

FILED
SEP 24 2007

Nos. 80357-9, 80366-8

CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT
OF THE 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.

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.

**THE NATIONAL ASSOCIATION OF SUBROGATION
PROFESSIONALS' AMICUS CURIAE MEMORANDUM
IN SUPPORT OF PETITIONS FOR REVIEW**

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I. INTRODUCTION

The National Association of Subrogation Professionals (“NASP”)¹ respectfully requests that this Court grant review of the published opinion issued by the Court of Appeals in *Stephens v. Omni & Panag v. Farmers*, 138 Wn. App. 151, 159 P.3d 10 (2007). NASP files this Amicus Curiae Memorandum contemporaneously with its Motion to File Amicus Curiae Memorandum in support of the pending Petitions for Review filed in the following matters: *Panag v. Farmers*, Supreme Court Cause No. 80357-9; and *Stephens v. Omni*, Supreme Court Cause No. 80366-8.²

II. WHY REVIEW SHOULD BE GRANTED

A. The Petitions for Review Should be Accepted Because They Involve Issues of Substantial Public Interest That Should be Determined by This Court.

Throughout Washington state, people working in the field of subrogation have for decades routinely sent recovery claim letters to tortfeasors as part of their normal business practice. In the uninsured motorist context, this practice 1) protects law-abiding insured drivers by

¹ NASP is a non-profit trade association of insurance companies, third party administrators, subrogation specialists, and attorneys practicing in the field of subrogation and recovery. NASP’s stated purpose is to “create a national forum for the education, training, networking and sharing of information and, ultimately, the most effective pursuit of subrogation on an industry-wide basis.”

² NASP supports the Petitions for Review filed by Credit Control Services, Inc. (“CCS”) and Farmers Insurance Company in *Panag*, and the Petition for Review filed by CCS in *Stephens*.

keeping insurance premiums low, and 2) holds accountable those uninsured motorists who cause injury and damage.

The Court of Appeals published opinion (if left to stand) will have a widespread adverse public impact on these longstanding and important practices and policies. Because the Petitions for Review filed in the *Panag* and *Stephens* cases involve issues of substantial public interest, review by this Court is warranted under RAP 13.4(b)(4).

B. **Although The Court of Appeals Opinion Recognizes the Importance of Subrogation, It Has the Effect of Undermining Subrogation Efforts.**

Subrogation is an equitable right that exists as a matter of law. When an insurance company pays its insured for a claim, the insurance company stands in the shoes of its insured for the purposes of recovery against third parties who may be liable for the claim. *See, e.g.,* Allen D. Windt, INSURANCE CLAIMS AND DISPUTES, § 10:5 at 221 (4th ed. 2001). This Court has described subrogation as an effort “to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.” *Mahler v. Szucs*, 135 Wn.2d 398, 412, 957 P.2d 632 (1998). The widespread societal benefits of subrogation are irrefutable. The practice of subrogation furthers important public policies by obtaining expeditious resolution without the need for litigation. It promotes efficient justice and judicial economy, makes injured parties

whole without the necessity of litigation, prevents unjust enrichment by responsible parties, and reduces insurance rates for policyholders.

The Court of Appeals aptly recognized the importance of subrogation, and vowed that its decision would not infringe upon subrogation rights. Specifically, the Court of Appeals stated as follows:

Our holding does not infringe on the right of insurance companies to recover subrogation interests or to employ collection agencies to do so.

Stephens, 138 Wn. App. at 171. However, the Court of Appeals opinion does indeed undermine subrogation efforts in direct contrast to the Court of Appeals' own promise.

Despite the laudable intentions articulated by the Court of Appeals, the far-reaching language appearing in the Court of Appeals published opinion is of grave concern to all parties involved with subrogation and recovery efforts. Upon learning of the Court of Appeals opinion, NASP promptly warned its nationwide membership of the potential consequences of this groundbreaking ruling. Based upon the analysis presented in the Court of Appeals opinion, a significant chilling effect has invaded the historical practice of subrogation.

The Court of Appeals was highly critical of the subrogation recovery efforts made in the cases before it, taking issue with practices and terminology used in the subrogation industry. Worse yet, it created a

new cause of action under the Consumer Protection Act (providing treble damages and recovery of attorney fees) that allows and encourages recipients of subrogation recovery letters to sue the insurance company and/or the collection agency that is pursuing the subrogation claim.³

Under the Court of Appeals opinion, the CPA is arguably violated each time there is an attempted recovery of an unliquidated sum, thereby severely discouraging and undermining the important public policies furthered by subrogation.⁴ Instead of promoting efficient justice and judicial economy achieved by obtaining expeditious reimbursement, the Court of Appeals opinion practically requires that lawsuits be filed and prosecuted to judgment.

Moreover, the Court of Appeals opinion reads as a judicial retooling of a statute designed to protect consumers (the CPA). Instead of encouraging subrogation efforts to prevent unjust enrichment by parties

³ As subrogating insurers (and thus their collection services agents) are "regulated under laws administered by the insurance commissioner," the Legislature in the CPA itself provides that they act under a "safe harbor" (RCW 19.86.170) and are outside the bounds of the CPA. If an insurer or its selected collection services company oversteps its bounds, the traditional tort remedies and equitable entitlements for injunctive relief remain available to curb abuses.

⁴ The Court of Appeals' suggestion that a CPA violation occurs each time an "amount due" in a tort claim is alleged that is unliquidated impacts practices far beyond the subrogation context. For example, in nearly every personal injury case, plaintiffs' attorneys submit demands to defense attorneys seeking payment of unliquidated sums. Arguably, the Court of Appeals' conclusion that this practice violates the CPA applies to all recovery efforts without limitation, including plaintiffs' attorneys' demands for payment of unilaterally-valued claims. If the opinion is allowed to stand, defendants against whom allegations of wrongdoing have been made will be able to recover treble damages and attorney fees from the very persons they were accused of harming.

responsible for causing injury and damage, the Court of Appeals made available a potential windfall for tortfeasors in the form of allowing them to pursue treble damages and attorney fees. This is contrary to the equities involved, as illustrated by the examples of circumstances and equities presented by subrogation claims involving uninsured motorists that are summarized in the Appendix attached hereto.

In all likelihood, if the Court of Appeals opinion stands, many subrogation efforts will be abandoned due strictly to economic considerations. These consequences will undoubtedly harm consumers of insurance, including all drivers in Washington who purchase liability insurance as required by law. The insurance premiums charged to current and future insureds will most certainly rise in order to absorb the increased costs due to fewer recoveries of subrogated claims and the more frequent need for litigation. The Court of Appeals opinion actually discourages efforts to hold uninsured motorists responsible for wrongdoing.

In order to honor the sentiment expressed by the Court of Appeals to "not infringe on the right of insurance companies to recover subrogation interests" that promote responsibility and protect the interests of insured motorists throughout Washington state, review should be granted and the Court of Appeals opinion reversed.

C. **Efforts to Recover Unliquidated Tort Claims Should be Encouraged as an Alternative to Litigation.**

The *Panag* and *Stephens* cases involved subrogation recovery efforts directed at uninsured motorists involved in automobile accidents. The pertinent underlying facts presented in these cases are instructive as to the methodology of the subrogation recovery process.

Using licensed insurance adjusters in accordance with Washington Insurance Commissioner's Office regulations, the claims were adjusted and liability was allocated.⁵ Each insured driver's insurance company paid for all bodily injury and property damages to make the parties whole, even where fault was attributable to the uninsured motorist. After doing so, each insurer had a right to recover those sums that were attributable to the uninsured motorist. To that end, the insurers arranged for subrogation recovery letters to be sent to the uninsured motorists by another entity, a subrogation recovery specialist.

The letters at issue contained some or all of the following phrases, which are commonly employed in subrogation recovery efforts: "notice of subrogation claim" and "subrogation claim amount due." In its published opinion, the Court of Appeals took issue with these terms, pointing out

⁵ The Insurance Commissioner's Office regulates the process of insurance subrogation. See, e.g., RCW 48.17.090 and WAC 287-17 (applying licensure, testing and training requirements to adjusters). Subrogating insurers (and thus their agents) are "regulated under laws administered by the insurance commissioner."

that “[t]he basis of the alleged ‘amount due’ is an unliquidated tort claim, not an unpaid consumer debt.” *Stephens*, 138 Wn. App. at 167.⁶ The Answers to Petitions for Review highlight the “unliquidated tort claim” aspect of the Court of Appeals’ opinion by characterizing the subrogated amounts as “fake debts”⁷ or “phony debts.”⁸ The fact that an amount due or the liability related thereto may not be judicially established does not make them any less real, or “fake,” as Panag and Stephens have characterized them. In fact, Washington statutes recognize that “debts” include not only liquidated sums, but also unliquidated sums. *See* RCW 19.40.011(4) & (6) (explaining that “debt” means liability on a claim, and “claim” means “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured”).

The Court of Appeals published opinion nonetheless urges that lawsuits be initiated and prosecuted through the court system to judgment. This would be utterly impractical given the relatively small sums being

⁶ The trial court in *Stephens* emphasized this point. The Court of Appeals expressly affirmed the partial summary judgment order entered by King County Superior Court Judge Mary Yu in the *Stephens* case, which read in relevant part: “The practice of sending collection notices such as the ones attached as ‘Exhibit A’ to individuals when the alleged amount ‘due’ or owed is an unliquidated claim that has not been previously adjudicated in any way is a violation of the Washington Consumer Protection Act.” CP (*Stephens*) 585.

⁷ *Stephens*’ Answer, at 3.

⁸ Panag’s Answer, at 3.

sought in many subrogation recovery cases. Moreover, it would be contrary to judicial economy (and overload Washington courts) to require that litigation be commenced following every uninsured motorist automobile accident. Certainly, injured parties and their representatives should not be subject to severe monetary punishment after simply asking uninsured motorists to pay for damage they caused.

Subrogation recovery claims are nearly always unliquidated tort claims and should be encouraged as an alternative to litigation. The notice and demand letter practice is designed to resolve the claims through negotiation, with litigation following only as a last resort. That is why the terminology "subrogation claim" is used. Trained and licensed insurance adjusters, regulated by the Insurance Commissioner, are the ones who determine the level of fault and damage "claimed" in subrogation whether the notice letter issues directly from the insurance company, legal counsel, a subrogation recovery specialist, and/or a collection agency. The combination of the training and licensing requirements of these insurance adjusters, with oversight by the Insurance Commissioner's office, provides the regulated process necessary to prevent abuses. Further, insured

motorists (as all motorists should be) have the benefit and skills of their own insurance company's adjusters to conduct those negotiations on their own behalf so as to relieve them of the task.

III. CONCLUSION

As demonstrated herein, the published opinion filed by the Court of Appeals discourages and undermines the important public policies furthered by well-established equitable subrogation practices. This is an issue of substantial public interest that should be determined on review by this Court under RAP 13.4(b)(4). For all of the reasons set forth herein and in the Petitions for Review, NASP urges this Court to grant review of the Court of Appeals published opinion.

RESPECTFULLY SUBMITTED this 23rd day of August, 2007.



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DECLARATION OF SERVICE

Dava Z. Bowzer states:

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.

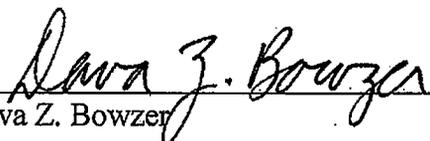
On this 24th day of August, 2007, I caused to be filed via electronic filing with the Supreme Court of the State of Washington the foregoing THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS' AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITIONS FOR REVIEW. I also served copies of said document on the following parties as indicated below:

Parties Served	Manner of Service
<i>Counsel for Panag & Stephens:</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 & Stephens:</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 Omni:</i> Jerret E. Sale Bullivant Houser Bailey PC 1601 Fifth Avenue, Suite 2300 Seattle, WA 98101-1618	<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

Parties Served	Manner of Service
<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
<i>Counsel for Credit Control Svcs.:</i> John A. Granger Melissa O'Loughlin White Cozen O'Connor 1201 Third Avenue, Suite 5200 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
<i>Counsel for Credit Control Svcs.:</i> Philip A. Talmadge Talmadge Law Group, PLLC 18010 Southcenter Parkway Tukwila, WA 98188-4630	<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 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 24th day of August, 2007.



 Dava Z. Bowzer

APPENDIX

Examples Of Typical Circumstances And Equities Presented By Subrogation Claims Involving Uninsured Motorists

Examples abound of uninsured motorists' efforts to skip out on legitimate clear liability obligations. The three examples that follow were each taken from actual subrogation efforts by a collection services company for Washington-based insurance companies based upon facts asserted in the police reports.⁹ The uninsured motorists ignored subrogation recovery efforts and never made any payments whatsoever.

a) While driving under the influence of alcohol, M.R., an uninsured motorist, rear-ended R.G. at 60 mph while she was stopped at a traffic signal, causing \$40,243 in property and medical payments.

b) E.M. was an uninsured motorist who ran a stop sign and "T-boned" C.O.'s vehicle, causing \$12,108 in property damage.

c) A.L. was an uninsured motorist who crossed the center divider and struck O.G. after weaving in and out of traffic at an extremely high rate of speed, causing \$33,915 of property damage and medical payments.

⁹ All three uninsured motorists are intended members of the class of plaintiffs claimed to be represented in the *Stephens* and *Panag* lawsuits as supposedly requiring protection from aggressive subrogation recovery correspondence.