

No. 80357-9 (Consolidated with No. 80366-8)

**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 BRIEF**

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I. INTRODUCTION

This Court is asked to consider whether traditional and long-standing subrogation claim recovery practices are subject to the Consumer Protection Act (“CPA”). The National Association of Subrogation Professionals (“NASP”) hereby files this brief as a friend of the Court to present a historical context for subrogation, as well as to provide the Court with some practical considerations that ought to be kept in mind when deciding this matter. As set forth herein, despite its assurances to the contrary, the Court of Appeals has substantially undermined the practice of subrogation and instilled considerable doubt as to what practices are permitted. The lack of workable bright-line rules and objective standards has and will continue to have a chilling effect on legitimate subrogation efforts, which is to the detriment of consumers throughout Washington. For these reasons, NASP asks that this Court give serious consideration to the far-reaching impact its ruling may have on subrogation practice.

II. IDENTITY AND INTEREST OF AMICUS

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 has approximately 2,000 members, representing more than 150 insurance companies and self-funded entities. The purpose of NASP 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.” NASP members are greatly concerned with the sustainability of efficient and successful subrogation practices. As relevant to the instant matter, NASP’s members routinely author subrogation claim letters to alleged tortfeasors as part of their normal business practices.

The issue of concern to NASP is whether correspondence (namely subrogation claim letters) issued by or on behalf of insurers to non-consumer adversaries, in an effort to collect unliquidated subrogation claims, is subject to the CPA. The subrogation claim letters at issue are intended to reduce the expense of subrogation and expedite recoveries, thereby avoiding unnecessary and costly litigation. If these laudable goals are achieved, Washington consumers will receive the benefit of lower premiums and more flexible underwriting standards. NASP’s interest in this case is in protecting the rights and practices of insurers, subrogation recovery professionals, and ultimately their insureds, who are the ultimate beneficiaries of an effective subrogation regime.

NASP is familiar with the CPA issues relating to subrogation recovery efforts addressed in *Stephens v. Omni & Panag v. Farmers*, 138 Wn. App. 151, 159 P.3d 10 (2007). NASP is also familiar with the

scope of the arguments presented by the parties, having reviewed all briefing in this case.

III. STATEMENT OF THE CASE

NASP relies upon the statement of facts set forth in the underlying Court of Appeals decision. *See Stephens*, 138 Wn. App. at 158-66.

IV. ARGUMENT

A. It is Undisputed that Subrogation Practices are Important and Must be Both Protected and Encouraged.

1. Subrogation Explained.

Subrogation is an equitable right that exists as a matter of law. A leading commentator, Allan D. Windt, describes subrogation this way:

Subrogation is the right that one party has against a third party following the payment, in whole or in part, of a legal obligation that ought to have been met by such third party. Insurance policies routinely include a provision entitling the insurer, on paying a loss, to be subrogated to the insured's right of action against any person whose act or omission caused the loss or who was legally responsible to the insured for the loss caused by the wrongdoer.

Allen D. Windt, *INSURANCE CLAIMS AND DISPUTES*, § 10:5 at 221 (4th ed. 2001). 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. *Id.*

This Court has described subrogation as an equitable doctrine that permits a party who has paid benefits to one party to collect from another.

Winters v. State Farm Mut. Auto Ins. Co., 144 Wn.2d 869, 875, 31 P.3d 1164 (2001). Likewise, this Court has expressly recognized some of the important public policies furthered by subrogation, *i.e.*, “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). This Court has even declared that “[s]ubrogation is always liberally allowed in the interests of justice and equity.” *Id.*

Indeed, the Washington State Office of the Insurance Commissioner (“OIC”) acknowledges the importance of protecting the subrogation rights of insured drivers and tacitly acknowledges the appropriateness of sending subrogation claim letters to alleged tortfeasors.

In a brochure intended for the consuming public, the OIC explains:

Subrogation allows your insurance company to recover the costs they’ve paid for your injury or property damage claims from the person legally liable for your injury or property damage.

For example, if your insurance company pays your doctor for your treatment following an auto accident and someone else was at fault for the accident, legally your company can seek reimbursement from the at-fault person (or his or her insurance company).

* * *

As a courtesy to you, your company may also include your deductible amount in the notice of subrogation to the at-fault-party.¹

2. Important Public Policies Furthered by Subrogation.

The widespread societal benefits of out-of-court subrogation recovery practices are irrefutable. These practices further important public policies by obtaining expeditious resolution of tort disputes without the need for litigation. It promotes efficient justice and judicial economy, makes injured parties whole, prevents unjust enrichment by responsible parties, and reduces insurance rates for persons who purchase insurance.² Out-of-court subrogation practices are rooted in principles of tort and insurance and properly regulated by both tort law and the OIC.

3. Even the Court of Appeals and Plaintiffs Recognize the Importance of Subrogation.

In the underlying decision, the Court of Appeals itself aptly recognized the importance of subrogation, and vowed that its decision

¹ Form 2089-OIC-Web Fact-Subrogation-01/07, at <http://www.insurance.wa.gov/publications/auto/subrogation.pdf> (emphasis added).

² See, e.g., *Rowe v. St. Paul Ramsey Med. Center*, 472 N.W. 2d 640, 644 (Minn. 1991) (stating the policies underlying subrogation to be “(1) to prevent double recovery, and (2) to allocate payment according to fault”); *Youngblood v. American States Ins. Co.*, 866 P.2d 203, 205 (Mont. 1993) (“The purpose of subrogation is to prevent injustice by compel[ling] the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it. It is an appropriate means of preventing unjust enrichment.” (quoting *Bower v. Tebbs*, 314 P.2d 731, 736 (Mont. 1957))); *Universal Underwriters Ins. Co. v. Farm Bureau ins. Co.*, 498 N.W.2d 333, 335-36 (Neb. 1993) (“Subrogation is an equitable doctrine applied in order to avoid unjust enrichment when one party has discharged an obligation which should have been satisfied in whole or in part by another.”)

would not infringe upon subrogation rights. Specifically, the Court of Appeals stated as follows:

“[There is no intent to] infringe on the right of insurance companies to recover subrogation interests or to employ collection agencies to do so.”³

Both Plaintiffs made similar assurances in their Answers to the Petitions for Review⁴ and again in their Joint Supplemental Brief to this Court.⁵

B. Reasonable Subrogation Efforts Will Be Severely Hampered If They are Made Subject to the CPA.

Although the Court of Appeals and Plaintiffs laud the importance of subrogation, they nonetheless contend that it should be made subject to the CPA. If that occurs, the CPA’s relaxed level of proof and enhanced penalties will serve to punish subrogating entities, even when they have done nothing wrong. There is a serious risk that uninsured tortfeasors will routinely counterclaim against subrogation professionals, thereby so severely limiting subrogation that it would be effectively disallowed in many instances. By so allowing, these alleged tortfeasors will have unreasonable leverage to defeat rightful claims. The proffered rationale for restricting subrogation in this manner arises from an illogical and indefensible premise – the premise that the legitimate effort to recover an

³ *Stephens*, 138 Wn. App. at 171.

⁴ Respondent Rajvir Panag’s Answer to Petitions For Discretionary Review, at 16; Respondent Michael Stephens’ Answer to Petitions For Discretionary Review, at 18.

⁵ Joint Supplemental Brief of Respondents Rajvir Panag & Michael Stephens, at 14.

unliquidated sum in a tort-based subrogation action without prior litigation is somehow an unfair or deceptive practice.

The practice that Plaintiffs allege to be unfair and deceptive under the CPA is the same fundamental activity routinely undertaken by all subrogation professionals: the use of a claim letter process aimed at tortfeasors in order to attempt the recovery of an unliquidated, but claimed amount, due and owing from a tort (*e.g.*, automobile accident). In the *Stephens* case, King County Superior Court Judge Mary Yu described the basis for this proposition in the following words of her summary judgment ruling:

“The practice of sending collection notices ... 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 Consumer Protection Act.”⁶

Thus, Judge Yu would require that every claim, no matter the size or likelihood of recovery, first be adjudicated in a court. In upholding this ruling, the Court of Appeals stated the rationale this way:

“[T]he notices sent by Credit were materially misleading even though they contained some accurate information. They created an impression of a debt owed and sent to collection when in reality all the ‘creditor’ had was a tort claim.”⁷

⁶ Clerk’s Papers (Stephens) at 585.

⁷ *Stephens*, 138 Wn. App. at 169.

Plaintiffs in their Supplemental Brief stated the same proposition as follows:

“[E]ven if you were proven to be at fault, it simply means that you are liable for some amount – not some purported ‘amount due’ unilaterally determined by an insurance company”⁸

The emphasis on the overall subrogation practice itself (rather than the actual wording of the letters) is further demonstrated by Plaintiffs’ attempt to reframe this Court’s issue as addressing “an unfair or deceptive scheme to extract money from them that they do not really owe.”⁹

As these quotes amply demonstrate, it is the very practice of out-of-court subrogation itself that is under attack in this case. In the section below, the context of automobile subrogation is set forth in order to demonstrate that important and legitimate subrogation efforts simply cannot continue if collection of unliquidated tort claims is made subject to the CPA.

C. The Context: Typical and Necessary Practices in Automobile Subrogation Involve Unliquidated Tort Claims.

Following an automobile accident, one motorist’s insurance company pays to make the injured parties whole and then attempts to recoup that payment from the parties believed to be responsible. Initial attempts are typically made to contact the party believed to be responsible

⁸ Joint Supplemental Brief of Respondents Rajvir Panag & Michael Stephens, at 11.

⁹ Joint Supplemental Brief of Respondents Rajvir Panag & Michael Stephens, at 2.

or, if applicable, his or her insurance company. If the matter is not resolved, the process normally continues with reminders that, if unanswered, escalate to include tone and content that are less gentle. The letters that are the subject of this case are akin to letters that are sent at the end of this long process. Understanding this context is critical to determining why such letters are neither improper, nor unfair.

Simply put, the process is not arbitrary. People receive these letters only after being involved in an automobile accident in which licensed adjusters have reviewed the facts and circumstances and concluded they were allegedly at fault for some or all of the bodily injuries and/or property damage sustained. Typically, by the time a person receives the type of letters sent to Plaintiffs in this case, he or she has already failed to respond to subrogation demand letters of a friendlier tone. Collection of unliquidated tort claims by subrogation professionals and paraprofessionals (attorneys, adjusters, and independent adjusters) in this same manner has been the accepted and encouraged practice for decades.¹⁰

NASP believes that the common thread to the misguided attack on the out-of-court subrogation process is a fundamental lack of knowledge

¹⁰ Furthermore, it is not just insurance professionals who seek to recover subrogated claims. Other subrogors will include: attorneys, hospitals, and workers at government agencies.

of the process of subrogation. This lack of understanding is apparent both as to subrogation practice generally and specifically as to the later stages of the process when traditional practices have been unsuccessful and follow-on collection efforts are required. The underlying decision mistakenly characterized this process as unregulated¹¹ and deceptive because the notices did not explain how the amount claimed was arrived at and contain no supporting documentation.¹² In reality, the recipients of these letters are well aware of the underlying accident details and fault allegations, which in many instances are based upon extensive documentation reviewed by the licensed insurance adjuster. Because these types of letters are not sent on a stand-alone basis – but rather follow a series of letters from the subrogating carrier – they must be evaluated in their proper context.

Moreover, the concerns raised about sums being “unliquidated” fail to recognize the typical and necessary practices that underlie subrogation. As this Court has noted, a subrogee has the right to commence a lawsuit against the alleged tortfeasor before attempting to collect the sums allegedly owing, but there is no rule that mandates litigation as a necessary first step. *Mahler*, 135 Wn.2d at 413. To the

¹¹ *Stephens*, 138 Wn. App. at 168.

¹² *Id.* at 167.

contrary, parties should be encouraged to make extrajudicial efforts to resolve disputes, with litigation being reserved as a last resort. As a practical matter, forcing litigation in every matter will significantly raise costs to parties seeking collection, as well as the alleged tortfeasors who will be required to hire attorneys to litigate each and every automobile accident dispute. This is contrary to judicial economy and common sense. As discussed herein, necessary and typical subrogation practices are (and should have the goal of being) resolved without formal litigation. Subrogating entities should not be punished for proceeding this way.

D. If the CPA is Applied to Uninsured Motorist Subrogation Collection Efforts, Subrogation Will Be Chilled.

Once subrogation is understood and the context is considered, it becomes apparent that any effort to fit these claims under the CPA is strained. The CPA has no proper place in non-litigation disputes between the subrogating entity and an alleged tortfeasor subrogee. NASP members should not be faced with the possibility of such tortfeasors threatening retaliatory CPA violations when they use legitimate tort-based subrogation practices – an area that as a whole, both nationally and in Washington, has never been held to be within the purview of CPA legislation at all.

E. If the CPA is Applied to Recipients of Subrogation Claim Notices, Consumers Will Suffer.

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 issued an alert to warn 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.

If recipients of collection letters are allowed to sue under the CPA, many smaller dollar subrogation files (which constitute the majority of all subrogation claims) will likely be abandoned due strictly to economic considerations. The increased costs of defending against an expected or threatened CPA counterclaim will simply not justify the risk of formal litigation. This means the insurers would be forced to absorb the cost of a great number of smaller claims. If this occurs, it is implicit that the insurance rates will increase, as described in the following University of Chicago Law Review article:

“Insurance companies can take subrogation into account in setting their rates An insurance company sets its rates based on historical net costs. Thus, if the insurer had one hundred policyholders in the experience period, and

experienced a total of \$20,000 in claim costs, it will set its actuarial premiums at \$200 per policy holder. If, on the other hand, the insurance company experienced \$20,000 in claim costs and received \$5,000 in subrogation, it will set its actuarial premiums at \$150 per policy holder. Thus, whether the insurer lists subrogation as a factor in its actuarial calculations is irrelevant; it is implicitly included.”

Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?* 64 U. Chi. L. Rev. 1337, 1355 (1997).

If subrogation efforts are curtailed, the insured drivers will be penalized for carrying insurance (as they are required by law to do) in being forced to pay increased insurance rates. The insured drivers will be victimized, not the uninsured drivers whom the Court of Appeals and Plaintiffs believe are in need of CPA protection. Put another way, application of the CPA to subrogation recovery efforts will actually harm consumers of insurance, including all drivers in Washington who purchase liability insurance. 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. Expansion of the CPA to automobile subrogation would actually discourage efforts to hold alleged tortfeasors responsible for wrongdoing. NASP submits that the CPA was never intended to lead to this result.

F. Important Public Policies Were Noted by the California Court of Appeal in *Camacho*.

A recent California Court of Appeal published opinion, *Camacho v. Automobile Club*, 142 Cal. App. 4th 1394 (Cal. Ct. App. 2006), addressed uninsured motorists subrogation practices similar to those at issue in this case.

NASP notes that the underlying Court of Appeals decision and Plaintiffs dismissed the case as being inapplicable because *Camacho* addressed unfairness as opposed to deception. Even if this Court agrees with this distinction, NASP asks this Court to consider the important policies behind encouraging subrogation practices in these cases as articulated by the *Camacho* court:

The public is well served when an uninsured driver who is at fault responds to his or her obligations. The benefits of collecting such sums clearly outweighs the “injury” of having to pay a sum of money that is owed.

[T]he injury . . . is also one that *Camacho* could have reasonably avoided by complying with the law and obtaining insurance. Thus, even if he can claim that he was “injured,” the fact is that he could have avoided any and all action taken by the defendants by obtaining and carrying insurance, as the law requires.

Id. at 1406.

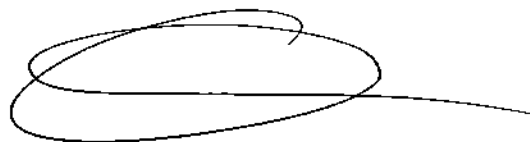
The same principles apply to all recipients of subrogation claim letters when uninsured motorists are believed to be responsible for automobile accidents. These letters can be easily avoided if the recipient

provides information about insurance or makes payment for the damage caused. Thus, public policy strongly supports the continued viability of historical subrogation practices – practices that cannot continue if the CPA is applied to restrict those efforts.

V. CONCLUSION

For the reasons discussed herein, NASP respectfully asks this Court to rule that subrogation claim recovery efforts are not subject to the CPA. If this Court were to issue a contrary ruling, far-reaching unintended consequences would follow that would actually cause harm to the very consumers the CPA was enacted to protect.

RESPECTFULLY SUBMITTED this 21st day of May, 2008.



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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 23rd day of May, 2008, 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 SUPPLEMENTAL BRIEF. I also served copies of said document on the following parties as indicated below:

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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.

Executed at Seattle, Washington, this 23rd day of May, 2008.


 Dava Z. Bowzer

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