

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

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

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STATE OF WASHINGTON
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MICHAEL STEPHENS, on behalf of himself and all others similarly
situated,
Plaintiff/Respondent,

v.

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

BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUE PRESENTED	4
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT	5
A. The Washington Insurance Code Is A Broad And Comprehensive Statutory Scheme Designed To Safeguard The Public Interest Regarding All Matters Involving The Business Of Insurance.	7
B. RCW 48.30.010 and RCW 48.30.040 prohibit persons from making knowingly deceptive or misleading representations involving the business of insurance, and these prohibitions should apply to subrogation collection efforts by insurers and their representatives.	8
VI. CONCLUSION	11
APPENDIX	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bennett v. Hardy</u> , 113 Wn.2d 912, 784 P.2d 1258 (1990)	10
<u>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</u> , 105 Wn.2d 778, 719 P.2d 531 (1986)	3-6,10
<u>Harris v. Labor & Industries</u> , 120 Wn.2d 461, 843 P.2d 1056 (1993)	10
<u>Industrial Idem. Co. v. Kallevig</u> , 114 Wn.2d 907, 792 P.2d 520 (1990)	8
<u>Mahler v. Szucs</u> , 135 Wn.2d 398, 957 P.2d 632 (1998)	6
<u>Oregon Auto. Ins. Co. v. Salzberg</u> , 85 Wn.2d 372, 535 P.2d 816 (1975)	7
<u>Stephens v. Omni Ins. Co.</u> , 138 Wn.App. 151, 159 P.3d 10 (2007), <i>review granted</i> , 163 Wn.2d ____ (2008)	passim
<u>Statutes</u>	
15 U.S.C. §1692	4
Ch. 19.16 RCW	4
Ch. 19.86 RCW	1
Ch. 48.22 RCW	6
Ch. 48.30 RCW	8
Ch. 284-30 WAC	8
RCW 19.86.170	4
RCW 48.01.030	5,7,9

RCW 48.22.040(3)	7
RCW 48.30.010	8
RCW 48.30.010(1),(2)	5
RCW 48.30.010(1)	5,8
RCW 48.30.010(2)	9
RCW 48.30.040	5,8-10
RCW 48.30.030-.300	9
Title 48 RCW	1,4,5

Other Authorities

Thomas V. Harris, <u>Washington Insurance Law</u> , §§52.1-52.4 (2 nd ed. 2006)	6
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of persons seeking legal redress under the civil justice system, and an interest in the proper interpretation and application of the Insurance Code, Title 48 RCW.

II. INTRODUCTION AND STATEMENT OF THE CASE

These consolidated cases, each of which is framed as a class action, involve the common issue of whether the plaintiff has established a basis for relief under the Consumer Protection Act, Ch. 19.86 RCW (CPA), for allegedly deceptive subrogation collection efforts by a collection agency on behalf of a motor vehicle insurer. The underlying facts are set forth in the published Court of Appeals opinion and the briefing of the parties. See Stephens v. Omni Ins. Co., 138 Wn.App. 151, 159 P.3d 10 (2007), *review granted*, 163 Wn.2d ___ (2008); Credit Collection Supp. Br. at 2-4; Credit Collection (Stephens) Pet. for Rev. at 2-3; Stephens Ans. to Pet. for Rev. at 1-3; Omni Br. at 3-10; Credit Collection (Stephens) Br. at 1-3, 4-12; Stephens Br. at 1-3, 5-11; Credit Collection (Stephens) Reply Br. at 3-6; Farmers Pet. for Rev. at 2-4; Credit Collection (Panag) Pet. for Rev. at 2-3; Panag Ans. to Pet. for Rev.

at 1-3; Farmers Br. at 1-11; Credit Collection (Panag) Br. at 1-2, 4-13; Panag Br. at 1, 3-11.

For purposes of this amicus curiae brief, the following facts are relevant: In Stephens v. Omni Ins. Co., Michael Stephens (Stephens) was involved in a motor vehicle accident with Carrine York (York), who carried underinsured motorist (UIM) coverage through Omni Insurance Company (Omni). Omni paid insurance benefits to York and sought recovery from Stephens. When Omni failed to recover all monies from Stephens, it arranged to have its subrogation claim pursued by Credit Control Services, Inc., d/b/a Credit Collection Services (Credit Collection), a corporation licensed to collect debt in Washington. See Stephens, 138 Wn.App. at 160; Credit Collection (Stephens) Br. at 2-3, 14.¹ Credit Collection sent demands to Stephens on behalf of Omni, seeking to recover the balance of Omni's subrogation interest. Stephens sued Omni and Credit Collection under the CPA for alleged deceptive acts regarding the manner in which Credit Collection portrayed the subrogation interest. See Stephens at 161-62. The superior court entered partial summary judgment in favor of Stephens on the CPA claim, and Omni and Credit Collection sought review.

In Panag v. Farmers Ins. Co. of Washington, Rajvir Panag (Panag) was involved in a motor vehicle accident with Deven Hamilton

¹ The briefing does not detail the exact terms of the relationship between Omni and Credit Collection. See e.g. Credit Collection (Stephens) Br. at 6 (describing how Omni "retained" Credit Collection "to assist in its recovery efforts").

(Hamilton), who was insured by Farmers Insurance Company of Washington (Farmers). Farmers paid Hamilton for property damage incurred in the accident. See Stephens at 162-63. Farmers then engaged Credit Collection to recover its subrogation interest against Panag, and Credit Collection contacted Panag on Farmers' behalf in an effort to collect the insurer's subrogation interest. See id. at 163; Farmers Br. at 2-3.² Panag brought this CPA action against Farmers and Credit Collection, contending that Credit Collection's portrayal of Panag's obligation to Farmers was deceptive. The superior court entered summary judgment in favor of Farmers and Credit Collection, and Panag appealed.

The Stephens and Panag cases were linked for consideration at the Court of Appeals level, and the court issued a published opinion affirming Stephens' summary judgment of liability on his CPA claim against Credit Collection, and allowing Panag's CPA claim to proceed against Farmers and Credit Collection. See Stephens at 161, 165, 181.³ The court found that the five elements for a private CPA action required by Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986), were met or could be met, as the case may be, and remanded both cases for further proceedings. See Stephens at 166-81.

² There is an excerpt from the Farmers-Credit Collection contract in the briefing, regarding Farmers referral of the subrogation claim to Credit Collection for recovery. See Farmers Br. at 2. Under the contract, Credit Collection was required to "utilize reasonable efforts consistent with industry standards, in a commercially reasonable manner and in compliance with all applicable laws" Id. (emphasis removed).

³ The Court of Appeals reversed the superior court partial summary judgment against Omni on the CPA claim, finding Stephens had not established Omni's liability as a matter of law on the record before the court. See Stephens, 138 Wn.App. at 181-83. This aspect of the Court of Appeals opinion is not before the Court on review.

In reaching this result, the Court of Appeals determined that the collection efforts by Credit Collection were not governed by either federal or state debt collection practices acts. See id. at 171.⁴ The court concluded:

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.

Id. at 172. It also held that neither Farmers nor Credit Collection could avoid liability under the “safe harbor” provision of the CPA, RCW 19.86.170. See Stephens at 172-73.

Lastly, the court refused to impose a separate and distinct “standing” requirement for a private CPA claim, above and beyond the five elements required under Hangman Ridge. See Stephens at 173-78. It refused to impose either a “consumer relationship” or “consumer transaction” requirement, while also concluding that there is no need for a plaintiff to establish privity of contract in order to pursue a CPA claim. Id.

This Court granted review in both Stephens and Panag, with the overarching issue being whether Stephens and Panag present viable claims under the CPA. See Farmers Pet. for Rev. at 1-2; Credit Collection (Panag) Pet. for Rev. at 1; Credit Collection (Stephens) Pet. for Rev. at 1.

III. ISSUE PRESENTED

To what extent is Washington’s Insurance Code, Title 48 RCW, relevant in determining whether plaintiffs in these cases are entitled to proceed against defendants under the CPA, for deceptive acts relating to efforts to collect the insurers’ subrogation interests?

⁴ See Fair Debt Collection Practices Act, 15 U.S.C. §1692; Washington Collection Agency Act, Ch. 19.16 RCW.

IV. SUMMARY OF ARGUMENT

In determining whether the Hangman Ridge elements for a CPA claim for deceptive acts are met in these cases, the letter and spirit of the Washington Insurance Code, Title 48 RCW, should feature prominently in the analysis. The subrogation collection efforts by insurers, and collection agencies on their behalf, emanate from an insurance transaction and involve the business of insurance. The Insurance Code provides that the business of insurance is one affected by the public interest and requires all persons, including insurers and their representatives, to avoid deception. See RCW 48.01.030. More particularly, the Code specifically prohibits persons from knowingly making deceptive or misleading representations in conducting the business of insurance. See RCW 48.30.010(1), (2); RCW 48.30.040. These statutes should apply to subrogation collection efforts by insurers and their representatives.

V. ARGUMENT

Introduction

In the course of the briefing in these cases, very little has been said about the Washington Insurance Code, Title 48 RCW, and what bearing the Code and the public policy it embodies may have on resolution of the issues before the Court.⁵ What has been said is incomplete, with certain

⁵ References to Insurance Code provisions or related administrative regulations are found in the briefing at: Stephens/Panag Joint Supp. Br. at 18; National Assoc. of Subrogation Professionals ACM at 6 n.5; Stephens/Panag Ans. to ACMs at 3; Farmers Pet. for Rev. at 10, 16; Panag Br. at 21-22 n.22; Farmers Reply Br. at 12-13; Credit Collection (Stephens) Pet. for Rev. at 15, 16; Credit Collection (Stephens) Br. at 22; Stephens Br. at 32 n.25; Credit Collection (Stephens) Reply Br. at 2, 10-11.

key Code provisions overlooked. Instead, there is considerable focus in the briefing regarding the influence of federal and state debt collection acts, which the parties and the Court of Appeals otherwise agree are inapplicable. See Farmers Pet. for Rev. at 11-13; Panag Ans. to Pet. for Rev. at 13-15; Credit Collection (Panag) Pet. for Rev. at 9-11; see also Stephens at 171-73. Only two insurance-related public policies are discussed in any detail. First, the public policy related to UIM coverage under Ch. 48.22 RCW, with Farmers and Credit Collection arguing plaintiffs, as underinsured motorists, are basically unworthy of the Court's solicitude in determining whether they meet the Hangman Ridge elements for claims under the CPA. See Farmers (Panag) Pet. for Rev. at 9-11; Credit Collection (Panag) Br. at 20-22; Credit Collection (Stephens) Reply Br. at 10-12. Second, Credit Collection discusses the public policy favoring allowing insurers to aggressively pursue subrogation in furtherance of maintaining low insurance premiums. See Credit Collection (Stephens) Pet. for Rev. at 15-16.

The Insurance Code bears directly on the subrogation collection efforts involved in these cases. While subrogation is an equitable doctrine of general application, it takes on an extraordinary aspect in the insurance law context. See generally Mahler v. Szucs, 135 Wn.2d 398, 411-18, 957 P.2d 632 (1998) (exploring in detail subrogation in the insurance law context); Thomas V. Harris, Washington Insurance Law, §§52.1-52.4 (2nd ed. 2006) (same). Insurers' entitlement to subrogation is grounded in

equity, the insurance contract, and, in some instances, a statute. See id.; RCW 48.22.040(3) (recognizing UIM insurers' right to recover subrogation interests). Moreover, subrogation collection efforts by insurers are an important and commonplace feature of the business of insurance. See Credit Collection (Stephens) Pet. for Rev. at 15-16.

A. The Washington Insurance Code Is A Broad And Comprehensive Statutory Scheme Designed To Safeguard The Public Interest Regarding All Matters Involving The Business Of Insurance.

The Legislature has identified the realm of insurance law as unique. RCW 48.01.030 sets forth a strong statement of public policy regarding insurance:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

This Court has also recognized the public nature of insurance contracts:

[I]nsurance policies, in fact, are simply unlike traditional contracts, *i.e.* they are not purely private affairs but abound with public policy considerations

Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 376, 535 P.2d 816 (1975).

As discussed below, the Legislature has enacted certain unfair practice statutes in furtherance of the public interest in insurance that should have particular relevance here.

B. RCW 48.30.010 and RCW 48.30.040 prohibit persons from making knowingly deceptive or misleading representations involving the business of insurance, and these prohibitions should apply to subrogation collection efforts by insurers and their representatives.

In addition to general declarations by the Legislature and this Court regarding the business of insurance being in the public interest, the Legislature has enacted specific provisions prohibiting certain conduct regarding the business of insurance. RCW 48.30.010(1) provides:

No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

RCW 48.30.010(2) provides two bases for establishing a deceptive act under the Insurance Code. A common means is by proving violation of an administrative regulation promulgated by the Insurance Commissioner. For example, a violation of one of the provisions of Ch. 284-30 WAC, governing insurance unfair claims settlement practices, constitutes a violation of RCW 48.30.010(1). See Industrial Idem. Co. v. Kallevig, 114 Wn.2d 907, 922-23, 792 P.2d 520 (1990).

The second way an unfair practice is established under subsection (2) is by proof a person engaged in the business of insurance has committed an unfair or deceptive act or practice “expressly defined and prohibited by this code.” RCW 48.30.010(2).⁶ In Ch. 48.30 RCW the Legislature has set forth a number of unfair or deceptive acts or practices.

⁶ The full text of the current version of RCW 48.30.010 is reproduced in the Appendix to this brief.

See RCW 48.30.030-.300. One of these statutes is particularly relevant here. It provides:

False information and advertising

No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein.

RCW 48.30.040.

This statute has not been interpreted by Washington appellate courts. By its plain language, it would appear to apply to the conduct involved in these cases. An insurer's invocation of subrogation rights involves the "business of insurance." See id.; text supra at 5-7; see also Credit Collection (Stephens) Pet. for Rev. at 15-16 (recognizing insurers' obligation to collect subrogation amounts in support of lower premium rates, and describing aggressive pursuit of subrogation rights as a reasonable business practice in furtherance of public interest). RCW 48.30.040 would also appear to cover collection agencies acting on behalf of insurers, as the statute prohibits *all persons* from making deceptive representations involving the business of insurance. See also RCW 48.01.030 (imposing the duty of utmost good faith on, inter alia, insurers "and their representatives"). Lastly, the statute covers "any" deceptive representations, which reasonably includes subrogation demands to third parties. Thus, an insurer and its representative would

violate RCW 48.30.040 to the extent they act deceptively in mischaracterizing the nature of an asserted subrogation interest.

In its briefing, Farmers argues that Panag failed to establish any violation of an Insurance Commissioner regulation as a basis for his claim here. See Farmers Reply Br. at 12-13. Similarly, Farmers contends that Panag “has not shown and cannot show that the Insurance Commissioner has identified as ‘unfair’ or ‘deceptive’ efforts to collect unliquidated subrogation claims that have not been reduced to judgment.” Id. at 13. RCW 48.30.040 answers both of these criticisms. First, the Legislature itself has condemned deceptive or misleading representations involving the business of insurance. Second, while there is nothing wrong with seeking to collect an unliquidated subrogation interest not reduced to judgment, RCW 48.30.040 requires that any such effort not be done in a deceptive or misleading manner.

RCW 48.30.040 should be taken into account in determining whether the Hangman Ridge elements have been met in these cases, and in deciding whether the insurers and their representatives committed a deceptive act or practice under the CPA.⁷

⁷ Although RCW 48.30.040 has not been called to the attention of the Court by the parties in briefing CPA liability, the Court nonetheless will consider statutes which arguably bear on the right of a party to maintain an action. See Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). To the extent relevant here, amicus curiae may call such statutes to the attention of the Court, when deemed necessary for proper consideration of the case. See Harris v. Labor & Industries, 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993); see also text supra at n.5.

VI. CONCLUSION

The Court should consider the analysis advanced in this brief in resolving the issues on review.

**FILED AS ATTACHMENT
TO EMAIL**

DATED this 23rd day of May, 2008.

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*Brief transmitted for filing by e-mail; signed original retained by counsel.

APPENDIX

RCW 48.30.010

Unfair practices in general — Remedies and penalties.

- (1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.
- (2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter 34.05 RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.
- (3)(a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.
- (b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).
- (c) Upon appeal the superior court shall review the findings of fact upon which the regulation is based de novo on the record.
- (4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.
- (5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.
- (6) If any such regulation is violated, the commissioner may take such

other or additional action as is permitted under the insurance code for violation of a regulation.

(7) An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant. "First party claimant" has the same meaning as in RCW 48.30.015.

[2007 c 498 § 2; 1997 c 409 § 107; 1985 c 264 § 13; 1973 1st ex.s. c 152 § 6; 1965 ex.s. c 70 § 24; 1947 c 79 § .30.01; Rem. Supp. 1947 § 45.30.01.]