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Nos. 80357-9 & 80366-8

BY RONALD R. CARPENTER
SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

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

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,
a foreign 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, and
CREDIT CONTROL SERVICES, INC., d/b/a Credit Collection Services,
Petitioner

**RESPONDENTS RAJVIR PANAG'S & MICHAEL STEPHENS'
JOINT ANSWER TO AMICI MEMORANDA**

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I. INTRODUCTION

Rajvir Panag and Michael Stephens, Respondents in Supreme Court Cause Nos. 80357-9 and 80366-8, respectively, file this single joint response to the five amici memoranda by: (i) The National Association of Subrogation Professionals (“NASP”); (ii) the American Insurance Association and the Property Casualty Insurers Association of America (“AIA/PCI”); (iii) the Liability Reform Coalition (“LRC”); (iv) the WSTLA Foundation (“WSTLA”); and (v) the Attorney General of Washington (“AG”).

In summary, Panag and Stephens for the most part disagree with the argument provided by NASP, AIA/PCI and LRC, and for the most part agree with the argument provided by WSTLA and the AG.

II. ARGUMENT

A. NASP’s Public Policy Argument Misstates Facts, Mischaracterizes the Issue, & Is Otherwise Without Merit

In what is essentially an irrelevant primer on subrogation, NASP makes a number of unsubstantiated statements and mischaracterizations. These broad proclamations, at least some of which are directly contrary to the records in these cases, do not withstand scrutiny.

For example, NASP claims that the FORMAL COLLECTION NOTICES sent to Panag and Stephens are not sent until “the end of [a]

long process.” NASP Br. at 9. This is contrary to the record. What is supported by the record, however, is NASP’s tacit acknowledgement that the collection scheme employs a strategy of making subsequent notices increasingly threatening and hostile (“less gentle” as NASP puts it).

NASP Br. at 9.

NASP also claims that subrogation reduces insurance rates. NASP Br. at 5. Not only is there nothing in the record to support the assertion, but NASP does not provide any details as to the extent of any alleged effect. Such vague and unsupported assertions carry little weight. *See Brown v. Snohomish Cty. Phys. Corp.*, 120 Wn.2d 747, 758, 845 P.2d 334 (1993) (“Neither SCPC nor HCCAG has made any attempt to identify what increased costs would result if the provisions are invalidated ...”). Moreover, public policy – such as the protection of the public reflected in the CPA – cannot be overridden simply because it may increase costs for an industry. *See id.* (public policy reflected in make whole doctrine cannot be “abrogated simply because the cost of health care service contracts may go up to some degree.”).

In addition, the “insurance rates” argument contradicts itself, as it is based on the assertion that some matters have so little value that it

would not make sense to pursue them in a lawful manner.¹ But if these unenumerated matters have so little value, how much impact could they have on insurance rates?²

Moreover, an important reason that such matters often possess little value is because the insurance company knows it has liability issues. Indeed, from the perspective of the insurance company and its debt collector, the “extrajudicial” collection scheme is terrific because it provides them with a neat way to avoid these liability issues. As is seen from Ms. Panag’s situation, the insurer certainly does not tell the person targeted, “to be honest, we know our insured was mostly at fault, so we would like 1/3 of the amounts we paid for him,” or otherwise acknowledge liability issues. And Ms. Panag’s case involved liability issues internally acknowledged by the insurance company.

But even where the insurer’s self-serving liability evaluation finds no fault on its insured, it is in no way binding on a third party. The scheme tries to make it binding, however, by putting the matter into the hands of a debt collector who demands payment of the insurer’s entire claim, and who is not going to listen to the target’s argument as to why he

¹ Inherent in this assertion is the premise that the only way to get people to pay money is through deception or intimidation.

² Recognition of this fault in the argument may be why defendants and their amici try so hard to posture this case as a general referendum about subrogation.

was not at fault in the accident.³

To support its argument that subrogation is important, NASP quotes an OIC brochure. Even the section quoted by NASP, however, points out that subrogation allows an insurer to recover from a person “legally liable.” See NASP Br. at 4. In fact, the quotation helps expose the error of the repeated attempts to equate driving without insurance with legal liability for an accident, which is a *non sequitur* as the first simply does not establish the second. It is similar to a person driving in the HOV lane by himself which, although unlawful, does not by itself mean that he is liable for any accident that occurs there. In short, the bombast from NASP and others about holding uninsured drivers “accountable” for their harm fails in its initial premise.⁴

A particularly egregious mischaracterization is NASP’s contention that the rulings of both Judge Yu and the Court of Appeals would require that all subrogation matters first be adjudicated in Court. NASP Br. at 7. This sort of extremist assertion is ridiculous and does nothing to inform the analysis. In fact, it is clear that even NASP doesn’t believe its

³ Or who will respond by stating or implying that the targeted individual is at fault simply because he was driving without insurance.

⁴ Notably, the “accountability” mantra echoed by defendants and their amici stands in stark, ironic, contrast with the efforts to have defendants escape accountability for the harm caused by their unlawful conduct.

rhetoric. In its brief, NASP stated that: “Upon learning of the Court of Appeals opinion, NASP promptly issued an alert to warn its nationwide membership of the potential consequences of this groundbreaking ruling,” and baldly claims a non-specific “chilling effect.” NASP Br. at 12.⁵ Given what NASP says is “required” by the Court of Appeals opinion, one would think that NASP “warned” its members to refrain from pursuing subrogation claims unless first adjudicated. Instead, NASP merely told its members:

As seen from the Washington Court of Appeal’s decision, judges will go to great lengths to reach subrogation recovery in the context of Consumer Protection laws. In light of the Washington decision, Insurers need to review their practices in order to see that they are not violating Washington’s Consumer Protection Act. Subrogation vendors need to be careful in use of form letters and their content to avoid claims under such Consumer Protection laws.

Consumer Protection Act Applies to Subrogation in Washington State,

NASP (undated) (emphasis added).⁶ In other words, NASP simply advised its members to be careful what they put in their correspondence, not to stop sending it.

In any event, the rulings are simple and straightforward: when

⁵ NASP used virtually identical language in its amicus brief in support of review. NASP Pet. Br. at 3.

⁶ A copy is attached as Appendix 1 for convenience. As of June 5, 2008, it is publicly accessible at: http://www.subrogation.org/user_documents/AC_Washington.pdf.

trying to obtain money from members of the public, a business cannot deceive as to the nature of a purported obligation. For example, representing that the targeted person owes a “debt” when that representation is untrue. In short, the Court of Appeals opinion does not stand in the way of fair and honest efforts to resolve claims prior to litigation, and even NASP evidently understands that.

In summary, no matter how much NASP or the other amici talk about it, these cases are not about the desirability or the principle of subrogation, or whether the pursuit of subrogation rights is a legitimate “end.” These cases concern whether entities claiming subrogation rights can employ whatever deceptive or unfair “means” suit them to achieve that “end.” Thus, NASP’s claim that “subrogating entities” will be “punish[ed] ... even when they have done nothing wrong.” NASP Br. at 6 (emphasis added), rings hollow. The fact is, a “subrogating entity” can only be subject to CPA liability if it engages in deceptive or unfair conduct – conduct specified as unlawful by RCW § 19.86.020.

NASP’s overarching assertion is that the collection scheme at issue promotes “efficient justice.” NASP Br. at 5. While the scheme may be “efficient” for those collecting money to which they are not entitled, the individual wrongfully targeted sees nothing “just” about it.

B. AIA/PCI's Public Policy Arguments Are Without Merit

AIA/PCI's brief is also a "what the law should be" argument, devoid of any analysis or insight as to what the law is. The only case cited is *Camacho v. Automobile Club of Southern California*, 48 Cal. Rptr. 3d 770 (Cal. Ct. App. 2006). But for the reasons stated in previous briefing and in the Court of Appeals' opinion, *Camacho* and its "unfair" analysis is uninforming for these "deceptive" matters before the Court.

AIA/PCI bases its public policy argument on the bold declaration that "Washington state has one of the highest rates of uninsured drivers in the country, estimated at 18-20 percent." AIA/PCI Br. at 2 (citing *Uninsured Motorists*, Insurance Research Council (2006 ed.) ("Report"). Regardless of whether the Court should even consider this Report, AIA/PCI's representations of it are questionable. The Press Release accompanying the Report identifies the five states having the "highest uninsured driver estimates" of between 20-26 percent; Washington is not among them. *See IRC Estimates More Than 14 Percent of Drivers Are Uninsured*, Insurance Research Council (June 28, 2006).⁷ In fact, this Press Release lists Washington at 18% (not 18-20%), which is not much above the Report's national average of 14.6%.

⁷ Plaintiffs' counsel declined to pay the \$100 it apparently costs to purchase the Report, but the Press Release is publicly accessible. As of June 10, 2008, the Press Release is found at the following URL: <http://www.ircweb.org/news/20060628.pdf>.

Even ignoring AIA/PCI's suspect characterization of the Report, AIA/PCI does not say how it matters for this case. If AIA/PCI is implying that permitting the collection scheme would help with insurance rates, it has failed to detail how or to what extent, and any such assertion fails for the same reasons articulated *supra*, Part II.A., concerning NASP's similar argument.

To support its economic justification for the challenged conduct, AIA/PCI does aver that the "extrajudicial" collection scheme "imposes low transaction costs on the participants." AIA/PCI Br. at 3. This is doubtless true from the perspective of insurance companies and collection agencies. But from the perspective of those individuals targeted, being deceived or intimidated into paying money not lawfully owed is a terribly high transaction cost. From a societal perspective, given that the scheme resulted in the unwarranted transfer of over \$1.5 million from the public's pockets to the defendants' coffers, the picture is even worse.

**C. LRC's Public Policy Argument Misstates
Facts and Are Without Merit**

Among the unhelpful amicus briefs, LRC's is likely the least helpful to the Court in resolving the issue presented. For the most part, the brief is a mish-mash of suspect, irrelevant assertions concerning Washington's purported business climate, and what the law should be or

what LRC wishes it was. Such arguments are patently misdirected – LRC should look to the Legislature if it desires the law to be changed, not this Court, which resolves issues on the law as it actually exists.

To the extent LRC provides any argument, it misstates both the facts and the law. For example, LRC bases its argument on the assertion that the collection notices demanded payment “for amounts attributable to the uninsured driver’s fault.” LRC Br. at 2. First, there is no amount “attributable” to either plaintiffs’ fault, because there was no legitimate determination of liability. Thus, there is nothing in the record to support this statement. Also, it is absurd to pretend that the claiming parties’ (Farmers, Omni, or CCS) self-serving assessment of fault constitutes “attribution.” It also ignores that even if liability were legitimately determined, it still leaves the question of provable, causally related damages.⁸

Second, highlighting the mischief inherent in the system proposed by LRC and others (in essence, “just trust the insurance company and their debt collectors”), it is undisputed that the collection notices sent to Panag sought nearly three times the amount Farmers thought it could actually

⁸ In a lawsuit, the mere fact that Farmers or Omni paid some amount of money to their insureds would not be sufficient to find the amounts were recoverable as “damages” (*e.g.*, reasonable and related charges for medical care, the amount of general damages, *etc.*). In fact, mere payment by the insurers would not even be admissible evidence on the issue.

claim in light of known and internally acknowledged liability issues.

Third, although there was initially some confusion, the fact is that Stephens was insured. LRC's misstatements are contrary to each of these facts.

LRC cites *Tank v. State Farm Fire & Casualty Company*, 105 Wn.2d 381, 715 P.2d 1133 (1986), in an effort to draw contrast with *Physicians Insurance Exchange v. Fisons Corporation*, 122 Wn.2d 299, 858 P.2d 1054 (1993). The underlying problem, however, is that *Tank* is inapposite to begin with.

In *Tank*, the plaintiffs sued the insurance companies of their respective tortfeasors.⁹ Each alleged that the respective insurer had engaged in bad faith¹⁰ against them (*i.e.*, the injured plaintiffs). Each based their claims on the duty of good faith imposed on insurers by RCW § 48.30.010. *Tank*, 105 Wn.2d at 392-93. Finding that this particular statutorily-imposed duty of good faith only ran to the insurer's insureds, the Court held that a non-insured could not sue for a breach of that duty of good faith. *See, e.g., id.* at 395 ("foreclosing the right of third party claimants to sue insurers for breach of their statutory duty of good faith ...") (emphasis added).

⁹ Two cases were combined in the *Tank* appeal.

¹⁰ Or breached a duty of good faith, which is essentially the same thing.

Panag and *Stephens*, however, are not based on the breach of the statutory duty of good faith imposed under RCW § 48.30.010. It is for this reason that *Tank* and other “bad faith” cases cited previously are inapplicable.¹¹

LRC also contends that the CPA is limited to frauds committed in connection with activities that are designed to result in or facilitate sales transactions. LRC Br. at 3. This proposition is simply untenable, and has already been expressly rejected:

The fact that the definition of those words [“trade” and “commerce”] state that they shall “include” sales must mean that there is encompassed more than just sales. If the legislature had intended to so limit the act it could have said that it applies only to sales. Not only did it not do so, it went on to include “any commerce directly or indirectly affecting the people of the state of Washington.”

Salois v. Mutual of Omaha, 90 Wn.2d 355, 359-60, 581 P.2d 1349 (1978) (referring to and partially quoting RCW §§ 19.86.010 & .020) (emphasis added).¹²

LRC also makes the obligatory, tired reference to the CPA’s short title. Perfunctory repetition, however, does not make this “argument” any more meaningful. It should be rejected for the reasons noted in previous

¹¹ *E.g.*, *Marsh v. General Adjust. Bureau, Inc.*, 22 Wn. App. 933, 592 P.2d 676 (1970); *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981).

¹² LRC does provide one useful observation – that the conduct at issue here plainly constitutes commerce. See LRC Br. at 2 (including it within “commercial activity”).

briefing, including that the focus of all of RCW Chapter 19 (“Business Regulations”) is, logically enough, on the regulation of all business activity conducted in Washington.¹³

LRC also claims that unless the Court imposes the new standing requirement sought, the CPA will turn into a “catch-all claim” available to challenge any business practice that is “subjectively perceived” as unfair. LRC Br. at 4. This is nonsense. The CPA only provides a basis of recovery to those who can prove that the conduct is unfair or deceptive.¹⁴ Once again, the best-positioned gatekeeper remains the business itself: if there is no unfair or deceptive conduct targeting Washington citizens, there cannot be any CPA liability.

In *State Farm Fire & Gas Co. v. Huynh*, the Court of Appeals rejected similar, unsupported alarmist arguments:

Kiniry argues that if we allow an insurance company to sue a doctor under the CPA, doctors will begin to question patients’ descriptions of symptoms and because of their fear of liability under the CPA – give clouded diagnoses. He therefore contends that doctor-patient relationships ... would be adversely affected.

¹³ The short-titled “AntiCybersquatting Consumer Protection Act,” concerning the unauthorized registration or use of trademarks in Internet domain names, is designed to protect the public regardless of any consumer transaction. It accomplishes this by regulating business conduct and providing a right of action to the owner of the trademark or distinctive name (*i.e.*, the person or business harmed). See ACPA, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (codified at 15 U.S.C. § 1125(d)).

¹⁴ In addition, even after a plaintiff establishes unfair or deceptive conduct, no matter how egregious the conduct, he must still prove four more requisite elements to obtain relief.

Doctors who *falsely* report objective findings and bill for services that were never provided *should* fear liability for fraud and under the CPA. ...

... We do not believe[, however,] that the CPA ... or any portion of this opinion should cause health care providers who in good faith treat patients' subjective symptoms to fear litigation. ...

...

At oral argument ... Kiniry argued that cross-claims against doctors could become a routine practice by attorneys representing insurers But ... the trial court has adequate means of sanctioning parties and attorneys who file claims without a legal or factual basis, under CR 11 and by ordering the payment of fees under RCW 4.84.185 if a lawsuit is frivolous. [W]holesale cross-claims against the health care profession ... would be swiftly dealt with under CR 11 and RCW 4.84.185. Contrary to Kiniry's contentions, doctors who honestly report objective findings and bill only for services that are provided have nothing to fear as a result of this opinion.

In sum, in accord with the broad legislative intent to protect the public and foster fair and honest competition, we hold that State Farm has standing to sue Kiniry under the CPA.

92 Wn. App. 454, 460-62, 962 P.2d 854 (1998) (italics in original, underscoring added).

In the end, LRC implies that the best thing this Court can do for Washington's business climate is to provide for some measure of certainty so as to limit surprise. Plaintiffs agree that ensuring that businesses are aware of the standard of conduct expected of them is a laudable goal.

Thus, the Court should make clear to all entities privileged to conduct their commercial activities in Washington that targeting members of the public with deceptive or unfair schemes will subject them to liability for the harm they cause. The only thing “surprising” about such a rule would be why any business might have previously believed otherwise.

D. WSTLA Accurately Identifies Important Considerations From the Insurance Code

WSTLA accurately identifies important, relevant considerations from the Insurance Code. Its argument supports two propositions. First, that the conduct at issue here is prohibited and illegal. Second, that public policy favors confirming the applicability of the CPA to the matters at bar.

WSTLA is correct when it points out that the subrogation effort at issue in these two cases are matters within the business of insurance. *See* WSTLA Br. at 5-6. Indeed, despite their other faults, the arguments of NASP and AIA/PCI necessarily highlight the same point. In other words, Farmers and Omni, and their agent CCS, were engaged in the business of insurance when they employed the debt collection scheme to try to recover on subrogation claims. *See, e.g.*, RCW § 48.01.060(4) (insurance transactions include “matters subsequent to execution of the contract and arising out of it”) (emphasis added).

Since the challenged activities occurred in the context of the

business of insurance, we can look to see whether the Insurance Code speaks to the conduct. As WSTLA points out, the Code specifically prohibits any “false, deceptive or misleading representation ... in the conduct of the business of insurance, or relative to the business of insurance....” RCW § 48.30.040 (emphasis added). Thus, on its face, the Insurance Code prohibits exactly what occurred here: false, deceptive and misleading representations in the pursuit of a subrogation claim, *i.e.*, in the business of insurance.¹⁵

But even if the Court were to find this or any other Insurance Code provision not directly applicable, the provisions nonetheless strongly support the proposition that Washington public policy prohibits the use of deception in connection with the pursuit of subrogation recoveries.

**E. The AG Is Correct That the CPA Provides
a Basis for Relief In These Two Cases**

The AG makes a compelling, straightforward argument that the CPA provides a basis for relief in these two cases. Plaintiffs agree with the AG that Washington courts do not require a plaintiff to establish a “consensual business relationship” with a defendant as a threshold

¹⁵ Arguably, RCW § 48.30.040 also provide the “duty” owed to plaintiffs that the *Tank* Court believed was absent in that case, which would entitle plaintiffs to a *per se* CPA claim. *Tank* notwithstanding, as far as insurance regulations promulgated pursuant to RCW § 48.01.030, a number of the clearly protect persons who are complete strangers – indeed, adversaries – to the insurance contract. *E.g.*, WAC §§ 284.30.330(6), (10) & (14); WAC §§ 284-30-380(5) & (6); WAC § 284-30-3906; WAC § 284-30-3914.

requirement for a CPA claim. *See* AG Br. at 7-9. Plaintiffs also agree that there is no “adversarial dispute” exception to the CPA and that, in any event, this case does not involve a tort dispute between two drivers, but rather the tactics employed by insurance companies and their collection agency when trying to extract money from individuals. *See* AG Br. at 10-12. Plaintiffs also agree that the Court of Appeals’ opinion does not stand in the way of pursuing subrogation claims or attempting to resolve disputes without resort to litigation through honest and lawful means, and that the purported threat of increased CPA litigation¹⁶ is both illusory and eminently avoidable. *See* AG Br. at 12-14. Finally, plaintiffs agree that there is nothing in the Collection Agency Act that is contrary to the application of the CPA here. *See* AG Br. at 14-15.

In addition, since the AG enforces the CPA on behalf of the public, it is important to recognize that the rule defendants’ seek would have significant repercussions on the AG’s ability to protect the public. This would be true because, according to defendants, any conduct occurring outside of a “protected consensual business transaction” would not be illegal under the CPA, no matter how deceptive, unfair or otherwise egregious or reprehensible. In short, if a private plaintiff cannot pursue

¹⁶ By persons characterized as “unworthy” by defendants and their amici.

such a claim because it is not “unlawful,” then there is nothing that the AG could do either. Such a result would have serious, negative repercussions for Washington.

III. CONCLUSION

Because the law does not favor them, the amici supporting defendants’ position do not argue the law as written. Instead, they ask the Court to create new law, ostensibly on “public policy” grounds. Their arguments come down to this: the plaintiffs and thousands of others who were targeted are lawbreaking, uninsured drivers, and insurers should be permitted to employ any “extrajudicial” collection scheme that will get such people to give up the money demanded for the least cost and effort.

But even if this case were to be decided on public policy grounds, the foregoing shows that defendants’ amici do not have the better argument. Moreover, their public policy arguments rest on an underlying fallacy because, in fact, driving without insurance does not by itself make a person responsible for any accident that might occur.

The defendants’ amici warn that permitting these plaintiffs to prevail will portend an avalanche of CPA-based cases. They also claim an end to subrogation as we know it, asserting that having to refrain from deception will make it uneconomical to pursue matters of limited value. Although they don’t mention it, this plainly includes matters where the

insurer knows that liability is a problem.

Defendants' amici's efforts to create what in technology circles is often called "FUD,"¹⁷ however, must be rejected. The immutable fact remains that absent deceptive or unfair conduct,¹⁸ a business cannot be held liable under the CPA. As far the pursuit of modest claims, collection agencies routinely engage in real "debt collection" activity for actual "debts" in amounts far smaller than the thousands of dollars at issue in these cases, and do so (as they must) without resorting to deception. In such matters (*i.e.*, actual debts) the debt collectors' conduct is subject to not one, but at least three different statutes (FDCPA, Collection Agency Act, and CPA).

In contrast, in its argument focusing on the Insurance Code, WSTLA demonstrates that whether the Code's provisions are deemed to apply directly or just inform the analysis, the conduct at issue is prohibited and wholly at odds with Washington public policy.

Ultimately, to the extent public policy arguments are needed, history has shown that the most important is the need to protect individuals from abusive conduct by overreaching, powerful business interests that believe any misconduct is justified by economic efficiency.

¹⁷ Fear, uncertainty and doubt.

¹⁸ Or, where applicable, various methods of unfair competition.

But as the argument by the AG illustrates, these cases need not be decided on public policy grounds, as the plain language of the CPA, and the 22 year precedent of *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 719 P.2d 531 (1986), provide for the proper result.

June 16, 2008.

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DECLARATION OF SERVICE

2008 JUN 16 P 2:16

I certify that on June 16, 2008, I caused to be filed with the Supreme Court, via electronic filing, the foregoing Respondents Rajvir Panag's & Michael Stephens' Joint Answer to Amici Memoranda, and caused to be served via first class mail (unless otherwise noted), postage pre-paid, true and accurate copies to:

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

Executed in Seattle, WA, this 16 day of June, 2008.

/s/ Matthew J. Ide, WSBA No. 26002
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*Filed as attachment
to E-mail*

APPENDIX 1

Consumer Protection Act Applies to Subrogation Collection in Washington State

The NASP Amicus Committee would like to alert all subrogation professionals about a recent set of cases in the State of Washington Court of Appeals for Division I. The two cases are: Stephens v. Omni Insurance Company Case No. 57068-4-1 and Panag v. Farmers Insurance Company of Washington, Case No. 56625-3-1. Anyone doing subrogation collection in the State of Washington needs to read these cases and be aware of this disturbing trend of applying Consumer Protections to the subrogation arena.

In the Stephens case, the insurer engaged a collection agency (agency) that sent Formal Collection Notices. Despite Stephens disputing the debt, the agency sent a second letter. As a result, Stephens sought legal advice and sued the agency and the insurance company for violation of Washington State's Consumer Protection Act (CPA). The trial court granted Stephens summary judgment on the issue of liability under the act but reserved ruling on damages.

Likewise in the Panag case, the insurer determined Panag was 40% at fault for the accident and was uninsured. Again, a collection agency was retained and sent a Formal Collection Notice for 100% of the subrogated amount. The agency sent second and third letters demanding payment and threatening suit. Panag consulted her personal injury attorney who sued both the insurer and the agency for a class action suit for violating the CPA. The trial court granted summary judgment for the insurer and agency but allowed the attorney additional discovery from both over others who received deceptive letters.

On appeal, the Washington Court of Appeals in a thirty-eight page opinion affirmed summary judgment for the consumer in Stephens against the agency and reversed summary judgment for the insurer and agency in the Panag case. The Consumer Protection Act requires a plaintiff to prove: (1) unfair or deceptive practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in her or her business or property; and (5) causation. The court found all five elements to exist in both cases.

On the issue of "deceptive practices," the Court of Appeals ruled that the letters don't have to be inaccurate to deceive. Instead, the Court found the "Formal Collection Notice" and "amount due" were deceptive to the public as they did not delineate the nature of the debt as being disputed tort liability or list what payments were made. In the Panag case, the court found deceptive the demand for 100% when only 40% by the insurance company's estimate was attributable to Panag.

On the issue of "trade or commerce," the Court of Appeals found that the sale of the agency's services to the insurance companies established the trade or commerce necessary to trigger the act. The Court rejected arguments that "trade and commerce" relate to the public at large saying the act did not limit it to such transactions.

On the issue of "public interest," the Court of Appeals found that sending of form letters and notice meant that the practice affected the public at large and were not isolated to the two parties in the lawsuit. The Court also looked to a California case which highlighted similar practices in the state of California. Finally, the Court used a sales power point presentation by the agency to an insurer with form letters to show the public impact of the practices.

On the issues of "injury and causation," the Court of Appeals found that injury was sustained by both in the time and expense on investigating fear of damaged credit and consultation to counsel. The Court found that getting a credit report was damage enough for the act and was caused by the notices sent by the agency. Thus, both Stephens and Panag had satisfied the elements necessary to prove a violation of the Consumer Protection Act.

As seen from the Washington Court of Appeal's decision, judges will go to great lengths to reach subrogation recovery in the context of Consumer Protection laws. In light of the Washington decision, Insurers need to review their practices in order to see that they are not violating Washington's Consumer Protection Act. Subrogation vendors need to be careful in use of form letters and their content to avoid claims under such Consumer Protection laws. The Amicus Committee will continue to monitor the situation and keep you informed.

OFFICE RECEPTIONIST, CLERK

To: Matt Ide
Cc: Murray Lewis
Subject: RE: Panag v. Farmers Ins., No. 80357-9 & Stephens v. Omni Ins., No.: 80366-8

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-----Original Message-----

From: Matt Ide [mailto:mjide@yahoo.com]
Sent: Monday, June 16, 2008 2:20 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Murray Lewis
Subject: Panag v. Farmers Ins., No. 80357-9 & Stephens v. Omni Ins., No.: 80366-8

Dear Clerk of the Court:

Attached please find the following joint brief that we are submitting for electronic filing in the two cases referenced.

Case Name: Rajvir Panag v. Farmers Insurance Co. of Washington, et al.
Case No.: 80357-9

and

Case Name: Michael Stephens v. Omni Insurance Co., et al.
Case No.: 80366-8

Filing: Respondents Rajvir Panag's and Michael Stephens' Joint Answer to Amici Memoranda

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