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STATE OF WASHINGTON

Supreme Court No. 80357-9 (CA 56625-3-I)
Consolidated with No. 80366-8 (CA 57068-4-I)

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

v.

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

Petitioners.

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

Respondent,

v.

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

**RESPONSE TO AMICI CURIAE BRIEFS BY PETITIONER
FARMERS INSURANCE COMPANY OF WASHINGTON**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	1
A. The Central Issue is Standing to Sue.	1
B. Nothing in the Insurance Code Creates a Cause of Action in Third Parties.....	10
III. CONCLUSION	12

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Associated General Contractors of California, Inc. v. California State of Council of Carpenters</i> , 459 U.S. 519, 103 S. Ct. 897 (1983).....	3, 4, 5, 7, 8
<i>Blue Shield of Virginia v. McCready</i> , 457 U.S. 465, 102 S. Ct. 2540 (1982).....	5, 7, 9
<i>Bravman v. Basset Furniture Ind., Inc.</i> , 552 F.2d 90 (3d Cir. 1977).....	4
<i>FTC v. Gill</i> , 265 F.3d 944 (9th Cir. 2001)	7
<i>Hawaii v. Standard Oil Co.</i> , 405 U.S. 251, 92 S. Ct. 885 (1972).....	7
<i>Illinois Brick Co., v. Illinois</i> , 431 U.S. 720, 97 S. Ct. 2061 (1977).....	8
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330, 99 S. Ct. 2326 (1979).....	7

STATE CASES

<i>Am. Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1, 802 P.2d 784 (1991).....	3
<i>Blewett v. Abbott Lab.</i> , 86 Wn. App. 782, 938 P.2d 842 (1997).....	2
<i>Escalante v. Century Ins. Co.</i> , 49 Wn. App. 375, 743 P.2d 832 (1987).....	9
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 718 P.2d 531 (1986).....	2
<i>In re Parentage of L.B.</i> , 155 Wn. 2d 679, 122 P.3d 161 (2005).....	3

<i>Physicians Ins. Exch. v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	2, 3, 6, 9
<i>Salois v. Mutual of Omaha</i> , 90 Wn.2d 355, 581 P.2d 1349 (1978).....	6, 8
<i>Save Columbia CU Committee v. Columbia Comm. Credit Union</i> , 134 Wn. App. 175, 139 P.2d 386 (2006).....	3
<i>Tank v. State Farm Fire and Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	2, 3, 4, 6, 9, 10, 11

FEDERAL STATUTES

15 U.S.C. § 15.....	7, 8
15 U.S.C. § 45(a)(1)	6, 7

STATE STATUTES AND REGULATIONS

RCW 19.86.020	6
RCW 19.86.080	9
RCW 19.86.090	8, 9
RCW 48.30.040	12
WAC 284-23-020	12
WAC 284-50-060	12

I. INTRODUCTION

Petitioner Farmers Insurance Company of Washington (“Farmers”) incorporates by reference the combined Answer to the Briefs filed by Amici Curaie Consumer Protection Division (“CP Division”) and Washington State Trial Lawyers Association Foundation (“WSTLA”) by Credit Control Services, Inc. (“CCS). In addition, Farmers offers this answer to the two *amici* briefs listed above.

II. ARGUMENT

A. The Central Issue is Standing to Sue.

Does an uninsured driver who receives a demand letter from a collection agency representing the other driver’s insurer in recovering the amounts attributed to the uninsured driver’s fault in a car accident have standing to challenge the letter under the CPA? The Court has identified this issue as central in this case. The *amicus* brief by the CP Division adds nothing to its analysis. In fact, the CP Division fails to even identify standing as a separate issue, and misstates Farmers’ position on standing and CPA’s relationship to the Washington Collection Agency Act. *See* CP Division’s Amicus Brief, at 2 (Statement of the Issues).

Standing is more fundamental than the application of the familiar *Hangman Ridge*¹ elements that the CP Division repeatedly recites. It has to do with whether Ms. Panag and Mr. Stephens are the proper parties to challenge the demand letters arising out of their car accidents as private attorneys general. Standing is a threshold *legal* issue that should not be confused with the elements of a CPA claim, which often involve factual issues. See *Blewett v. Abbott Lab.*, 86 Wn. App. 782, 788, 938 P.2d 842 (1997) (rejecting plaintiff's contention that "the plain language of the Consumer Protection Act allow[ed] her claim"); *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 313, 858 P.2d 1054 (1993) (analyzing standing separately from the *Hangman Ridge* elements and holding that a doctor "did have standing" to bring a CPA claim against the drug company because he acted as the "learned intermediary" between the drug company and his patients and therefore "stands in the shoes of the 'ordinary consumer' of the drug"); *Tank v. State Farm Fire and Cas. Co.*, 105 Wn.2d 381, 395, 715 P.2d 1133 (1986) (when State Farm's insured, Tank, assaulted Walker, Walker had no right to stand in Tank's shoes and challenge State Farm's denial of coverage under the CPA).

¹ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 718 P.2d 531 (1986).

“Standing” is shorthand for the policy judgment that the doctor in *Fisons* was a proper party to sue the drug company for deceptive or unfair marketing of drugs to the doctor’s patient, while the tortfeasor’s victim in *Tank* was not a proper party to sue the tortfeasor’s insurer under the CPA. *See Tank*, 105 Wn.2d at 395 (“we are persuaded that the public as a whole would not benefit from allowing such suits”). Standing inquiry is not unique to CPA cases and has been used in other statutory contexts. *See In re Parentage of L.B.*, 155 Wn.2d 679, 714, 122 P.3d 161 (2005) (standing to seek visitation under third-party visitation statute); *Save Columbia CU Committee v. Columbia Comm. Credit Union*, 134 Wn. App. 175, 139 P.2d 386 (2006) (standing to sue under Washington’s Savings and Loan Association Act); *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7-8, 802 P.2d 784 (1991) (taxpayer standing).

In the past, this Court approached standing on a case-by-case basis. This is typical of standing cases. The United States Supreme Court observed that legal concepts “rich in content” (such as standing and causation) frequently “afford alternative ways . . . for stating an acceptable [policy] judgment.” *Associated General Contractors of California, Inc. v. California State of Council of Carpenters*, 459 U.S. 519, 535 n.32, 103 S. Ct. 897 (1983) (citation omitted). *See also id.* at 536 n.33 (“it is simply not possible to fashion an across-the-board and easily applied standing

rule which can serve as a tool of decision for every case.”) (citation and internal quotation marks omitted).

Instead of attempting to come up with a single bright-line standing rule, the United States Supreme Court identified several non-exclusive factors “that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.” *Id.* 537. These factors include: (1) the nature of the plaintiff’s injury, (2) the directness or indirectness of the asserted injury, (3) the potential for duplicative recovery or complex apportionment of damages, and (4) the existence of more direct plaintiffs of the challenged conduct. *Id.* at 538-545. The Supreme Court explained that the weight to be given each of these (or other factors) is not uniform but depends of the nature of each case. *Id.* at 538. *See also Bravman v. Basset Furniture Ind., Inc.*, 552 F.2d 90, 99 (3d Cir. 1977) (concluding that “there is no talismanic test capable of resolving all . . . standing problems,” instead, standing is generally a balancing test comprised of “many constant and variable factors”):

In the claim of unfair competition by a labor union against contractors’ association, the first two factors (nature and directness of injury) were controlling. With respect to the first factor, the Supreme Court emphasized that “the Union was neither a consumer nor a

competitor in the market in which the trade was restrained.” *Associated General Contractors*, 459 U.S. at 539. It distinguished *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S. Ct. 2540 (1982), where a subscriber alleged that Blue Shield conspired to restrain competition in the market for mental health services by providing insurance coverage only for consumers who patronized psychiatrists not psychologists.

The Supreme Court emphasized that, unlike the union,

McCready alleged that she was a consumer of psychotherapeutic services and that she was injured by the defendants’ conspiracy to restrain competition in the market for such services. . . . [Therefore her] injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.

Associated General Contractors, 459 U.S. at 538. *See also id.* at 540-41 and n.44 (unlike McCready, who “did not yield to Blue Shield’s coercive pressure, and bore Blue Shield’s sanction in the form of an increase in the net cost of her psychologist’s services,” the union “claimed only unspecified injury in its ‘business activities’”).

The United States Supreme Court held that *McCready* had standing to sue her insurer because the benefit provided by her insurance policy was detrimentally affected by the insurer’s unfair exclusion of psychologists. In contrast, the union was neither a consumer nor a

competitor in the construction market that it claimed was unfairly influenced by the defendant's practices, and therefore had no standing to challenge them. This Court has identified the same distinction in *Fisons* and *Tank*. Dr. Klicpera, while not himself a consumer of the drug that Fisons "unfairly" marketed to his patients, was nonetheless a critical link in the marketing chain and therefore could stand in the shoes of his patients. In contrast, the attacker's victim in *Tank* had no standing to sue the attacker's insurer *because he was a complete stranger to their consumer relationship, no matter how "unfair" it was alleged to be.*

Until the case on review, courts in this state have never extended the CPA to suits of the latter variety. RCW 19.86.020 is patterned after section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) ("FTCA").² See *Salois v. Mutual of Omaha*, 90 Wn.2d 355, 358, 581 P.2d 1349 (1978). FTCA § 5 does not provide for a private right of action for "unfair or deceptive acts or practices in commerce." As a result, there are no federal cases arising from that section that would provide guidance on the issue of standing by private parties. However, the FTC has never

² In 1914, Congress enacted the Federal Trade Commission Act (FTCA) and created the Federal Trade Commission (FTC), giving it the power to prohibit "[u]nfair methods of competition in commerce." 38 Stat. 719. In 1938 Congress broadened § 5 of the FTCA by giving the FTC the power to prohibit "unfair or deceptive acts or practices in commerce" as well as "[u]nfair methods of competition in commerce." 52 Stat. 111, codified as 15 U.S.C. § 45(a)(1).

enforced § 5 of the FTCA on behalf of complete strangers to consumer or business transactions alleged to have been influenced by unfairness or deception, such as Ms. Panag or Mr. Stephens. *See FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001) (a practice falls within the prohibition of FTCA § 5(a)(1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material).

Unlike the unfair-or-deceptive-practices component of the FTCA, its unfair-competition component³ did provide for a private enforcement and has generated many standing decisions that are helpful to the analysis here. *See Associated General Contractors*, 459 U.S. 519; *McCready*, 457 U.S. 474; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326 (1979) (the term “property” in § 4 of the Clayton Act has “naturally broad and inclusive meaning” that gives consumers standing to seek § 4 remedies for the increase in the cost of goods attributable to price fixing); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S. Ct. 885 (1972) (§ 4 did not authorize a State to sue in its *parens patriae* capacity for damages to its general economy, which “is no more than a reflection of injuries to the ‘business or property’ of consumers, for which they may recover

³ *See* section 4 of the Clayton Act, 15 U.S.C. § 15 (“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law” can seek treble damages).

themselves under § 4”); *Illinois Brick Co., v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061 (1977) (indirect purchasers of concrete block have no standing to seek § 4 remedy against the manufacturer).

Because CPA’s private-enforcement and remedies section, RCW 19.86.090, was patterned after § 4 of the Clayton Act, the standing analysis in these cases is highly relevant. *See Associated General Contractors*, 459 U.S. at 535 and n.31 (“the question whether the Union may recover for the injury it allegedly suffered by reason of the defendants’ coercion against certain third parties cannot be answered simply by reference to the broad language of § 4. Instead . . . the question requires us to evaluate the plaintiff’s harm, the alleged wrongdoing by defendants, and the relationship between them”).

To repeat, Farmers never suggested that only those who can “prove a consensual business relationship with the defendant . . . have standing to bring a private CPA action.” *See* CP Division’s Amicus Brief, at 2. It is well settled that the CPA “encompass[e]s more than just sales” of goods and services. *See Salois*, 90 Wn.2d at 359. The CPA encompasses, without limitation, solicitations, advertising, marketing, promotion and other business activities designed to facilitate, result in, or support sales, as well as the subsequent consumer or business relationship. *Id.* at 360 (“Plaintiffs . . . purchased the potential benefits and security of coverage. .

. . . [P]laintiffs were deprived of . . . what they purchased” when the insurer refused to honor the plaintiff’s claim for benefits). Moreover, in some cases the CPA can be enforced by appropriate third parties. *See Escalante v. Century Ins. Co.*, 49 Wn. App. 375, 387, 743 P.2d 832 (1987) (passenger could sue the driver’s insurance company when the policy provided that the passenger was a named insured); *Fisons*, 122 Wn.2d at 313 (the “unique relationship results in the physician being comparable to the ordinary consumer in other settings”).

The CP Division has not identified any of its enforcement actions outside this broad realm, despite the relaxed statutory requirements for the actions by the Attorney General. *See* RCW 19.86.080.⁴ In *Tank*, this Court was “persuaded that the public as a whole would not benefit from allowing such suits.” *Tank*, 105 Wn.2d at 395. *See also McCready*, 457 U.S. at 477 (“the potency of the remedy implies the need for some care in its application”). The same rationale that applied in *Tank* applies here. Ms. Panag has no standing to invoke the CPA. The Court of Appeals’ contrary decision should be reversed.

⁴ While a private plaintiff must “be injured in his or her business or property” in order to bring any suit under the CPA, *see* RCW 19.86.090, the injury requirement is absent in RCW 19.86.080 that authorizes actions by the Attorney General.

B. Nothing in the Insurance Code Creates a Cause of Action in Third Parties.

Implicitly recognizing the lack of any qualifying consumer or business relationship between Ms. Panag and the defendants that could give rise to a CPA action, WSTLA's *amicus* brief suggests an alternative basis for allowing this novel CPA case to go forward. WSTLA alleges that a CPA claim "emanate[s]" from the Insurance Code, Title 48 RCW. WSTLA's Brief, at 5. WSTLA's argument is contrary to this Court's decision in *Tank* that made clear that the Insurance Code has nothing to do with non-parties to the insurance contracts, much less with those who are adverse to the insureds, such as Ms. Panag and Mr. Stephens. *See Tank*, 105 Wn.2d at 391 ("We hold that third party claimants may not sue an insurance company directly for alleged breach of duty of good faith under a liability policy.").

This Court explained:

The statutory violations alleged by petitioners as the basis for their negligence per se actions are bottomed on RCW 48.30.010 [the same statute on which WSTLA relies]. This statute . . . generally prohibits unfair or deceptive acts or practices in the business of insurance. It further authorizes the Insurance Commissioner to promulgate regulations which define and prohibits specific unfair acts or practices.

Pursuant to authority under RCW 48.30.010, the Insurance Commissioner developed comprehensive unfair practice regulations

which became effective on September 1, 1978. These rules are found in WAC 284-30-300 through -600. They generally set forth certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settling practices.

Nothing in the language of these regulations specifically gives third party claimants the right to enforce the rules. Moreover, we are not persuaded that it was the intent of the Insurance Commissioner in drafting these regulations to create a cause of action in third party claimants.

Tank, 105 Wn.2d at 392-393.

Most recently, in explaining the operation of the Insurance Fair Conduct Act that went into effect on December 6, 2007 and provides remedies for unreasonable denial of insurance claims and violation of certain settlement practices, the Insurance Commissioner reiterated:

The law applies only to claims made by insured people to their own insurance companies. It does not apply to claims made by one person to someone else's insurance company.

For example: If a person has been in an accident, this law applies to a claim made by an insured under his own policy to his own insurance company. It does not apply to someone making a claim against another person's insurance company.

http://www.insurance.wa.gov/consumers/insurance/insurancefairconduct/questions_and_answers.shtml (last visited on June 16, 2008) (emphasis added).

Similarly, the advertising statute, RCW 48.030.040, does not give parties who were not shopping for insurance any rights against insurers who never tried to sell it to them. *See also* WAC 284-23-020 (defining advertisement as material designed . . . to induce the public *to purchase, increase, modify, reinstate, or retain a policy*"); WAC 284-50-060 (prohibiting omissions that have the capacity to or tendency to deceive *purchasers or prospective purchasers* as to the nature of the policy benefit).

Ms. Panag never purchased car insurance from any insurer. (If she had, she would not have received the demand letters she challenges in this action.) Neither does she allege that she received any solicitations or advertisements to purchase any car insurance from Farmers and was misled by their content. Therefore, she has no standing to sue Farmers under the Insurance Code or the CPA.

III. CONCLUSION

For the reasons stated, the Court of Appeals' decision should be reversed.

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