IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN HARKNESS and SHERRI HARKNESS,	)	Washington County Circuit Court Case No.: C092970CV
Plaintiffs-Appellants, Petitioners on Review,	)	Court of Appeals No.: A147439
v.	)	Supreme Court No.: S063222
JACK R. PLATTEN,	)	
Defendant-Respondent, Respondent on Review.	)	

OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF AMENDED PETITION FOR REVIEW

IF REVIEW IS ALLOWED, *AMICUS CURIAE* INTENDS TO FILE A BRIEF ON THE MERITS

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Washington County, Honorable Charles D. Bailey, Judge.

Opinion Filed: April 8, 2015

Author of Opinion: Hon. Rex Armstrong, Presiding Judge
Concurring Judges: Hon. Lynn R. Nakamoto and Hon. James C. Egan, Judges.

May 2015

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I. INTRODUCTION

Amicus Oregon Trial Lawyers Association ("OTLA") files this brief in support of the Amended Petition for Review because it presents an important issue of agency law that was wrongly decided by the Oregon Court of Appeals and may significantly and negatively impact the development of that law. [1]

The Oregon Court of Appeals concluded, as a matter of law, that a loan officer who represented two loan companies was not acting as an agent for those principals in perpetrating a fraud that was based entirely on fraudulent *loans* that were sold using her companies' names and through their facilities. *Harkness v. Platten*, 270 Or App 260, 273-74, __ P3d __ (April 8, 2015). The Court of Appeals narrowly portrays the facts in this case as solely an "investment fraud" – not a loan fraud – and then concludes that a reasonable consumer would not understand a loan officer to be acting within her agency when she sold the investments.

That conclusion ignores that the investments at issue in this case were entirely made up of fraudulent loans and notes. A reasonable consumer might expect that loans – including those later discovered to be fraudulent – may be

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[1] This brief addresses only the apparent authority issue that arose in the context of the underlying case (the "case within a case") that gave rise to the potential legal malpractice action. Like the Court of Appeals' decision, this brief does not express any position on the merits of the malpractice lawsuit. Similarly, this brief, like the Court of Appeals' decision, does not address vicarious liability theories under *respondeat superior*, although there could be a basis for vicarious liability under these facts.

within the purview of a loan company that is in the business of offering and selling loans to the public. Even when narrowly cast as solely an investment case, loans (or notes or bonds) are all forms of investments and are defined as securities under the Oregon Securities Laws.

The Oregon Court of Appeals' narrow casting of the nature of the agency in this case, and its resulting severe limitation on the agent's authority for the principal, has the potential for significant negative impacts on agency law. The Court of Appeals' reformulation of agency law standards threatens to further insulate corporations and other principals from responsibility for the foreseeable risk of their agent's misconduct. This is particularly egregious when an agent uses her principal's name and business to sell products and services that are not approved by the company, but are closely related to the company's business. Agency law should encourage a principal to supervise its agent rather than incentivize the company to later limit the agency by narrowly defining the scope of work to the particular product or service offered and not reasonably related products or services.

II. STATEMENT OF FACTS

For the purpose of this amicus brief, OTLA adopts the statement of facts set forth in the Court of Appeals' opinion, although not the very limited inferences that the court drew against plaintiffs, as well as the supplemental facts stated in the Amended Petition for Review.

III. QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented:

Whether a loan company may have liability based on apparent authority when its loan officer, using the company's name and facilities, used both legitimate mortgages and fraudulent real estate loans to defraud the company's customer out of money?

Proposed Rule of Law:

When a company cloaks its agent with apparent authority to issue or sell its products or services, the company has potential liability as principal not only for the misconduct related to the actual products or services sold by the company, but also for the sale of any reasonably related products and services. A loan company may be liable for the acts of its loan officers in selling both approved home mortgage loans and more complex and unapproved investment loans that turn out to be fraudulent.

IV. REASONS FOR GRANTING REVIEW

A. Agency Law Presents Important Questions that Arise Across Nearly All Substantive Areas of Law and Appear Every Day in Modern Business Life.

Nearly every aspect of modern business is conducted through agents for corporations or other business entities. Agency law is significant because, while it does not give rise to independent claims, the issue of whether someone is an agent for a principal can arise in *any* case involving a contractual, common law or statutory tort claim, as evident in this case. Consumers, investors, borrowers, and other individuals do not deal directly with a company, but with the numerous individual representatives of the company who carry its imprimatur and backing in the marketplace.

Companies receive the benefit of substantially spreading their reach through numerous individual agents, but also take on the risk and responsibility that their agents may not be acting within their actual authority as limited by the agent's specific job description. Of course, agents may still be acting within the apparent authority that reasonable customers perceive to exist from the agent's association with their companies even though the agents are acting far beyond their actual authority, even through related illegal conduct. *See Badger v. Paulson Inv. Co.*, 311 Or 14, 24, 803 P2d 1178 (1991) (concluding that apparent authority "arises when the agent does not possess actual or implied authority to act for the principal but the principal has 'clothed the agent with the apparent authority to act for the principal in that particular.'") (Citations omitted). Because of this, agency law incentivizes companies to adequately supervise their agents and ensure they are acting within their authority when dealing with the public.

This case is important, in part, because its facts may arise often. It involves a familiar business entity, a loan or mortgage company, whose loan officer likely exceeded her actual authority (offering mortgages to the public), but engaged in a financial scam that directly arose out of and is related to her actual authority: the agent convinced customers to take out loans on their homes (on the front side of the transaction) in order to invest the proceeds in other "hard money" loans to third parties (on the back side of the transaction). This is

an easily conceived investment scam that is directly connected to the loan officer's actual authority. Loan officers and mortgage brokers, because they have ready access to money from the equity in borrowers' homes, can target unsophisticated borrowers and move their money into new loans or other high-risk investments (such as toxic investment products).

The result of the Court of Appeals' narrow reading of the loan officer's authority discourages mortgage companies, banks, and others that access cash from consumers to supervise their agents in order to prevent very common financial scams that are facilitated by the business's good name and the agent's easy access to the consumer's money.

B. The Court of Appeals' Decision Was Incorrect.

The Court of Appeals' decision also was incorrect and inconsistent with long-standing agency law in this Court. In *Badger*, investors sued a securities brokerage firm when the firm's individual brokers sold investors unregistered securities that were not approved by the firm – a practice common enough in the industry that it has its own defined term called "selling away" or "off-book" sales. *Badger*, 311 Or at 25-26. The Oregon Supreme Court held that even though the securities were not approved, Paulson had given apparent authority to its brokers by giving the public the impression its brokers were authorized to sell securities in general (without providing any limitation on which securities)

and letting the brokers use Paulson's stationery, materials, and facilities to do the same. *Id*.

Applied here, there are facts – and certainly reasonable inferences to be drawn from those facts – that a reasonable consumer would believe that the loan officer was generally authorized to facilitate loans and used her companies' letterhead, cards and facilities in doing so. To a reasonable consumer sitting in a loan agency and presented with complex stacks of documents involving real estate loan transactions, it may appear that the company authorized the agent to offer the real-estate related loans, particularly if the company did not expressly limit the agent's authority with the public.

The Court of Appeals reached a different conclusion by improperly drawing inferences against the plaintiff and narrowly defining the agency to include only offering home mortgages. *Harkness*, 270 Or App at 273. It also simply disregarded evidence where the loan officer used the company's name in advertising and selling the loans even though the company provided the officer with that opportunity. *Id*. at 272 ("Disregard[ing]" evidence where the loan officer used the company name in a flyer and directed checks and payments to the company). As an initial matter, the loan officer's second part of the fraud (facilitating the customers' fraudulent "hard money loans" to developers) was entirely dependent on the initial part of the fraud (accessing the equity in the customer's home though a mortgage). Moreover, the second part of the fraud

involved fraudulent *loans*, and it is certainly a reasonable inference that a customer would apparently believe that a loan officer had authority to facilitate both loans to and from the customer.

The Court of Appeals concluded that it was not objectively reasonable for the plaintiff to believe that the "investment vehicle (hard money loans)" was part of the loan officer's job. *Harkness*, 270 Or App at 273. That inference was reasonable, or at least raised a question of fact for the jury, because the investments were, in fact, loans and the agent was a loan officer.[2] Moreover, whether a real-estate related loan is a security or investment is a complex issue over which even sophisticated attorneys and judges may disagree. *See Bergquist v. International Realty, Ltd.*, 272 Or 416, 426-27, 537 P2d 553 (1975) (holding that an interest in a proposed apartment and a lease-back right in the apartment was a security); *Foelker v. Kwake*, 279 Or 379, 384, n 7, 568 P2d 1369 (1977) (discussing whether a promissory note is a security and citing to cases holding that it is); *Sperry & Hutchinson Co. v. Hudson*, 190 Or 458, 468, 226 P2d 501 (1951) (stating that "it would not only be inadvisable, but also

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[2] See *Ince v. AMEV Investors, Inc.*, 122 Or App 66, 70, 857 P2d 165 (1993):

> The business card was-or could be found by a fact finder to be-a manifestation by [the potential principal] AMEV that [the potential agent] Kaneen had authority to act for it. Moreover, AMEV does not contend that it had no representative relationship with Kaneen; it argues only that his involvement in the G/A investment was outside his actual or apparent authority. *Assuming arguendo that that question is relevant, it also is a question for the trier of fact.*

impossible to lay down any fixed rule for determining in every case that might arise just what is or is not a 'security'[.]")

In fact, the Oregon Securities Laws define a security to include "a note * * * bond, debenture, evidence of indebtedness * * * *real estate paper sold by a broker-dealer, mortgage banker, mortgage broker* or [certain banks, financial holding companies and similar financial institutions] * * *." ORS 59.015(19)(a) (emphasis added). Real estate paper includes "any obligation secured or purportedly secured by an interest in real property." ORS 59.015(15). The line between a simple, secured mortgage and a security is very thin, if there is a difference at all in many cases. Although this case does not need to address whether the loans offered here were securities, there is certainly at least a disputed issue about whether a reasonable person would perceive a loan officer to be within their agency when giving investment advice tied to loans.

V. CONCLUSION

For the reasons stated above, OTLA respectfully requests that this Court grant the Amended Petition for Review.

DATED this 26th day of May, 2015.

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CERTIFICATE OF COMPLIANCE

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 1,965 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 in ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 26, 2015, I filed the original of **OREGON TRIAL LAWYERS ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF AMENDED PETITION FOR REVIEW** with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

All participants in this case are registered eFilers and will be served via the electronic mail function of the eFiling system. If any are not current upon filing, they will be served a copy by United States mail and a courtesy electronic copy by electronic mail.

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