, we conclude the plaintiffs incurred them to find out whether they actually owed a debt in the "amount due" and to determine how to respond. This was sufficient to establish an injury caused by the deceptive practice.

In summary, we conclude both Panag and Stephens presented evidence sufficient to establish each of the five elements for violation of the Consumer Protection Act. The trial court erred in dismissing Panag's claim. Because the evidence is undisputed with respect to Stephens' claim against Credit, the trial court did not err in granting him summary judgment on that claim.

OMNI'S LIABILITY TO STEPHENS

In the Stephens case, the trial court entered summary judgment as to liability against Omni as well as Credit. Omni contends that liability for the letters, if any, should be imposed only on Credit.

The trial court did not find fault, nor do we, with the letters Omni sent before recruiting Credit's assistance. Stephens contends that Omni's violation of the Act arises from its decision to hire a professional debt collector while fully realizing that no debt had yet been established. But the practice of referring a subrogation interest to a debt collector does not by itself have the capacity to deceive a substantial portion of the public. Credit could have sent out letters like Omni's.

Stephens argues that Omni and Credit were joint tortfeasors, but in this record there is no evidence of the collaboration or concerted action needed to establish that relationship. See Elliott v. Barnes, 32 Wn. App. 88, 90, 645 P.2d 1136 (1982). Stephens does not contradict Omni's David Quigley who declares that Omni did not suggest or review the wording of Credit's letters:

Omni retained Credit Collection Services to pursue recovery of its subrogation claims for the uninsured motorist benefits paid under Ms. York's policy. Omni referred the matter to CCS by sending it a copy of the medical bills and supporting documentation regarding Ms. York's claim. Omni has no relationship to CCS and retained them as an independent contractor. After sending these materials to CCS, Omni had no more involvement in CCS's efforts to collect the subrogation claim. Specifically, Omni does not exercise control over how CCS pursues recovery of subrogation claims. For example, Omni does not review letters or notices sent

by CCS and has no input or involvement in wording, typeface, or format of these letters. Once a matter is referred to CCS, CCS has sole discretion over collection of the claim. CCS has sole discretion over whether to compromise the claim or agree to payment plans.²³

The record likewise fails to support Stephens' argument that Omni was a concurrent tortfeasor. Concurrent tortfeasors are those whose independent acts breaching separate duties, concur to produce the injury. Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 235, 588 P.2d 1308 (1978). The mere referral of subrogation claims to Credit breached no duty.

Stephens also contends that Omni was vicariously liable for Credit's acts, either as a joint venturer or on the theory that Credit was Omni's agent. But taking the evidence in the light most favorable to Omni, Omni had no right of control over Credit's means of collection. The right to control is indispensable to vicarious liability. See Adams v. Johnston, 71 Wn. App. 599, 610-611, 860 P.2d 423 (1993) (joint venturers must have an equal right of control); Kroshus v. Koury, 30 Wn. App. 258, 267, 633 P.2d 909 (1981) (principal liable only for agent's activities over which principal has a right of control). Because Stephens has not shown that Omni controlled any aspect of notices sent by Credit, there was no basis upon which to impose vicarious liability. We conclude the trial court erred by granting summary judgment to Stephens in his claim against Omni.

²³ Clerk's Papers at 216-217 (Declaration of David Quigley).

DENIAL OF CONTINUANCE

Credit assigns error to the trial court's refusal to continue the hearing on the motion for summary judgment in the Stephens case.

The court signed a stipulated discovery and motions schedule in May 2005. The order scheduled the deposition of Stephens for July 6, 2005, and it scheduled oral argument on all summary judgment motions for August 12, 2005. Later, with agreement of the parties, the court reset the date for oral argument to September 16, 2005. Stephens filed his motion for summary judgment in mid-August and noted the motion for argument on September 16 in accordance with the order.

Credit moved to postpone argument on the motion until November because of counsel's personal time conflict. In support of this motion, Credit argued that the parties had abandoned the stipulated scheduling order. The court denied the motion and maintained the September 16 argument date, stating that counsel "had ample opportunity" to raise a scheduling issue earlier but did not do so.²⁴ Credit then filed a responding brief in which, for the first time, Credit said more time was needed to depose Stephens. The court denied the motion and proceeded to hear argument on September 16. The decision to grant or deny a continuance is discretionary. A court does not abuse its discretion in denying such a motion if the requesting party does not offer a good reason for

²⁴ Clerk's Papers (Stephens) at 169.

the delay in obtaining the desired evidence. Pitzer v. Union Bank, 141 Wn.2d 539, 556, 9 P.3d 805 (2000). The record here supports the trial court's exercise of discretion. Credit did not provide a good reason for failing to depose Stephens by the stipulated deadline.

RES JUDICATA

After Stephens filed suit against Omni, Omni counterclaimed that Stephens was liable to Omni for the amount Credit had attempted to collect: \$6,412. Four months before the summary judgment decision, Stephens confessed judgment in that amount in favor of Omni, and GEICO satisfied the judgment. Credit contends that the doctrine of res judicata precludes Stephens from continuing to litigate the present Consumer Protection Act case. However, Credit's appellate brief gives only passing treatment to this issue. Credit has particularly failed to explain how Omni's counterclaim against Stephens and the Consumer Protection Act claim Stephens brought against Credit are the same cause of action. See Knuth v. Beneficial Wash, Inc., 107 Wn. App. 727, 732, 31 P.3d 694 (2001) (analyzing four factors to determine whether two causes of action are the same for res judicata purposes). We decline to review Credit's res judicata contention. See Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), remanded on other grounds, 132 Wn.2d 193, 937 P.2d 597 (1997) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

CR 12(b)(6) MOTION

Before Panag moved for summary judgment, Farmers moved to dismiss the action for failure to state a claim. Farmers assigns error to the trial court's decision denying this motion with respect to the Consumer Protection Act claim. We have decided that Panag presented sufficient evidence to meet each of the five elements of a Consumer Protection Act violation. It is implicit in our analysis that she stated a claim, and Farmers was not entitled to judgment on the pleadings. That order is affirmed.

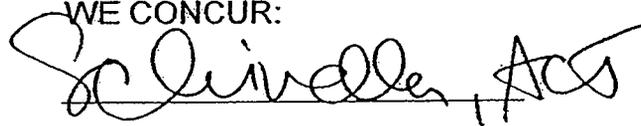
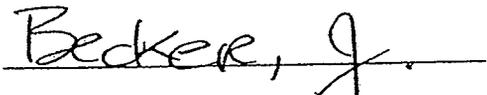
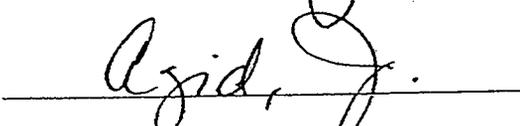
DISCOVERY ORDER

Although the trial court granted defendants' motion to dismiss Panag's action for failure to offer proof of a cognizable injury, the court believed that counsel for Panag should be allowed to continue with discovery in order to find a replacement plaintiff to continue the putative class action. The court signed a summary judgment order dismissing Panag but simultaneously ordering Farmers and Credit to provide contact information for persons who received similar notices and to indicate whether such persons had paid any money. Credit and Farmers appealed that decision, arguing that there is no recognized legal basis for permitting discovery to continue once the case before the court has been entirely resolved. This court granted Credit's and Farmers' motion for a stay of the discovery order pending our disposition of the case. Because we conclude

the entry of summary judgment against Panag must be reversed, the discovery issue is now moot. The stay is lifted.

CONCLUSION

The order granting Stephens' motion for partial summary judgment against Credit is affirmed. The order granting Stephens' motion for partial summary judgment against Omni is reversed. The order granting the joint motion by Farmers and Credit for summary judgment against Panag is reversed.

WE CONCUR:




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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

RAJVIR PANAG,)	NO. 56625-3-I
)	
Appellant,)	ORDER DENYING MOTION
)	
v.)	FOR RECONSIDERATION
)	
FARMERS INSURANCE CO. OF)	
WASHINGTON and CREDIT)	
CONTROL SERVICES, INC.)	
)	
Respondents.)	
_____)	

Respondent, Credit Control Services, Incorporated, having filed this motion for reconsideration, and a panel of the court having determined that the motion should be denied; Now, therefore, it is hereby

ORDERED that the Motion for Reconsideration is denied.

Dated this 25th day of May, 2007.

FOR THE COURT
Becker, J.
Judge

FILED
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STATE OF WASHINGTON
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