IN THE SUPREME COURT OF THE STATE OF OREGON

DANIEL N. GORDON, PC, an Oregon professional corporation; and DANIEL N. GORDON, individually,

Plaintiffs-Respondents,
Petitioners on Review,

v.

ELLEN ROSENBLUM, Attorney General; DEPARTMENT OF JUSTICE,

Defendants-Appellants,
Respondents on Review.

SC S063978

CA A154184

LANE COUNTY CIRCUIT COURT No. 161208399

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

On review from the decision of the Court of Appeals

On appeal from the judgment of the
Circuit Court for Lane County
The Honorable Karsten H. Rasmussen

Court of Appeals Opinion filed March 9, 2016
Author of opinion: Egan, J.
Concurring judges: Armstrong, P.J. and Hadlock, C.J.

Counsel are listed on the next page

SEPTEMBER 2016

Jonathan P. Strauhull OSB 106094
Attorney at Law
6717 N. Michigan Ave.
Portland, OR 97217
503.413.9416
jonstrauhull@gmail.com
Of Attorneys for Amicus Curiae Oregon Trial Lawyers Association

Phil Goldsmith OSB 782230
Law Office of Phil Goldsmith
707 SW Washington Street
Portland OR 97205
503.224.2301
phil@lopglaw.com
Of Attorneys for Amicus Curiae Oregon Trial Lawyers Association

R. Daniel Lindahl OSB 842765
Bullivant Houser Bailey PC
888 S.W. Fifth Avenue, Suite 300
Portland, OR 97204
dan.lindahl@bullivant.com
503.228.6351
Attorneys for Daniel N. Gordon, PC

Daniel N. Gordon OSB 782255
Gordon, Aylworth & Tami, P.C.
P.O. Box 22338
Eugene, OR 97401
dgordonpc@aol.com
541.342.2276
Attorneys for Daniel N. Gordon

Ellen F. Rosenblum, OSB 743239
Attorney General
Benjamin Gutman, OSB 160599
Solicitor General
Michael A. Casper, OSB 062000
Senior Assistant Attorney General
michael.casper@doj.or.us
1162 Court Street
Salem, OR 97301-4096
503.378.4402
Attorneys for Ellen Rosenblum, Attorney General, and Oregon Department of Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

BRIEF OF AMICUS CURIAE
OREGON TRIAL LAWYERS ASSOCIATION

INTRODUCTION

This civil action presents the question whether Oregon's Unlawful Trade Practices Act (UTPA), and specifically ORS 646.607(1) and ORS 646.608(1)(b), applies to the conduct of debt collectors when collecting consumer debt on behalf of a third party.

The trial court granted summary judgment in Petitioner's declaratory relief action finding that ORS 646.607(1) and ORS 646.608(1)(b) of the UTPA and ORS 646.639 of Oregon's Unlawful Debt Collection Practices Act (UDCPA) did not apply to actions taken toward debtors in third party debt-collection litigation. The Court of Appeals reversed regarding the UTPA and affirmed regarding the UDCPA. *Daniel N. Gordon, P.C. v. Rosenblum*, 276 Or App 797, 370 P3d 850 (2016).

The Oregon Trial Lawyers Association (OTLA) urges this Court to affirm the judgment of the Court of Appeals under review and hold that ORS 646.607(1) and ORS 646.608(1)(b) apply to Petitioner's alleged misrepresentations toward tens of thousands of consumers before and during debt collection litigation.

ARGUMENT

I. Preliminary Statement

ORS 646.607(1) provides that:

> "[a] person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person:
>
> "(1) [e]mploys any unconscionable tactic in connection with the sale, rental or other disposition of real estate goods or services, or collection or enforcement of an obligation." [1]

---

[1] "Unconscionable tactics" is defined at ORS 646.605(9):

> "(9) 'Unconscionable tactics' include, but are not limited to, actions by which a person:
>
> "(a) Knowingly takes advantage of a customer's physical infirmity, ignorance, illiteracy or inability to understand the language of the agreement;
>
> "(b) Knowingly permits a customer to enter into a transaction from which the customer will derive no material benefit;
>
> "(c) Permits a customer to enter into a transaction with knowledge that there is no reasonable probability of payment of the attendant financial obligation in full by the customer when due; or
>
> "(d) Knowingly takes advantage of a customer who is a disabled veteran, a disabled servicemember or a servicemember in active service, or the spouse of a disabled veteran, disabled servicemember or servicemember in active service."

ORS 646.608(1)(b) provides that "[a] person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following: […] [c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services."[2]

Because of the definition of "unconscionable tactics" in the UTPA, the Court of Appeals held that a violation of ORS 646.607(1) does not require an "unconscionable tactic" to be directed at one's own "customer" so long as the person is "a customer." *Gordon*, 276 Or App at 808. Similarly, the Court of Appeals held that a person's unlawful practice alleged to be in violation of ORS 646.608(1)(b) need not involve that person's *own* real estate, goods, or services. *Id.* at 814.

Respondent's brief on the merits thoroughly addresses why the text, context, and the legislative history of the UTPA demonstrate the legislature's intent

---

[2] "Real estate, goods or services" are defined at ORS 646.605(6)(a):

> "(6)(a) "Real estate, goods or services" means those that are or may be obtained primarily for personal, family or household purposes, or that are or may be obtained for any purposes as a result of a telephone solicitation, and includes loans and extensions of credit, and franchises, distributorships and other similar business opportunities, but does not include insurance."

for ORS 646.607(1) and ORS 646.608(1)(b) to apply to Petitioner's alleged litigation and debt collection practices. OTLA will not repeat those arguments.

Instead, OTLA writes to emphasize three points: (1) the remedial purpose of the UTPA and decisions involving analogous laws in other states support a finding that the UTPA provisions apply to third party debt collection, (2) this Court should adopt the Court of Appeals' holding in *Raudebaugh v. Action Pest Control, Inc.*, 59 Or App 166, 650 P2d 1006 (1982) regarding third party liability under the UTPA , and (3) there are few remedies to assist victims of deceptive debt collection practices other than the UTPA.

II. The UTPA Provisions Apply to Third Party Debt Collectors

The UTPA was meant to proscribe certain conduct and protect consumers. Petitioner (the Gordon firm) frames the issues in this matter as specific to lawyers, and argues that Respondent, the Department of Justice (the DOJ), lacks the power to regulate the practice of law. Gordon's BOM at 2, 40. However, under the Gordon firm's interpretation of ORS 646.607(1) and ORS 646.608(1)(b) requiring a direct business-customer relationship to state a claim under the UTPA, all third-party debt collectors in Oregon will operate with impunity.

The Gordon firm is asking this Court to permit a business to simply transfer a consumer debt to a third party and avoid any consequences under the UTPA. In other words, under the Gordon firm's proposed interpretation, a third

party debt collector is free to engage in unfair and deceptive acts that the UTPA would otherwise specifically proscribe, simply because it does not have a direct consumer relationship with the debtor. This result would encourage a race to the bottom and is contrary to the history and purpose of the UTPA.

It is undisputed that the UTPA is a consumer protection statute. The Court of Appeals noted that the UTPA is a "remedial statutory scheme, 'enacted as a comprehensive statute for the protection of consumers from unlawful trade practices'" that ought **"**to be construed liberally to effectuate the legislature's intent" and be interpreted broadly. *Gordon*, *supra*, 276 Or App at 805 (citing *Pearson v. Philip Morris, Inc.*, 358 Or 88, 115, 361 P3d 3 (2015). The Court of Appeals correctly interpreted the UTPA provisions to regulate third parties, including lawyers that engage in deceptive practices when collecting on consumer debts.

OTLA will not repeat the arguments supporting that construction based on statutory text, context and legislative history that are contained in the Court of Appeals opinion and the DOJ's brief. But it is important to point out the Gordon firm's misplaced reliance on *Roberts v. Legacy Meridian Park Hospital*, 2014 WL 294549 (D Or 2014) and *CollegeNET, Inc. v. Embark.com, Inc.*, 230 F Supp 2d 1167 (D Or 2001). These cases involved disputes between businesses with no consumer transaction involved. In *Roberts*, the plaintiffs were a physician

and his medical clinic; in *CollegeNET*, the plaintiff was a provider of online services to colleges. These case are inapposite because the UTPA applies only to consumer transactions.

A survey of other states supports the conclusion that the UTPA provisions apply to third party debt collection. Like many other states, Oregon's UTPA was derived from the 1966 Uniform Deceptive Trade Practices Act (the 1966 UDTPA).[3]

Courts around the country interpreting statutes also derived from the 1966 UDTPA have held that lawyers engaging in deceptive practices as third party debt collectors are liable under a state's unlawful deceptive acts and practices (UDAP) law. For example, banks and their attorney debt collectors in Florida who sent proposed confessions of judgment along with service of complaints were held subject to Florida's UDAP statute and not immune under Florida's litigation

---

[3] *See* Ralph James Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience*, 54 Or L Rev 117, 119 (1975).

In a nearly identical provision to ORS 646.608(1)(b), the 1966 UDTPA provides that "[a] person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he: […] causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services." Unif. Deceptive Trade Practices Act § 2(a)(2) (1966). "Goods or services" is not defined in the 1966 UDTPA. *Id.* at § 1.

privilege. *North Star Capital Acquisitions, LLC v. Krig*, 611 F Supp 2d 1324, 1338 (MD Fla 2009).

Similarly, a court applied the Nebraska UDAP statute to deceptive debt collection by a collection law firm and creditor, *Henggeler v. Brumbaugh & Quandahl, P.C.*, 2012 WL 2855104, *3 (D Neb 2012), and in New York, a court refused to dismiss a claim that a creditor and its law firm's practice of filing frivolous collection lawsuits with false statements violated New York's UDAP statute. *Serin v. Northern Leasing Sys., Inc.*, 2009 WL 7823216, *2 (SD NY 2009). Finally, a law firm in Ohio collecting a debt on behalf of a mortgagee was found to be a debt collector, and filing deceptive foreclosure cases was found to be a UDAP violation. *Turner v. Lerner, Samson, & Rothfuss*, 776 F Supp 2d 498, 509-510 (ND Ohio 2011).[4] While every state UDAP has textual differences, the application to third party debt collector is often based on the plain meaning of the state's UDAP statute and the remedial nature of that statute.

---

[4] Many other states have also applied their UDAP statutes to third party debt collection, often against collection law firms. *See*, *e.g.*, *Brown v. Constantino*, 2009 WL 3617692 (D Utah 2009) (UDAP state covers attorney collector); *Campos v. Brooksbank*, 120 F Supp 2d 271 (D N M 2000) (refusing to dismiss UDAP claim against attorney for debt collection); *1st Nationwide Collection Agency, Inc. v. Werner*, 288 Ga App 457, 654 SE2d 428 (2007) (UDAP statute covering "extension of credit" applied to activities of third party debt collection agency that had purchased a medical debt). *Cf.* DOJ Brief at 38, 40 at n.15-16.

As discussed in the DOJ's brief, Oregon has modified the uniform act to apply specifically to debt collection. Upon a deeper inquiry, the question of whether the UTPA is limited to debt collection of one's *own* consumer goods does not depend on the Oregon specific language adding debt collection as a covered practice or the definition of "goods and services." Instead, the inquiry often focuses on whether any limiting language exists in the statute to alter the uniform act.[5] Here, the Oregon UTPA does not have any limiting language with respect to covered entities that is distinct from the 1966 UDTPA, so the UTPA provisions should apply to third party debt collectors.

II. This Court should adopt the Court of Appeals' holding in *Raudebaugh*

It may not be necessary to address the Gordon firm's argument that *Raudebaugh* "should be overruled for the reasons stated in then-Judge Gillette's dissent" for this Court to affirm the Court of Appeals' ruling on the ORS

---

[5] In many states, third party debt collection is not covered because of explicit departures from the 1966 UDTPA. *See, e.g., DirecTV, Inc. v. Cephas*, 294 F Supp 2d 760 (MD N C 2003) (state UDAP statute does not apply to debt collection because the party cannot have simultaneous liability under the state debt collection act and the UDAP); *Mengedoht v Nationwide Ins. Co.*, 2006 WL 3715908 (WD Ky 2006) (no liability for third party under Kentucky UDAP statute requiring privity); But see *Melvin v. Credit Collections*, 2001 WL 34047943 (WD Okla 2001) (misrepresentations by third party debt collectors were not actionable because Oklahoma UDAP did not mention debt collection);

638.608(1)(b) claim. Gordon's BOM at 35. The *Raudebaugh* dissent relied on "the language of the private-right-of-action section of the UTPA, ORS 646.638(1)" in addressing what "a private party * * * must show" in order "to take advantage of the [UTPA]." *Raudebaugh*, *supra*, 59 Or App at 174 (Gillette, J, dissenting), emphasis deleted. But ORS 646.638(1) is irrelevant to a public enforcement action brought by the DOJ. *Pearson*, supra, 358 Or at 116 and 116 n17.

In any event, the dissent's reasoning contravenes ORS 174.010's dictate not to "insert what has been omitted." *Raudebaugh*, *supra*, 59 Or App at 172. The dissent focuses on the following portion of ORS 646.638(1): "as a result of willful use or employment by another person of a method, act or practice declared unlawful by ORS 646.608." *Raudebaugh*, *supra*, 59 Or App at 174 (Gillette, J, dissenting), internal quotations and emphasis omitted. It reads these words as referring exclusively to "the other party to the transaction." *Id.* at 175. That is plainly incorrect. "Another" is a word of broad scope referring to some person other than the victim, not a word of limitation.

The dissent's misreading of the statutory language is made even more clear by its view that "[t]he proper rule would require that defendant be in the business of selling the misrepresented product, or be associated with the party that is in such a business, and that defendant commit the unlawful trade practice act knowing that the ultimate victim would receive the misrepresentation." *Id.* at 176.

There is no way to get from the statutory words "another person" to the dissent's proposed rule under which some set of other people would have liability and some other set would not.

The concern that animates the dissent's effort to rewrite ORS 646.638(1) is its belief that a private UTPA plaintiff should have to show the defendant "could have * * * foreseen" the plaintiff's receipt of that party's misrepresentation. *Raudebaugh*, *supra*, 59 Or App at 175 (Gillette, J, dissenting). The dissent complains that the "the majority * * * requires only that there be a causal connection between the unlawful act and the harm." *Id.*

This Court has subsequently endorsed the majority's reading of ORS 646.638(1). In *Pearson,* this Court read the words "as a result of" in that statute as "effectively requir[ing] that the unlawful trade practice *cause* the ascertainable loss on which a UTPA plaintiff relies." 358 Or at 126, emphasis in original.

In summary, it is the *Raudebaugh* dissent that misreads ORS 646.638(1) and thereby proposes improper limits on ORS 646.608. This Court should adopt the Court of Appeals' holding in *Raudebaugh*.

III. There are Few Remedies to Assist Victims of Deceptive Debt Collection Practices if the UTPA is Held not to Apply

In support of narrowing the scope of the UTPA, the Gordon firm contends that there are “adequate remedies available” for "a party aggrieved by unfair or unlawful litigation conduct," alluding to the “numerous laws and rules”

regulating litigation practice. Gordon's BOM at 23. In reality, consumers facing a default judgment for inflated debt due to a misrepresentation by a third party—whether that be a business, a collection agency, or a lawyer—have few remedies.

While there are rules that prohibit deceptive litigation practices, these provide few remedies for aggrieved parties. For example, the Oregon Rules of Professional Conduct Rule 8.4 prohibits misrepresentations by lawyers.[6] In addition, a defaulted party may seek to aside a judgment under ORCP 71 for fraud upon the court.[7] However, the typical relief for lawyer misconduct by the Oregon State Bar would be at most compensation for a wronged client by the professional liability fund or discipline for the lawyers. These remedies offer no solace to wronged third parties as they are not clients of the lawyer and discipline offers no monetary compensation whatsoever.

---

[6] ORPC 8.4(a)(3) provides that "[i]t is professional misconduct for a lawyer to: "(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law"

[7] ORCP 71C provides:

> "Relief from judgment by other means. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, or the power of a court to grant relief to a defendant under Rule 7 D(6)(f), or the power of a court to set aside a judgment for fraud upon the court."

Moreover, neither rule provides for any penalties for wrongdoing like statutory damages or prevailing plaintiff attorney fees granted to consumers under the UTPA. This Court has long recognized the importance of fee shifting statutes in small value cases, and specifically in the context of consumers' rights under the UTPA. In *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 210, 797 P2d 1019 (1990), this Court held that:

> "attorney fees awarded in an unlawful trade practices case * * * [allow] wronged consumers [to] obtain counsel to prosecute claims that otherwise might be impractical to pursue because such claims would require an expenditure of attorney time the value of which greatly exceeded the value of the goods or services in question."[8]

Finally, common law tort claims for abuse of civil process and malicious prosecution are "[h]edged with restrictions which make [them] very difficult to maintain."[9] Victims of unscrupulous debt collectors would likely be

---

[8] See also *Colby v. Larson*, 208 Or 121, 126, 297 P2d 1073 (1956) (noting that ORS 20.080 "was undoubtedly enacted for the purpose of encouraging the settlement without litigation of meritorious tort claims involving small sums" by creating "[t]he risk [for] the defendant" otherwise "of having to pay the fee of the plaintiff's attorney."); *Wilson v. Tri-Met*, 234 Or App 615, 627, 228 P3d 1225 (2010) (noting that ORS 742.061's "purpose is to expedite the processing of insurance claims and reduce litigation by providing an incentive for efficient claim resolution").

[9] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §119 (5th ed 1984) (supplemented periodically) (noting that "[m]alicious prosecution is an action which runs counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty and letting finished litigation remain undisturbed and unchallenged. It has never been regarded with any favor by

unable to maintain such an action, even if they had an attorney to represent them. The legislature recognized the lack of remedies available to consumers when it enacted the UTPA, so to leave consumers without a remedy would undermine the statutory purposes.

In some cases, Oregon's other law that aimed to combat unlawful debt collection, the UDCPA, might offer some relief.[10] However, in *Porter v. Hill*, 314 Or 69, 838 P2d 45 (1992), this Court held the UDCPA did not apply to certain debt collection litigation practices. Despite the Gordon's firm's assertions[11] to the contrary, this Court opined in *Porter* that the UTPA may be the proper statute to address deceptive practices by lawyers in litigation in holding that:

> "[d]efendant's reading of the [UDCPA] also would make it redundant of portions of * * * ORS 646.608[.] * * * Those provisions cover the situation in which a lawyer

---

the Courts, and it is hedged with restrictions which make it very difficult to maintain.")

[10] While there may be other federal laws that also proscribe some of the alleged debt collection practices, like the Fair Debt Collection Practices Act (FDCPA), 15 USC § 1692 *et seq.*, those laws do not provide for any state administrative enforcement as intended by the Oregon legislature when they passed the UTPA. In addition, the application of the FDCPA to law firms requires that the lawyer "regularly" engage in debt collection, which is present here but may be harder to prove in other cases. *See, e.g.*, *Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002).

[11] The Gordon firm argues that "it makes no sense that debt-collection practices not actionable under the UDCPA should be subject to claims under the UTPA." Gordon's BOM at 40.

> files an action to collect fees when the lawyer knows or has reason to know that no fees in fact are owed."

314 Or at 94 (footnote omitted).[12]

Finally, trial courts do not have the ability or resources to monitor or verify default proceedings. Because aggrieved parties have very few remedies at law to combat the alleged debt collection practices, the UTPA should be interpreted so as to protect consumers and apply to third party debt collection.

CONCLUSION

For the foregoing reasons, the Oregon Trial Lawyers Association joins Respondent and respectfully requests that this Court affirm the judgment of the Court of Appeals under review.

DATED: September 29, 2016.

Respectfully submitted,

/s/ Jonathan P. Strauhull
Jonathan P. Strauhull OSB 106094
Phil Goldsmith OSB 782230
Of Attorneys for *Amicus Curiae*
Oregon Trial Lawyers Association

---

[12] If this Court were inclined to revisit the holdings in *Porter* and at the Court of Appeals and interpret the UTPA and UDCPA together (*see* DOJ BOM at 44, n. 19), OTLA would also support an interpretation of the UDCPA that covers the deceptive debt collection practices by law firms alleged in this case.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 29, 2016, I directed the original BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served following by using the electronic service function of the court's e-Filing system (for registered e-Filers):

R. Daniel Lindahl, OSB 842765
Bullivant Houser Bailey PC
888 S.W. Fifth Avenue, Suite 300
Portland, OR 97204
dan.lindahl@bullivant.com
Attorneys for Daniel N. Gordon, PC

Ellen F. Rosenblum, OSB 743239
Attorney General
Benjamin Gutman, OSB 160599
Solicitor General
Michael A. Casper, OSB 062000
Senior Assistant Attorney General
michael.casper@doj.or.us
1162 Court Street
Salem, OR 97301-4096
Attorneys for Ellen Rosenblum, Attorney General, and Oregon Department of Justice

and by first class mail, with postage prepaid (as they are not registered e-Filers):

Daniel N. Gordon, OSB 782255
Gordon, Aylworth & Tami, P.C.
P.O. Box 22338
Eugene, OR 97401
dgordonpc@aol.com
Attorneys for Daniel N. Gordon

CERTIFICATE OF COMPLIANCE

WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word count limitations in ORAP 5.05(2)(b) and (2) the word-count of the is brief (as described in 5.05(2)(a)) is 4,293 words. I further certify that the size of the type in this brief is not smaller than 14 point both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

DATED this 29th day of September, 2016.

/s/ Jonathan Strauhull_____
Jonathan Strauhull OSB 106094
Phil Goldsmith OSB 782230

Of Attorneys for *Amicus Curiae*
Oregon Trial Lawyers Association