IN THE SUPREME COURT OF THE STATE OF OREGON

DANIEL N. GORDON, PC, an Oregon professional corporation; and DANIEL N. GORDON, individually,	**SC S063978**
Plaintiffs-Respondents, Petitioners on Review,	**CA A154184**
v.	**Lane County Circuit Court No. 161208399**
ELLEN ROSENBLUM, Attorney General; and OREGON DEPARTMENT OF JUSTICE,	
Defendants-Appellants Respondents on Review.	

BRIEF ON THE MERITS OF DANIEL N. GORDON, P.C. AND DANIEL N. GORDON

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.

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I. INTRODUCTION

This civil action presents the question whether Oregon's Unlawful Trade Practices Act, and specifically ORS 646.607(1) and ORS 646.608(1), apply to a lawyer's conduct while representing a client in debt-collection litigation against a third-party debtor with whom the lawyer has no relationship other than as a litigation adversary.

Proceedings in this Court are the culmination of a process that began with the Oregon Department of Justice accusing Daniel N. Gordon and his law firm, Daniel N. Gordon, PC,[1] of violating ORS 646.607(1) and ORS 646.608(1)(b) of Oregon's Unlawful Trade Practices Act (UTPA) and ORS 646.639 of Oregon's Unlawful Debt Collection Practices Act (UDCPA) through actions taken toward debtors while representing clients in debt-collection litigation. The Gordon firm responded by bringing this action for a declaration that the UTPA and UDCPA do not apply to its actions while representing clients in debt-collection litigation, and to obtain an injunction against future enforcement actions by DOJ.

The trial court ordered summary judgment for the Gordon firm. The Court of Appeals reversed regarding the UTPA and affirmed regarding the UDCPA. *Gordon v. Rosenblum*, 276 Or App 797 (2016).

The Gordon firm asks this Court to affirm the trial court, reverse the Court of Appeals, and hold that neither ORS 646.607(1) nor ORS

[1] Except where the context requires otherwise, this brief refers to Daniel N. Gordon and Daniel N. Gordon, PC collectively as "the Gordon firm."

646.608(1)(b) applies to the Gordon firm's actions taken while representing clients in litigation.

II. LEGAL QUESTIONS PRESENTED

1. Does ORS 646.607(1) apply to a lawyer's actions taken in the course of legal representation of clients pursuing debt-collection litigation against third-party debtors with whom the lawyer has no relationship other than as litigation adversaries?

2. Does ORS 646.608(1)(b) apply to a lawyer's actions taken in the course of legal representation of clients pursuing debt-collection litigation against third-party debtors with whom the lawyer has no relationship other than as litigation adversaries?

III. PROPOSED RULES OF LAW

1. ORS 646.607(1) does not apply to a lawyer's actions taken in the course of legal representation of clients pursuing debt-collection litigation against third-party debtors with whom the lawyer has no relationship other than as litigation adversaries.

2. ORS 646.608(1)(b) does not apply to a lawyer's actions taken in the course of legal representation of clients pursuing debt-collection litigation against third-party debtors with whom the lawyer has no relationship other than as litigation adversaries.

IV. STATEMENT OF THE CASE

A. Nature of the action.

DOJ investigated the Gordon firm for allegedly violating the UTPA and the UDCPA in the course of representing creditor clients in debt-collection litigation against third-party debtors. After deciding the Gordon firm had violated those acts, DOJ proposed an assurance of voluntary compliance; the terms of the assurance of voluntary compliance would have regulated the manner in which the Gordon firm represented its clients in debt-collection litigation by imposing restrictions not borne by other creditors and their lawyers.

The Gordon firm responded by bringing this action seeking declarations that the UTPA and UDCPA do not apply to its conduct while representing clients in debt-collection litigation, and asking for an injunction enjoining DOJ from bringing enforcement actions against it for violating the UTPA.

B. Nature of the judgment rendered by the trial court.

On cross-motions for summary judgment, the trial court ordered summary judgment for the Gordon firm on the first and third counts of the cause of action for declaratory judgment. (ER 10, 11.[2]) The court held that neither the UTPA nor the UDCPA apply to a lawyer's actions

[2] "ER" refers to the excerpt of record filed with DOJ's opening brief in the Court of Appeals. "SER" refers to the supplemental excerpt of record filed with the Gordon firm's answering brief in the Court of Appeals.

taken on behalf of a creditor client during debt-collection litigation. The court also granted summary judgment for the Gordon firm on the claim for injunctive relief, ordering "Defendants are enjoined, consistent with this opinion, from filing suit on the facts alleged against Plaintiffs claiming the above discussed violations of the UTPA." (ER 11.)

V. STATEMENT OF FACTS

A. The Gordon firm represents clients seeking to collect debts owed to them.

Daniel Gordon is an attorney licensed to practice in Oregon. (SER 1.) He is the president and sole shareholder of Daniel N. Gordon, P.C. (SER 1.)

The Gordon firm represents clients seeking to collect debts, usually defaulted credit-card debt. (SER 1, 11, 25.) The firm represents clients throughout the collection process, from pre-suit collection efforts and negotiation, and continuing through the civil process, including post-judgment collection. (SER 11, 25-26.)

Some clients are the original creditors, such as American Express, U.S. Bank, and Capital One Bank. (SER 1, 11, 25.) Other clients own defaulted debt purchased from the original creditors. (SER 1.) Neither Daniel Gordon nor the Gordon firm own the debt that is the subject of their collection efforts. (SER 25.)

B. The Gordon firm handles thousands of debt-collection matters each year, some of which result in litigation and a judgment against the debtor.

Each year, the Gordon firm represents clients in thousands of debt-collection matters. (SER 11, 26.) Some matters are resolved without litigation. Others are litigated, sometimes culminating in a judgment against the debtor. The following chart summarizes information in the record concerning the disposition of the law firm's debt-collection matters in 2008-2010. (SER 11, 26-27.)

Year	Matters placed with the Gordon firm	Matters resolved without litigation	Matters resulting in a judgment
2008	15,085	1,440	2,369
2009	15,047	1,665	3,998
2010	16,240	1,719	9,151

C. DOJ issued an investigative demand accusing the Gordon firm of UTPA violations.

In June 2011 DOJ issued an investigative demand to seven organizations, including the Gordon firm. (SER 3, 21 ¶ 3.) The investigative demand was issued under ORS 646.618.

The investigative demand alleged "it appears to the Attorney General" that the Gordon firm "[has] engaged in, [is] engaging in, or [is] about to engage in an act or practice declared to be unlawful by the Oregon Unlawful Trade Practices Act * * *." (SER 3-4.) The alleged violations were:

- Violating ORS 646.607(1) by employing any unconscionable

tactic in connection with the collection or enforcement of an obligation;

- Violating ORS 646.608(1) by causing the likelihood of confusion or of misunderstanding as to the source of a debt; and
- Violating ORS 646.607(6) by employing a collection practice that is unlawful under ORS 646.639. (SER 4.)

The investigative demand required the production of documents and interrogatory answers. (SER 4, 9, 11.) The Gordon firm complied with those requirements. (SER 22.) In addition, DOJ deposed Daniel Gordon. (SER 22.)

D. DOJ tendered an assurance of voluntary compliance that proposed to dictate how the Gordon firm could conduct litigation on behalf of its clients.

DOJ eventually decided "it had probable cause to sue to enjoin the Gordon law firm and its attorneys from continuing to engage in unlawful trade practices under the UTPA." (SER 22.) According to DOJ, its investigation found "that the Gordon lawfirm [*sic*] had a pattern and practice or filing thousands of breach of contract actions against credit card debtors and obtaining default judgments for attorneys' fees and interest in a manner that apparently took advantage of the debtors' legal ignorance, lack of resources and general belief that they could not fight the claim." (SER 22 ¶ 5.) DOJ was

particularly concerned about two alleged facets of the Gordon firm's debt collection litigation:

- Complaints filed by the Gordon firm alleged a nonstatutory right to attorney fees, but did not always attach the card-member contract giving rise to the right to collect fees (SER 22-23 ¶ 7);
- The Gordon firm sometimes did not follow the choice of law provisions in card-member agreements, and, consequently, applied the wrong interest rate, or filed claims that were barred by the relevant state's statute of limitations. (SER 23 ¶ 10.)

Consequently, DOJ served the Gordon firm with an assurance of voluntary compliance under ORS 646.632. (SER 14.)

The assurance of voluntary compliance did not specify the conduct that DOJ believed violated the UTPA. But DOJ's original answer filed in this litigation listed specific categories of conduct that allegedly violated the UTPA. The DOJ's primary contention was that the Gordon firm allegedly pursued attorney-fee awards in litigated cases where it did not possess evidence it was entitled to recover fees:

> In the course of conducting the investigation referenced in Paragraph 29 above, defendants, through the DOJ Financial Fraud Section, became aware of circumstances which, if sufficiently proven, demonstrate that plaintiff Daniel N. Gordon P.C., through its attorneys, including plaintiff Daniel N. Gordon, engaged

> in, among other things, the following activities:
>
> a) Systematically filing legal complaints that seek fees and interest award without having adequate evidentiary basis to support any entitlement to such fees or interest;
>
> b) Making false and misleading representations to courts that a consumer contract or obligation includes attorney fees when plaintiffs have no basis for such representation; and
>
> c) Failing to disclose to consumers and to courts that it does not have the applicable contract at the time of filing a complaint, and therefore does not have a basis to assert the right to collect attorney fees or interest.

(TCF Dkt. No. 6, ¶ 41.)

The assurance of voluntary compliance provided that if the Gordon firm agreed to the proposed "remedies," DOJ would be "deemed to have released and discharged [the Gordon firm], their respective officers, directors, agents, employees and heirs, from any and all liability and claims for alleged or possible violations of Oregon's Unlawful Trade Practices Act (the Act), including violations of Oregon's Unlawful Debt Collection Practices Act, arising out of respondents' business activities through the date that the court approves this AVC." (SER 14.)

The proposed "remedies" pertained to several facets of the Gordon firm's representation of clients. Of special interest here are seven proposed remedies by which DOJ proposed to control the Gordon firm's representation of clients in debt-collection litigation, including

dictating the content of complaints filed by the Gordon firm. DOJ's proposed litigation-related remedies are set forth here:

> **C. Breach of Contract Litigation on Consumer Credit Card Debt:**
>
> 1) In Breach of Contract actions – whether filed in Oregon Circuit or Small Claims Courts – involving defaulted consumer credit card debt:
>
> a) A copy of the charge-off statement from the Original Creditor and the contract terms and conditions in effect at the time of charge-off or those in effect within six (6) months of the charge off date must be attached to the complaint; and
>
> b) The complaint shall identify the debt by account number or other account identifier, the date of last payment or charge off date and shall clearly and conspicuously identify/distinguish charge-off principal and any post charge-off/prejudgment interest and fees being sought.
>
> c) In cases where Respondent's client is not the Original Creditor proof of ownership of the debt by Respondent's client (at a minimum a bill of sale with an attachment that contains a specific reference to the account being litigated) must be attached to the complaint;
>
> d) No Motion for a Default Order/Judgment shall be filed unless the Court file contains the information described supra at 1)A) and B);
>
> e) All Motions for Default Orders/Judgments shall clearly and conspicuously set forth the amount due and owing at the time of charge-off and accrued prejudgment simple interest thereon at the statutory rate of 9% per annum on the charged-off amount from the date of charge-off through the date of the judgment[;]
>
> f) Respondent will not seek to recover its

> attorney fees as part of any judgment obtained by default.
>
> **D. Time-Barred Debt**: Respondent shall not attempt to collect Time-Barred Debt.

(SER 17-18.)

E. The Gordon firm did not accept the proposed assurance of voluntary compliance and, instead, commenced this lawsuit.

1. First cause of action for declaratory relief.

The Gordon firm did not accept the proposed assurance of voluntary compliance. Instead, it commenced this lawsuit.

The first cause of action was brought under the declaratory judgment act. ORS 20.010-20.160. It alleged four counts.

Count one sought a declaration that UTPA sections 646.607(1) and 646.608(1)(b) do not apply to a lawyer's or law firm's actions taken with respect to a third-party debtor during the course of the lawyer's or law firm's representation of a client in a dispute with the third party. (ER ¶ 6.) Instead, the supplemental complaint alleged "[t]hose sections only apply between a person or business and such person's or business's customer or a party to a particular transaction with such person or business." (ER 2, ¶ 6.)

Count two sought a declaration that neither the UTPA nor the UDCPA apply to Daniel Gordon individually because the definition of a "person" subject to those statutes excludes "officers acting under statutory authority of this state[.]" (ER 3, ¶ 10.) The supplemental

complaint alleged that, because Gordon is a lawyer and, therefore, an "officer of the court," he is not a "person" within the meaning of the UTPA or UDCPA. (ER 3, ¶ 11-12.)

Count three sought a declaration that Daniel Gordon's and the Gordon firm's litigation actions, taken in the course of representing clients in debt-collection actions, are not subject to the UDCPA. (ER 3, ¶¶ 16-17.)

Count four sought two declarations concerning the constitutionality of DOJ's invocation of the UTPA to regulate Daniel Gordon's and the Gordon firm's practice of law: (1) that DOJ, an arm of the executive branch of government, was not constitutionally authorized to regulate the practice of law; and (2) if the UTPA purported to authorize DOJ to regulate the practice of law, then the UTPA itself was unconstitutional. (ER 5, ¶ 23.)

2. Second cause of action for injunctive relief.

The second cause of action sought an injunction prohibiting DOJ "from future enforcement actions against [Daniel Gordon and the Gordon firm] pursuant to the UTPA." (ER 6, ¶ 27.)

F. The trial court ordered summary judgment for the Gordon firm; the Court of Appeals affirmed in part and reversed in part.

As noted, on cross-motions for summary judgment, the trial court ordered summary judgment in favor of the Gordon firm and granted the requested injunction:

> IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs are entitled to the following declarations:
>
> 1) ORS 646.608(1)(b) and ORS 646.607(1) of the Unlawful Trade Practices Act do not apply to plaintiff's collection activities taken on behalf of their clients against third-parties; and
>
> 2) Plaintiffs' litigation activities taken on behalf of their clients against third-parties are not subject to the Unlawful Debt Collection Practices Act (ORS 646.639 *et seq*.) as incorporated by ORS 646.607(6) of the Unlawful Trade Practices Act.
>
> IT IS FURTHER ORDERED AND ADJUDGED the defendants are permanently enjoined from bringing future enforcement actions under the Unlawful Trade Practices Act against plaintiffs relating to litigation activities taken on behalf of their clients against third-parties.

(ER 14.)

The Court of Appeals affirmed in part and reversed in part. *Gordon*, 276 Or App 797. The Court of Appeals affirmed the trial court's holding that the UDCPA does not apply to the Gordon firm's litigation activities on behalf of clients. *Id.* at 817 (ORS 646.639(2)(k)), 820 (ORS 646.639(2)(n)), 822 (ORS 646.639(2)(m)).

The Court of Appeals reversed the trial court's holding that the UTPA does not apply to the Gordon firm's litigation activities on behalf of clients. *Id.* at 809 (ORS 646.607(1)), 814 (ORS 646.608(1)(b)). The Court of Appeals also reversed the permanent injunction. *Id.* at 822.

G. The Gordon firm petitioned for review; DOJ did not cross-petition; this Court granted review.

The Gordon firm petitioned for review of the portions of the decision adverse to it. DOJ neither petitioned for review nor did it make a contingent request for review of the UDCPA issues resolved against it by the Court of Appeals. *See* ORAP 9.10(1) (authorizing a party to respond to a petition for review with a "contingent request for review of any question properly before the Court of Appeals in the event that the court grants the petition for review."). Consequently, the UDCPA issues decided by the Court of Appeals are not at issue in this Court.

VI. SUMMARY OF THE ARGUMENTS

Neither ORS 646.607(1) nor ORS 646.608(1)(b) apply to the Gordon firm's actions while representing clients in debt-collection litigation against third-party debtors with whom the Gordon firm has no relationship other than as litigation adversaries.

A violation of ORS 646.607(1) requires proving a "person" employed an "unconscionable tactic" against "a customer." DOJ's allegations against the Gordon firm do not involve any actions by the Gordon firm against its clients/customers. Instead, the allegations involve actions taken in litigation against litigation adversaries with whom the Gordon firm has no customer relationship. Therefore, ORS 646.607(1) does not apply.

A violation of ORS 646.608(1)(b) requires proving a "person," in the course of that person's business, vocation, or occupation, causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods, or services. "Real estate, goods, or services" include "loans and extensions of credit." ORS 646.605(6)(a).

ORS 646.608(1)(b) does not apply to the Gordon firm because the Gordon firm, in the course of its business, vocation, or occupation, did not make any loans or extensions of credit, nor did it have a consumer transaction with the alleged victims. The DOJ wants to use ORS 646.608(1)(b) to regulate litigation activities between adversaries. That is outside the UTPA's consumer protection scope and purpose.

VII. ARGUMENT

A. The meaning of the UTPA is an issue of law.

The Gordon firm brought this action to establish whether either ORS 646.607(1) or ORS 646.608(1)(b) applies to the legal representation of clients in debt-collection actions against third-party debtors with whom the Gordon firm has no relationship other than as litigation adversaries. These questions require construing these statutes. "[D]etermining the meaning of a statute is a question of law, 'ultimately for the court.'" *Bergerson v. Salem-Keizer School Dist.*, 341 Or 401, 411, 144 P3d 918 (2006) (quoting *Springfield Education Assn. v. School Dist.*, 290 Or 217, 224, 621 P2d 547 (1980)).

B. Statutory construction involves finding a statute's meaning based on its text, context, legislative history and, if necessary, applying maxims of statutory construction.

"The rules of statutory construction are familiar." *Halperin v. Pitts*, 352 Or 482, 486, 287 P3d 1069 (2012). This Court's "goal is to determine the meaning of the statute that the legislature that enacted it most likely intended." *Id.* To determine a statute's intended meaning, this Court examines its text, in context. *Id.* The starting point is the statute's words because

> there is no more persuasive evidence of the intent of the legislature than " 'the words by which the legislature undertook to give expression to its wishes.' " *State ex rel Cox v. Wilson,* 277 Or 747, 750, 562 P2d 172 (1977) (quoting *U.S. v. American Trucking Ass'ns.*, 310 US 534, 542–44, 60 S Ct 1059, 84 L Ed 1345 (1940)). Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law. Or Const, Art IV, § 25. The formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law[.]

State v. Gaines, 346 Or 160, 171, 206 P3d 1042 (2009).

At the first level of analysis, in addition to examining the statute's words, the Court considers statutory context, which includes other provisions of the same statute and other related statutes as well as preexisting common law and the statutory framework within which the law was enacted. *Atkinson v. Board of Parole and Post-Prison*

Supervision, 341 Or 382, 387, 143 P3d 538 (2006).

No further inquiry is necessary if the text and context analysis makes obvious the legislature's intent. *Gaines*, 346 Or at 164. But if the legislature's intent remains unclear, the court moves to the second level, which is to consider legislative history. *Id.* The court may consider any legislative history submitted by the parties, giving "whatever weight it deems appropriate to the legislative history that a party offers." *Id.* at 166.

Finally, if the legislature's intent remains unclear after considering the statute's text, context, and legislative history, "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612, 859 P2d 1143 (1993).

C. ORS 646.607(1) does not apply to the Gordon firm's legal representation of clients pursuing debt-collection actions against third-party debtors with whom the Gordon firm has no relationship other than as litigation adversaries.

1. The text and context of ORS 646.607(1) show that the statute does not apply to the Gordon firm's litigation actions on behalf of its clients.

We begin with ORS 646.607(1), which says

> A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person:
>
> (1) Employs 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.

Establishing a violation of ORS 646.607(1) requires showing (1) a person,[3] (2) in the course of the person's business, vocation or occupation, (3) employs any unconscionable tactic, (4) in connection with the sale, rental or other disposition of real estate, goods or services, or collection or enforcement of an obligation.

Throughout this case, the parties have agreed that whether ORS 646.607(1) applies to the Gordon firm's representation of clients in debt-collection actions turns on the meaning of "unconscionable tactics." That phrase 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

[3] "'Person' means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity except bodies or officers acting under statutory authority of this state or the United States." ORS 646.605(4).

> (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. * * *

In ORS 646.605(9), the legislature has used the familiar technique of providing a general term ("unconscionable tactics") followed by specific examples. When interpreting such a statute, this court's task is to "examine the ordinary meaning of the general term * * * as well as the specific examples that the legislature has given to help in understanding the meaning of that more general term." *Schmidt v. Mt. Angel Abbey*, 347 Or 389, 402-03, 223 P3d 399 (2009) ("When, as here, the legislature uses a general term in a statute and also provides specific examples, those specific examples provide useful context for interpreting the general term."). The principle of *ejusdem generis* describes the process of finding the meaning of the general term by identifying the common characteristics of the specific examples. *Lewis v. Cigna Ins. Co.*, 339 Or 342, 350, 121 P3d 1128 (2005).

We begin with the ordinary meaning of "unconscionable tactics." *Schmidt*, 347 Or at 402 (when interpreting a statutory term, the term's ordinary meaning is "the appropriate starting point"). "Unconscionable" is an adjective meaning: "**1 :** not guided or controlled by conscience : UNSCRUPULOUS <an ~ villain> **2 a :** excessive, exorbitant <advertising and promotion costs an ~

amount – G.P. Brockway> <was staying up there an ~ time – Joseph Conrad> **b :** lying outside the limits of what is reasonable or acceptable : shockingly unfair, harsh or unjust : OUTRAGEOUS <the grinding poverty, the ~ death rate, and the appalling illiteracy – *Commonweal*>." *Webster's Third New Int'l Dictionary* 2486 (unabridged ed. 2002).

"Tactics" is a noun that, in this context, means "a device or expedient for accomplishing an end : MANEUVER * * *." *Webster's Third New Int'l Dictionary* 2327 (unabridged ed. 2002).

Thus, the dictionary instructs that the ordinary meaning of "unconscionable tactics" is an unscrupulous, shockingly unfair, harsh, or unjust device or expedient for accomplishing an end. But finding the term's ordinary meaning is just the first step of the analysis because the legislature's specific examples of "unconscionable tactics" provide important context for interpreting the general term. *Schmidt*, 347 Or at 402-03 (the court is "not free * * * to ignore the examples that the legislature has set forth" because "those specific examples provide useful context for interpreting the general term.").

Schmidt explains the methodology for interpreting a general term by examining specific examples:

> [W]hen using the principle of *ejusdem generis*, the court seeks to find, if it can, a common characteristic among the listed examples. We then determine whether the conduct at issue, even though not one of the listed examples,

> contains that characteristic and, thus, falls within the intended meaning of the general term.

Id. at 405.

The four subsections of ORS 646.605(9) describe a diverse spectrum of conduct that can be an "unconscionable tactic." Subsection (a) focuses on the customer's personal traits, such as physical condition, education, and mental ability. Subsection (b) focuses on the merit of the transaction itself, and whether the customer will derive any material benefit. Subsection (c) also focuses on the transaction and, specifically, the customer's ability to pay the financial obligation created by the transaction. And subsection (d) focuses on taking advantage of customers who are veterans and servicemembers.

The four examples have little in common except for one trait: in each example of an unconscionable tactic, the "person's" unconscionable tactic is directed toward "a customer." Therefore, through its specific examples of "unconscionable tactics," the legislature has expressed its intent that, for purposes of ORS 646.607(1), there cannot be an unconscionable tactic unless the prohibited conduct is directed toward "a customer."

The UTPA does not define "customer," so we look to the word's ordinary meaning. *Schmidt,* 347 Or at 402. As pertinent here, the dictionary defines "customer" to mean: "**2 a** : one that purchases some

commodity or service <she had never seen that ~ before>; *esp* : one that purchases systematically or frequently <these countries are the largest ~s of U.S. products> <lost most of her ~s through neglect and rudeness> **b** : one that patronizes or used the services <as of a library, restaurant, or theater : CLIENT." *Webster's Third New Int'l Dictionary* 559 (unabridged ed. 2002).

Thus, the text and context of ORS 646.607(1) establish that a violation of ORS 646.607(1) requires an "unconscionable tactic" directed at "a customer." The Court of Appeals agreed. *Gordon*, 276 Or App at 808 ("We agree with plaintiffs that an act can be an unconscionable tactic only if it involves 'a customer.'"). The Court of Appeals held, however, that "Nothing in the text of the statute defining 'unconscionable tactics' requires that 'a customer' must be a customer of the person employing the unconscionable tactic.'" *Id.* The court held, instead, that the UTPA applies to the Gordon firm's actions so long as the alleged victim was *someone's* "customer," but not necessarily the *Gordon firm's* customer. In this respect the Court of Appeals was wrong.

The definition of "unconscionable tactics" specifies that a violation of ORS 646.607(1) requires an "unconscionable tactic" directed at "a customer." On that much the parties, and the Court of Appeals, agreed. What is less clear from the words of the statute is whether the alleged victim of the unconscionable tactics must be a customer of the alleged

perpetrator. Or, phrased in terms of this case, can the Gordon firm (or any other "person") be subject to UTPA liability under ORS 646.607(1) for conduct directed at persons who are not its customers and with whom it has never had a customer relationship at all?

The Court of Appeals found pivotal the legislature's use of "a" customer and inferred that the legislature intended for the statute to apply so long as the alleged victim was someone who "buys and received real estate, goods, or services" as opposed to "someone who does not buy and receive real estate goods or services." *Gordon*, 276 Or App at 808.

This interpretation of the statute is flawed. First, the legislature's use of "a" customer is not inconsistent with a legislative intent to have the statute apply to only the customers of the party allegedly committing unconscionable tactics. It is just as reasonable to interpret the statute to mean it applies to conduct toward *a customer of the person engaging in an unconscionable tactic* as it is to interpret the statute to mean conduct toward someone who is *a customer of someone, somewhere*. The use of "a" does not signal one way or another whether the legislature intended that the "customer" must be "a customer" of the offending person or can be anyone's customer. Instead, the statute may be plausibly read either way.

In view of the statute's purpose, it is more plausible to interpret the statute to mean "a customer of the person committing the

unconscionable tactics." The UTPA was enacted for the protection of consumers. *Pearson v. Philip Morris, Inc.*, 358 Or 88, 115, 361 P3d 3 (2015). There is no suggestion in the statute's words that the legislature intended a remedy so broad that it applied to a "person's" actions toward "a customer of another."

Applying the UTPA in the context of litigation is especially inappropriate because the law provides remedies to a party aggrieved by unfair or unlawful litigation conduct. If the Gordon firm has engaged in any improper conduct in the course of litigation against debtors—an allegation the Gordon firm denies—then there are already adequate remedies available without distorting the UTPA to apply in a context where it was never intended to apply. Furthermore, there are numerous laws and rules—including the entire Oregon Rules of Civil Procedure—directed at what is permissible and required by litigants and their lawyers. Nothing in the UTPA indicates a legislative intent to overlay the UTPA and, UPTA remedies, on top of the rules and statutes specifically directed at litigation practices.

Limiting the reach of ORS 646.607(1) to unconscionable tactics directed at a customer of the person committing the unconscionable tactics is consistent with the cases holding that the UTPA applies only in the consumer context.

"Courts interpreting the UTPA have almost uniformly recognized that it is first and foremost a consumer protection statute."

CollegeNET, Inc. v. Embark.com, Inc., 230 F Supp 2d 1167, 1173 (D Or 2001). Oregon's appellate courts have noted the UTPA's consumer protection focus. *See, e.g., Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n 4, 566 P2d 1177 (1977) (the UTPA's legislative history supports the view that it should be interpreted liberally to achieve consumer protection); *Cullen v. Investment Strategies, Inc.*, 139 Or App 119, 128, 911 P2d 936, *rev den*, 323 Or 265 (1996) ("the UTPA is to be construed consistently with its consumer protective purposes"); *Hinds v. Paul's Auto Werkstatt, Inc.*, 107 Or App 63, 66, 810 P2d 874, *rev den*, 311 Or 643 (1991) (the UTPA is "for consumer protection"); *Raudebaugh v. Action Pest Control, Inc.*, 59 Or App 166, 650 P2d 1006 (1982) (the policy of the UTPA "is to discourage deceptive trade practices and to provide a viable remedy for consumers who are damaged by such conduct"); *Investigators, Inc. v. Harvey*, 53 Or App 586, 592, 633 P2d 6 (1981) ("The purpose of the Act is to protect the consumer from certain acts by persons engaged in the practice of offering or providing services or goods to the public").

Because consumer protection is the UTPA's purpose, it follows that consumer protection also limits the UTPA's scope. Although no Oregon appellate case has addressed the issue, several federal cases have held that the UTPA is confined to consumer transactions. For example, in *Roberts v. Legacy Meridian Park Hospital*, 2014 WL

294549 (D Or 2014), the plaintiffs, a physician and his medical clinic, brought UTPA claims alleging that the defendant doctors, hospital, and medical clinics, had disparaged the plaintiffs' surgical abilities through false or misleading representations. After reviewing the unbroken string of federal cases holding that the UTPA is limited to consumer actions, Judge Simon granted the defendants' motions to dismiss the UTPA claim because the claim did not "allege that they were consumers of any Defendant's products or services." *Id.* at *11.

Roberts discusses *CollegeNet*, 230 F Supp 2d 1167, which involved a dispute between competing providers of online services to colleges. The court dismissed the UTPA claim because "the UTPA provides a cause of action only for consumers." *Id.* at 1174.

Because the UTPA applies only in the context of conduct directed at consumers, it does not apply to the Gordon firm's actions taken in the course of representing its clients in litigation against debtors. Those debtors are not consumers of the Gordon firm's services, and litigation is not a consumer transaction.

For these reasons, the only plausible reading of ORS 646.607(1) is that it applies to a person's unconscionable tactics toward a person's customers. The Gordon firm's alleged UTPA violations do not involve the firm's "customers." Instead, DOJ's allegations involve the Gordon firm's actions toward adverse parties in litigation—debtors—who are being sued for debts owed to the Gordon firm's clients. Those debtors

are the antithesis of "customers." They are, instead, opponents whose interests are adverse to the Gordon firm's clients. Therefore, if ORS 646.607(1) is interpreted to require an "unconscionable tactic" directed toward "a customer," then the DOJ's complaints about the Gordon firm are outside the scope of ORS 646.607(1) because the Gordon firm's allegedly wrongful conduct is not directed at "customers."

2. The legislative history does not support DOJ's argument that ORS 646.607(1) applies to law firms representing creditors in debt-collection litigation.

DOJ has previously argued that the legislative history supports its interpretation of ORS 646.607(1). In anticipation that DOJ will make that argument again, the Gordon firm addresses the statute's legislative history.

ORS 646.607(1) was enacted by Oregon Laws 1977, chapter 195, section 4. The definition of "unconscionable tactics," now found at ORS 646.605(9), was enacted at the same time. Or Laws 1977, ch 195, § 1(8).

Both provisions began as Senate Bill 269. That bill changed substantially as it moved through the legislative process. The first committee hearing was on January 28, 1977, before the Senate Committee on Labor, Consumer, and Business Affairs. (TCF Dkt. No. 30 – Declaration of Shannon Ross, Ex. 2 at 5.) The minutes state that

Paul Romain, Chief Counsel for the Consumer Protection Division of the Department of Justice, explained that "the major point of the bill * * * concerns jurisdiction over loans and extensions of credit[.]" (TCF Dkt. No. 30—Declaration of Shannon Ross, Ex. 2 at 7.) In other words, SB 269 began as a device to regulate lenders, such as banks, savings and loans, and other finance companies. Romain testified that the bill was drafted in response to *Haeger v. Johnson*, 25 Or App 131, 548 P2d 532 (1976). (Tape Recording, Senate Committee on Labor, Consumer, and Business Affairs, SB 269, January 28, 1977, Tape 3, side 2 (statement of Paul Romain).) *Haeger* involved DOJ's investigative demand to the division manager of Public Finance Corporation concerning alleged UTPA violations involving extensions of consumer credit. The manager challenged the investigative demand on the grounds that DOJ lacked jurisdiction to investigate lending practices. The Court of Appeals held that "the legislature has unambiguously defined the Unlawful Trade Practices Act as being applicable only to the sale of goods and services" and, consequently, the UTPA did not grant DOJ jurisdiction to investigate lending practices. *Id.* at 135.

So SB 269 began, at least in part, as an effort to bring lenders within the UTPA. But that purpose soon changed. At the hearing on March 7, 1977, Romain reported that SB 269 had been amended to eliminate the provisions that would have expanded the UTPA to

lenders. (Tape Recording, Senate Committee on Labor, Consumer, and Business Affairs, SB 269, March 7, 1977, Tape 12, side 1 (statement of Paul Romain).)

At both the March 7, 1977, and March 16, 1977, committee hearings, there was substantial discussion of the bill's application to rental transactions. The bill's "measure intent statement," prepared after the senate had approved SB 269, begins by stating "This bill addresses the problem of certain rental transactions, specifically the advertising thereof, not being covered by existing unlawful trade practices law." (TCF Dkt. No. 30—Declaration of Shannon Ross, Ex. 2 at 22.) The measure intent statement goes on to describe other aspects of SB 269; it says nothing about expanding the UTPA to apply to debt-collection activities, and it says nothing about expanding the UTPA to apply to law firms representing creditors in debt-collection actions. At the same time, and in connection with a hearing before the House Committee on Business and Consumer Affairs, Romain prepared a memorandum summarizing SB 269. (TCF Dkt. No. 30—Declaration of Shannon Ross, Ex. 2 at 17.) That memorandum does not mention expanding the UTPA to apply to debt-collection activities, and the memorandum does not mention expanding the UTPA to apply to law firms and lawyers representing creditors in debt-collection actions—a significant omission if, in fact, the bill was designed to have that effect.

Nothing in the legislative history reveals a legislative intent that "collection practices" meant litigation-related activities by lawyers and law firms representing creditors in debt-collection actions. One would expect to find some expression of that intent if the legislature had in mind such a dramatic expansion of the UTPA's scope. The interpretation advanced by DOJ and adopted by the Court of Appeals produces an unprecedented expansion of the UTPA's scope, and puts DOJ in the position to oversee conduct by counsel in litigation, and even prescribe in detail how a case would be handled, including what has to be alleged in a complaint. Furthermore, the holding by the Court of Appeals allows DOJ to supersede substantive law by depriving a party of rights otherwise allowed by law, such as the right to petition for attorney fees where such a right is granted by contract. Nothing in the legislative history or the enacted words of ORS 646.607(1) hints that the legislature understood it was granting DOJ such sweeping powers.

Of course, ultimately the legislature's chosen words control the statute's meaning, and legislative history may not be used "as a justification for inserting wording in a statute that the legislature, by choice or oversight, did not include." *Halperin*, 352 Or at 495 ("[l]egislative history may be used to identify or resolve ambiguity in legislation, not to rewrite it."). The legislature's chosen words do not bring the Gordon firm's challenged conduct within ORS 646.607(1).

3. Even though it is a remedial statute, the UTPA must be interpreted according to its words, and without omissions or insertions.

DOJ has argued that the UTPA should be liberally construed because it is a remedial statute. But general maxims of statutory construction are invoked only if the legislature's intent remains obscure after focusing on the statutory text and context, and any useful legislative history brought to the court's attention. *Brandrup v. ReconTrust Co.*, 353 Or 668, 682-83, 303 P3d 301 (2013). Here, the statutory wording permits only one conclusion, so there is no need to resort to maxims of statutory construction.

Furthermore, any maxim of statutory construction must yield to the statutory mandate that a court may not insert what has been omitted, or omit what has been inserted. ORS 174.010. Because this court must interpret the statute in a manner consistent with the statute's words, it may not adopt the interpretation that DOJ advocates. *Haeger*, 25 Or App at 134-35 (rejecting the attorney general's calls for a "liberal construction" of the "remedial legislation," and holding that the UTPA did not apply to extensions of consumer credit because the legislature had "unambiguously defined" the UTPA as applying only to the sale of goods and services).

D. ORS 646.608(1)(b) does not apply to the Gordon firm's legal representation of clients pursuing debt-collection actions against third-party debtors with whom the Gordon firm has no relationship other than as litigation adversaries.

We now consider whether ORS 646.608(1)(b) applies to the Gordon firm's actions while representing clients in debt-collection litigation. We begin by reviewing the statutory wording. ORS 646.608(1)(b) states

> **646.608 Additional unlawful business, trade practices; proof; rules.** (1) 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:
>
> (a) * * *
>
> (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

"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.

DOJ's investigative demand alleged the Gordon firm had violated ORS 646.608(1)(b) "by causing the likelihood of confusion or of misunderstanding as to the source of a debt[.]" DOJ's theory is that

ORS 646.608(1)(b) applies to the Gordon firm because, allegedly, the firm, in the course of its business, vocation or occupation (namely, the provision of legal services to its clients), made misleading or confusing statements to non-clients) about the status or terms of the credit arrangement between the Gordon firm's clients and the debtors.

There are two flaws in DOJ's theory. First, as discussed previously, the UTPA's purpose is to regulate the provision of real estate, goods, and services to consumers. But the Gordon firm's alleged wrongdoing does not involve providing real estate, goods, or services to consumers; instead, the alleged wrongdoing involves actions by the Gordon firm in the course of representing its clients in litigation against debtors who obtained credit from the Gordon firm's clients (or, in the case of client debt buyers, from the original creditor who sold the debt to the debt buyer). Therefore, ORS 646.608(1)(b) does not apply because none of the Gordon firm's alleged misconduct involved providing legal services to the alleged victims of the wrongdoing.

DOJ has emphasized that the definition of "real estate, goods or services" includes "loans and extensions of credit[.]" DOJ's theory is that litigation arising from "loans and extensions of credit" is equivalent to making loans and extensions of credit, and misleading or confusing actions in either context are subject to the UTPA. In the DOJ's view, there is no difference between a lender or financing

company that actually makes loans and extensions of credit and a law firm representing a lender or financing company in litigation.

If the DOJ's theory were correct, it would dramatically broaden the UTPA by making it applicable to lawyers and law firms in contexts never before imagined. DOJ's theory treats the law firm and its client as essentially identical. For example, under DOJ's interpretation of the UTPA, a law firm defending a car dealership in litigation about a defective car would be subject to UTPA liability for representations made during the litigation about the car's standard, quality, or grade. ORS 646.608(1)(g). More fundamentally, every breach of contract action for unpaid sums would be a potential source of UTPA claims based on any allegation of fact with which the trier of fact disagrees. Such a result seems absurd, yet it is exactly what DOJ is advocating.

The Gordon firm is not advocating that law firms should be immune from UTPA liability. Instead, it recognizes that professionals may violate the UTPA through false or misleading representations to consumers about *their own* goods or services. *Investigators, Inc.*, 53 Or App at 592 (dentists are subject to the UTPA). But DOJ's claim against the Gordon firm does not involve the Gordon firm's own goods or services. Instead, DOJ's complaints involve actions and representations about the firm's clients' goods and services. As the trial court held, that important distinction means ORS 646.608(1) does not apply.

The Court of Appeals relied on *Raudebaugh*, 59 Or App 166, which involved a very different factual setting. In *Raudebaugh*, the purchasers of a home brought a UTPA claim against the company that prepared a pest and rot inspection report that plaintiffs relied on in purchasing the home. The inspection company argued that it could not be liable under the UTPA because it was hired by the home's *seller*—not the *purchaser*—and the inspection company had no direct relationship with the purchaser and did not even know the house was to be sold, or that plaintiffs were the potential purchasers. The Court of Appeals held that a UTPA violation could be proved by showing that the defendant had violated the act (through making a false report), and that the violation caused plaintiffs an ascertainable loss; the court held that it was not necessary that plaintiffs and defendant have had direct contact. *Id.* at 171-72.

Raudebaugh is distinguishable because the UTPA claim in *Raudebaugh* involved a violation made in the course of a consumer transaction involving the very service that the defendant was in the business of providing to consumers. *Raudebaugh* would be relevant if, instead of suing the inspection company, the plaintiffs (or DOJ) had sued the inspection company's lawyers, alleging a UTPA violation based on representations about the inspection report that the lawyers made during litigation about the inspection report.

Of course, that was not the claim in *Raudebaugh*. Indeed, the

Gordon firm has found no case, and DOJ has cited no case, in which a law firm was alleged (much less found) to have violated the UTPA based on actions taken in the course of representing a client in litigation concerning a consumer transaction.

Furthermore, to the extent *Raudebaugh* can be understood to support applying ORS 646.608(1)(b) to the Gordon firm, then *Raudebaugh* should be overruled for the reasons stated in then-Judge Gillette's dissent.

Judge Gillette dissented from the majority opinion in *Raudebaugh* on the grounds that ORS 646.608(1) should be interpreted to apply only as between parties to a consumer transaction. *Id.* at 175.

The dissent began by considering the statutory definition of "real estate, goods, and services" and noting that "transactions between business entities are not within the purview of the Act. One who seeks damages must show he bought, rented or otherwise obtained the real estate, goods or services in question for his personal use." *Id.* at 173. Thus, the statute is concerned solely with consumer transactions.

The dissent then moved to the question whether the statute applied where the plaintiff and defendant had no relationship at all—consumer or otherwise. The dissent held that the statute should be interpreted to apply only where the parties have engaged in a consumer transaction:

> That is, where an offender has used an unlawful practice, the other party to the transaction, if he suffers any ascertainable loss, has a cause of

> action. The existence of a consumer transaction between the two parties is pivotal. Such a construction gives the UTPA all the scope it needs to accomplish its legislative purpose—it permits anyone who is injured by an unlawful practice in the course of an otherwise qualifying commercial transaction to sue.

Id. at 175.

The dissent also expressed concern about the boundless scope of UTPA liability that could emerge from construing the statute to apply where the person to be held liable had no relationship with the alleged victim, and did not provide any real estate, goods, or services to that person. *Id.* at 175-76. In the present case we have seen that concern come to fruition as the Gordon firm is alleged to have violated ORS 646.608(1) despite having provided no real estate, goods, or services to any of the alleged victims. This Court should overrule *Raudebaugh* and adopt Judge Gillette's proposed interpretation of ORS 646.608(1).

E. The Gordon firm's interpretation of the UTPA is consistent with this Court's case law regarding the applicability of the UDCPA to debt-collection litigation.

Adopting the Gordon firm's proposed interpretation of ORS 646.607(1) and ORS 646.608(1) would have the benefit of making this Court's case law regarding the UTPA consistent with how it has interpreted the Unlawful Debt Collection Practices Act in a similar context. On the other hand, adopting DOJ's view, as articulated by the Court of Appeals, would produce the incongruous result that, in the context of debt-collection litigation, the UTPA is broader than the

UDCPA, even though the UDCPA is specifically directed at abusive debt-collection practices.

The UDCPA, ORS 646.639-646.643, provides that it is an "unlawful collection practice for a debt collector, while collecting or attempting to collect a debt, to do" any of the several acts delineated in ORS 646.639(2)(a)-(o). The UDCPA focuses on prohibiting "debt collectors in the state from using certain abusive collection practices." *Lyon v. Chase Bank USA*, 656 F3d 877, 883 (9th Cir 2011). A violation of the UDCPA is actionable under the UTPA by virtue of ORS 646.607(6), which provides that "A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person * * * (6) Employs a collection practice that is unlawful under ORS 646.639."

This Court has held that bringing a lawsuit to recover a non-existent debt is not an abusive "collection" practice within the UDCPA. *Porter v. Hill*, 314 Or 86, 838 P2d 45 (1992). In *Porter*, a lawyer sued on his own behalf to collect fees from a former client. The former client counterclaimed, contending (among other things) that the lawsuit violated ORS 646.639(2)(k) because it sought to collect a debt (*i.e.*, fees plus late-payment charges) that was not owed and did not exist. After checking his records, the lawyer acknowledged that his complaint sought fees and charges that were not owed, and he amended the complaint to eliminate those. The former

client nonetheless persisted with the UDCPA counterclaim.

The trial court dismissed the UDCPA counterclaim before trial. The former client appealed, and the case eventually reached this Court, which said "[t]he disputed question under UDCPA is whether ORS 646.639(2)(k) proscribed plaintiff's attempt to collect an allegedly nonexistent debt by filing a civil action." *Id.* at 90.

Subsection (2)(k) makes it unlawful to "[a]ttempt to or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten to take any action which the debt collector in the regular course of business does not take." The Court first held that the word "right" in subsection (2)(k) does not mean the debt itself. *Id.* at 91-92. Instead, the word "right" refers to "certain methods of collecting a debt, such as enforcing a right [to] collateral to the debt in order to pressure the debtor to pay the debt." *Id.* at 92. Therefore, when subsection (2)(k) refers to attempting or threatening to enforce a "right," the right is not the debt itself, but something separate from the debt. "Nothing in the statute evidences a legislative concern with the existence or amount of the underlying debt, as distinct from the use of abusive methods to pressure debtors to pay their debts." *Id.* Therefore, the Court held, subsection (2)(k) did not apply to a lawsuit that sought to recover a debt that allegedly did not exist because the existence or non-existence of the debt was not a "right" within the meaning of subsection (2)(k). *Id.*

The Court then examined whether a lawsuit seeking to collect a nonexistent debt constituted an attempt to enforce a "remedy [that] does not exist" within the meaning of ORS 646.639(2)(k). The Court examined each of the acts prohibited by ORS 646.639(2) and noted that several subsections refer to "sidestepping the legal process or using the appearance of legal authority when no such legal authority exists." *Id.* at 93. "In contrast, no paragraph suggests that actually filing a legal action is prohibited. That is because filing a legal action resolves issues surrounding the debt in a proper manner, not duplicitously or coercively." *Id.* at 94. Consequently, the Court held "that filing a civil action to collect an alleged debt is not an act attempting to enforce a 'right' or 'remedy' proscribed by ORS 646.639(2)(k) merely because all or part of the alleged debt does not exist." *Id.* at 95.[4]

Therefore, in *Porter* this Court held that the UDCPA does not apply to allegations and claims asserted in debt-collection litigation,

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[4] In a footnote, the court cautioned that its holding was not categorical, and it could imagine a circumstance where the act of initiating litigation might violate the UDCPA, such as if the parties' agreement required them to submit to arbitration instead of filing a civil action. *Id.* at 93 n 4. Of course, this is not such a case because DOJ does not contend that the Gordon firm used civil litigation where the parties' agreement prohibited it. Therefore, this case falls within the court's observation that "[i]t is apparent from examining other paragraphs of subsection (2) that filing civil actions is not ordinarily the sort of conduct that ORS 646.639(2)(k) proscribes." *Id.* at 93.

including meritless claims regarding non-existent debts. It is sensible that the UDCPA and UTPA should be interpreted to have a similar scope regarding their applicability to similar conduct (*i.e.*, debt-collection litigation). On the other hand, it makes no sense that debt-collection practices not actionable under the UDCPA should be subject to claims under the UTPA.

F. DOJ has no authority to regulate the practice of law.

1. The Court of Appeals erred by failing to consider arguments presented in Daniel N. Gordon's brief regarding DOJ's lack of power to regulate the practice of law.

In reversing the trial court, the Court of Appeals refused to consider arguments advanced in Daniel N. Gordon's brief, which contended the judgment should be affirmed because the UTPA does not authorize DOJ to prescribe rules controlling the manner in which the Gordon firm and Daniel N. Gordon practice law, and allowing DOJ that power would violate the separation of powers established in Article III, section 1 of the Oregon Constitution. *Gordon v. Rosenblum*, 276 Or App 797, 804 n 7 (2016) ("We reject these contentions as unreviewable because Gordon failed to cross-appeal the trial court's grant of summary judgment to defendants on Counts 2 and 4.").

The Court of Appeals was wrong. No cross-appeal was required because the arguments were advanced as alternative grounds for

affirming the judgment that the UTPA did not apply to the Gordon firm and Daniel N. Gordon; they were not raised as a basis for modifying the relief granted by the trial court. *Williams v. Mallory*, 284 Or 397, 406 n 2, 587 P2d 85 (1978).

The starting point is the judgment entered in the circuit court. It says:

> IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs are entitled to the following declarations:
>
> 1) ORS 646.608(1)(b) and ORS 646.607(1) of the Unlawful Trade Practices Act do not apply to plaintiff's collection activities taken on behalf of their clients against third-parties; and
>
> 2) Plaintiffs' litigation activities taken on behalf of their clients against third-parties are not subject to the Unlawful Debt Collection Practices Act (ORS 646.639 *et seq*.) as incorporated by ORS 646.607(6) of the Unlawful Trade Practices Act.
>
> IT IS FURTHER ORDERED AND ADJUDGED the defendants are permanently enjoined from bringing future enforcement actions under the Unlawful Trade Practices Act against plaintiffs relating to litigation activities taken on behalf of their clients against third-parties.

(ER 14.)

That judgment granted all the relief sought by Gordon and the Gordon firm. Specifically, it adjudged that (1) the UTPA does not apply to litigation activities undertaken by Gordon and the Gordon firm on behalf of clients; (2) the Unlawful Debt Collection Practices

Act does not apply to litigation activities undertaken by Gordon and the Gordon firm on behalf of clients; and (3) DOJ is enjoined from bringing enforcement actions against Gordon and the Gordon firm for allegedly violating the UTPA because of activities undertaken during the course of representing clients in litigation.

For Gordon and the Gordon firm, the judgment represented a complete victory: they achieved all of the relief they sought.

They did not, however, prevail on every grounds they argued in support of the relief they sought. Consequently, in the Court of Appeals they argued both the grounds on which they prevailed in the trial court and also alternative grounds on which they had not prevailed but which, in their view, supported the judgment. It was those alternative grounds that the Court of Appeals refused to consider, holding that it was necessary to cross-appeal in order to raise those issues in the Court of Appeals.

This Court has said repeatedly "[a] cross-appeal is unnecessary [where] the respondent does not contend that the judgment is erroneous * * * ." *Dean Vincent, Inc. v. Stearns*, 276 Or 533, 536-37, 555 P2d 448 (1976); *Williams*, 284 Or at 406 n 2 ("a cross-appeal is unnecessary where the respondent does not contend that the judgment is erroneous."). This Court has explained "a cross-appeal is unnecessary and illogical unless the respondent is contending that the judgment is in error * * * ." *Artman v. Ray*, 263 Or 529, 533, 501 P2d

63 (1972).

The controlling principles are illustrated in *Bakker v. Baza'r*, 275 Or 245, 551 P2d 1269 (1976). In *Bakker*, plaintiff (who was employed by defendant) alleged claims for assault, battery, and intentional infliction of emotional distress based on a confrontation with defendant's store detective. After the jury returned a verdict for plaintiff, the trial court held that plaintiff's action was barred by the exclusive remedy provisions of the worker's compensation law and entered judgment for defendant. Plaintiff then appealed.

On appeal, defendant argued the judgment should be affirmed because plaintiff's claims should not have been submitted to the jury, but instead should have been dismissed by a directed verdict, because there was no evidence a battery had occurred. Because defendant was defending the judgment on a grounds on which it had not prevailed in the trial court, plaintiff contended the argument could not be considered because defendant had not cross-appealed the denial of its motion for directed verdict. This Court rejected that argument, stating "The plaintiff argues that we cannot consider whether plaintiff's evidence of a battery was insufficient because defendant has not filed a proper cross appeal. Defendant has raised the question in its brief, and it was not necessary, the defendant having received a favorable judgment, for defendant to have filed a cross appeal." *Id.* at 248 n 2.

In *Bakker*, the defendant did not seek to modify the result it

achieved in the trial court—a judgment in its favor and against plaintiff. It did, however, rely on a grounds on which it had not prevailed in the trial court. This Court held that, in those circumstances, a cross-appeal is not required. *Id.*

This case presents the same circumstances. Petitioners on Review do not seek to have the judgment modified. Instead, they want it affirmed just as it was issued by the trial court. All they have done is advance additional, alternative arguments for why the relief granted by the trial court was correct. A cross-appeal is not required, and the Court of Appeals erred in holding otherwise.

2. Neither the UTPA nor any other provision of law authorizes either the Attorney General or the Department of Justice to regulate the practice of law by prescribing special rules of procedure applicable only to Gordon, the Gordon Firm, and their clients.

Daniel N. Gordon's brief filed in the Court of Appeals explored how DOJ exceeded its authority by purporting to regulate the manner in which the Gordon firm practices law and, in fact, infringed on the judiciary's authority over litigation. Petitioners on Review rely on Daniel N. Gordon's brief filed in the Court of Appeals and do not reiterate those arguments here, except to supplement those arguments in one respect. ORAP 9.20(4) (the parties' briefs in the Court of Appeals are considered the main briefs in the Supreme Court, supplemented by the brief on the merits on review).

In evaluating the extent of DOJ's overreach and intrusion into the judicial branch's jurisdiction, it is instructive to consider Circuit Court Judge Rasmussen's observations at the summary judgment hearing. Judge Rasmussen repeatedly expressed surprise and skepticism at DOJ's assertions that it could mandate the practices and procedures by which the Gordon firm would handle cases:

> THE COURT: So, if they attached a contract [to the complaint] we'd be okay?
>
> MS. POSEGATE [for DOJ]: If they attached the contract, and if they attached the right contract, yes.
>
> THE COURT: Isn't—I mean—aren't you talking about my job now? I mean really aren't you talking about my job now? If he files—if he files a lawsuit that doesn't have a contract attached to it, which I don't think is an absolute pleading requirement. But pleading attorney's fees you have to plead in the cause of action you've got to plead the factual basis for the fee? Right.
>
> MS. POSEGATE: Yes.
>
> THE COURT: And that's a pleading requirement? Right?
>
> MS. POSEGATE: Yes, Your Honor.
>
> THE COURT: That's my job if he doesn't do it right? Isn't it?

(Tr. 11-12.)

Judge Rasmussen returned to the same theme later:

> THE COURT: This is really a [fascinating] debate, because you know, you're really talking

> about pleading requirements. You want him to plead certain things. Which again clearly is my world. Clearly is my world.
>
> * * *
>
> THE COURT: I'm trying to make this point. It is an imposition on the pleading rules that already exist in the state to require a firm to do more by way of pleading than another firm. You're adding to the rules of civil procedure de facto.

(Tr. 42, 44.)

Judge Rasmussen's comments are noted here because they reflect a trial judge's sentiments about the notion that the DOJ, rather than a trial judge, is the proper arbiter of pleading requirements.

G. This Court should reinstate the injunction against DOJ bringing actions against the Gordon firm for violating the UTPA.

The trial court enjoined DOJ from bringing actions under the UTPA and UDCPA against the Gordon firm. The Court of Appeals reversed the injunction to the extent it was inconsistent with the court's holdings regarding the UTPA's applicability.

Consistent with the Gordon firm's arguments about whether the UTPA applies to the Gordon firm's litigation practices, this Court should reinstate the injunction to the extent the Court holds that the UTPA does not apply to the Gordon firm.

VIII. CONCLUSION

This Court should reverse the Court of Appeals and affirm the trial court's holdings that neither ORS 646.607(1) nor ORS 646.608(1)

apply to the Gordon firm's representation of clients in debt-collection litigation.

DATED: July 28, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 10,581 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE

I certify that on July 28, 2016, I served this Brief on the Merits of Daniel N. Gordon, P.C. and Daniel N. Gordon on the following persons via the method indicated:

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CERTIFICATE OF FILING

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