IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW, ELLEN ROSENBLUM, ATTORNEY GENERAL; AND OREGON DEPARTMENT OF JUSTICE

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the District Court for Lane County
Honorable KARSTEN H. RASMUSSEN, Judge

Opinion Filed: March 9, 2016
Court of Appeals Opinion
Author of Opinion: Egan, J.
Before: Armstrong, P.J. and Hadlock, C.J.

Continued…

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INTRODUCTION

Every year, the Department of Justice's Consumer Protection section receives hundreds of complaints from consumers who have been preyed upon by deceptive businesses, and one of the most common sources of complaints is the conduct of unscrupulous debt collectors. The worst offenders use threatening, misleading, or fraudulent tactics, and deliberately try to turn a profit by taking advantage of the consumers' lack of resources and their ignorance of their contractual and legal rights. To address that widespread problem, the legislature has authorized the department under the Unlawful Trade Practices Act (UTPA) to bring a civil action to stop anyone from using deceptive or unconscionable tactics when collecting a debt.

The issue in this case is whether the department's authority under the UTPA allows it to investigate and prosecute deceptive debt collection practices used by a law firm that is in the business of recovering consumer debt. Plaintiffs—a lawyer and his law firm—file thousands of complaints against consumers each year on behalf of lenders and debt purchasers, seeking to recover unpaid credit card bills and other forms of consumer debt. The department has alleged that in the course of that business, plaintiffs violated the

UTPA by making false or misleading claims in their pleadings, allowing the firm to profit from the debtor's ignorance and lack of resources. Yet plaintiffs contend that a law firm's debt collection practices are not subject to the UTPA, and that the department has no authority under the UTPA to intercede in what they characterize as merely a dispute between "litigation adversaries." Plaintiffs are wrong. Other courts around the country—including the United States Supreme Court—have rejected similar attempts by lawyers who are in the business of filing debt collection lawsuits to avoid consumer-protection statutes, and this court should do the same thing. The text and history of the UTPA demonstrate unequivocally that the legislature intended the UTPA to afford broad protection for vulnerable consumers against deceptive debt collection practices. As correctly construed, the UTPA is easily broad enough to encompass the kind of conduct that the department has alleged here.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

First Question Presented

> Under ORS 646.607(1) it is an unlawful trade practice for a person in the course of his or her business or occupation to use "any unconscionable tactic * * *in connection with" the "collection or enforcement of an obligation." Does that provision apply to unconscionable practices employed by a law firm that collects consumer debt on behalf of its clients?

First Proposed Rule of Law

> Yes. The text, context, and legislative history of ORS 646.607(1) unambiguously demonstrate that the legislature intended the law to apply

broadly to unconscionable debt collection tactics by anyone, including a law firm that uses such tactics in the course of its debt collection business.

Second Question Presented

Under ORS 646.608(1)(b), it is an unlawful practice for any person in the course of his or her business or occupation to "[c]ause[] likelihood of confusion or of misunderstanding as to, among other things, the source, sponsorship, approval, or certification" of a loan or extension of credit. Does that provision apply to the practices of a law firm acting as a third-party debt collector if those practices cause "confusion" and "misunderstanding" to the debtors about their loans?

Second Proposed Rule of Law

Yes. A law firm that engages in debt collection practices that cause "confusion" and "misunderstanding" to the debtors about their loans and their obligations regarding those loans commits an unlawful practice under ORS 646.608(1)(b).

SUMMARY OF MATERIAL FACTS

A. After investigating complaints from consumers, the department notifies the Gordon firm of its intent to seek an injunction for violations of the UTPA and UDCPA.

Daniel Gordon is a licensed Oregon attorney and president of plaintiff Daniel N. Gordon, P.C. ("the Gordon firm," or simply "Gordon"), a law firm that represents creditors and debt collectors in efforts to collect on debts, typically defaulted consumer credit card debt. (TCF 278; 280). The firm itself does not purchase debt, but represents clients and is active in "all stages of debt collection activity." (TCF 278). As part of its practice, the firm files thousands of debt collection lawsuits against consumers each year. In one year alone, for example, the firm pursued collection actions against more than 16,000 debtors

and obtained a judgment against more than 9,000 of them. (TCF 94; TCF 279-80). When consumers do not respond to the complaints and the firm obtains default judgments. The firm then collects on the debt through garnishment or other processes available to judgment creditors. (TCF 276)

For several years, the department's Consumer Protection section received numerous complaints regarding the Gordon firm's debt collection practices. (TCF 275). Those complaints led the department to conduct a preliminary investigation, and then to serve the law firm with a "civil investigative demand" (CID) requesting responses to interrogatories and requests for documents. (TCF 274-75).

As part of its investigation, the department reviewed several of the complaints that the Gordon firm had filed in its collection cases. (TCF 276). In all of the complaints that the department reviewed, the Gordon firm alleged a non-statutory right to attorneys' fees and to interest on the underlying debt. *Id*. Yet many of the complaints did not attach the credit card member contract that allegedly provided the right to fees or interest, and in some complaints, the firm had attached the wrong contract. *Id*. In addition, in some cases the firm failed to follow the choice-of-law provision in the applicable card member agreement, applied the wrong interest rate, or filed suit after the statute of limitations had run. *Id.*

The department determined that the Gordon firm was "systematically"

filing complaints seeking fees and interest awards despite lacking any evidence to support such awards—without having the applicable contract to determine whether it was entitled to attorney fees or interest, and without telling the court or the consumer that it did not have the contract. (TCF 25). As a result plaintiffs made false or misleading representations about its entitlement to such fees. *Id*. The department could not determine from the information that Gordon provided in response to the CID what percentage of cases ended in a default judgment, or how often default judgments resulted in collection through garnishment.[1] But the department was aware that consumers who had defaulted on credit card debt frequently do not respond to such lawsuits, because they lack both the legal or financial resources to understand what is in the complaint or the consequences of not responding, and because they assume if they owe the underlying debt there is no point in challenging such a complaint. (TCF 275-76). The department thus concluded that the Gordon firm had engaged in "a pattern of practice of 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

[1] (TCF 275-76). In response to an interrogatory seeking that information, Gordon indicated that it was unable to determine a way to conduct a computer search that would yield that information. (TCF 280).

claim." *Id*.

Based on the totality of its investigation, the department concluded that it had probable cause to sue to enjoin Gordon and its attorneys for violating the Unlawful Trade Practices Act and the Unlawful Debt Collection Protection Act, and specifically for violating ORS 646.607(1), ORS 646.608(1)(b), and ORS 646.607(6). (TCF 275-77). The department then notified Gordon of its intent to sue the firm to enjoin its debt collection activities unless Gordon agreed to voluntarily abide by certain conditions, as set forth in an Assurance of Voluntary Compliance (AVC).[2] (TCF 277). The proposed AVC would have required Gordon to provide clearer information to consumers when sending validation notices, to attach to any civil complaint information about any debt that was charged off by the original creditor, to stop attempting to collect time-barred debt, and to stop seeking attorney fees as part of any default judgment. (TCF 103-104).

[2] *See* ORS 646.632 (describing procedures for enjoining unlawful trade practices and the use of an AVC to avoid litigation).

B. The trial court issues a declaratory judgment enjoining the department and declaring that neither the UTPA nor the UDCPA apply to the Gordon firm's debt collection practices

The Gordon firm declined to execute the AVC and instead filed an action for declaratory and injunctive relief in circuit court. In particular, Gordon sought the following declarations:

- Count 1: A declaration that "ORS 646.608(1)(b) and ORS 646.607(1) do not apply to plaintiffs' collection activities taken on behalf of their clients as to third-parties";
- Count 2: A declaration that Gordon, in his capacity as an attorney, is not subject to the UTPA or UDCPA;
- Count 3: A declaration that "plaintiffs' litigation activities as complained of by defendants are not subject to the UDCPA"; and
- Count 4: A declaration that defendants' attempts to regulate plaintiffs' activities in the practice of law violated Article III, section 1, of the Oregon Constitution by interfering with the judiciary's powers.

(TCF 51). Gordon also requested an injunction to prohibit the department from enforcing the UTPA or UDCPA against plaintiffs in their litigation activities. *Id*. The department answered that plaintiffs are subject to the UTPA and UDCPA and denied that they were entitled to any relief. (TCF 109-113).

The parties moved for summary judgment on all claims. Following a hearing, the trial court concluded that the Gordon firm's debt collection practice was not subject to regulation under either the UTPA or the UDCPA. In particular, with respect to the UTPA, the court concluded that ORS 646.607(1) requires that any violation arise from a "business transaction" that the violator is a party to, and that ORS 646.607(1) did not apply to Gordon's debt collection

practices because the firm was not a party to any transaction with the debtors they pursue. (ER 313). Similarly, the trial court concluded that ORS 646.608(1)(b) also requires that any violation must arise from a "transaction" that the violator is a party to, and that ORS 646.608(1)(b) also did not apply to the Gordon firm's debt collection practices. (TCF 312). With respect to the UDCPA the court concluded, based on this court's case law, that the "filing of lawsuits is not an improper debt collection practice." (*Id.*).

C. The Court of Appeals reverses the trial court's judgment in part and affirms in part.

The department appealed the trial court decision, and the Court of Appeals reversed in part and affirmed in part. With respect to the UTPA provisions, the Court of Appeals concluded that both ORS 646.607(1) and ORS 646.608(1)(b) were broad enough to reach a law firm's practice of filing deceptive pleadings that make "misrepresentations directly to debtors to the debtors' detriment." *Daniel N. Gordon, PC v. Rosenblum*, 276 Or App 797, 813–14, 370 P3d 850, 859–60 (2016). In reaching that conclusion, the Court of Appeals ruled that the trial court had erred in concluding that the UTPA requires that any violation arise from a "business transaction" to which the violator itself is a party. But with respect to the UDCPA, the Court of Appeals agreed with the trial court's conclusion that that law did not apply to plaintiffs' alleged litigation conduct. In particular, the Court of Appeals agreed that under

Porter v. Hill, 314 Or 86, 838 P2d 45 (1992), a lawyer's debt collection litigation practices are categorically exempt from the UDCPA. *Id*. at 819.

SUMMARY OF ARGUMENT

As the Court of Appeals correctly concluded, the Gordon firm's third-party debt collection practices are not exempt from the UTPA, and, in particular, those practices are subject to both ORS 646.607(1) and ORS 646.608(1)(b).

ORS 646.607(1) prohibits any person from employing "unconscionable tactics" in connection with "collecting or enforcing an obligation." The Gordon firm's alleged practices fit within the plain, ordinary meaning of those words. Indeed, in this court, plaintiffs do not dispute that. Instead they claim that, notwithstanding the ordinary meaning of the statute's terms, the list of examples of "unconscionable tactics" in the statute *implicitly* demonstrates that the legislature intended the ORS 646.607(1) to reach only tactics that a business employs against its own customers, and not against a debt collector whose relationship to consumers is purely adversarial.

But if the legislature had wanted to narrow the scope of the statute in that way, it could have and would have said so explicitly. And it is clear from the text and legislative history that such a narrow scope is not at all what the legislature wanted—on the contrary, it wanted just the opposite. The very purpose for extending ORS 646.607(1) to those "collecting * * * an obligation"

was to give the department broad jurisdiction over unconscionable collection practices by debt collectors. This court should reject plaintiffs' attempt to insert into the statute words that are not there, particularly when the words would subvert the statute's purpose.

ORS 646.608(1)(b) prohibits any person in the course of his business from causing "likelihood of confusion or of misunderstanding" as to, among other things, "the source, sponsorship, approval, or certification" of a "loan or an extension of credit." By its plain terms that provision applies to plaintiffs' alleged practice of filing complaints in which they misrepresented what was owed and to whom. In arguing to the contrary, plaintiffs make no attempt whatever to explain why the text of that provision does not include their alleged misconduct, nor do they point to anything in the legislative history that would suggest the provision means anything other than what it says. Instead, they argue only that interpreting the provision to apply to them would be inconsistent with what they claim is the UTPA's overarching purpose—regulating a business's transactions with its customers. As an initial matter, plaintiffs' characterization of the statute's purpose is wrong. The UTPA is a remedial consumer-protection statute designed to protect consumers, not just from those who try to sell them goods and services directly, but from any business—including a debt collection law firm—that would prey upon consumers in a variety of contexts including debt collection. But in any case,

the general purpose of the UTPA is beside the point, because plaintiffs' argument fails as a matter of statutory construction. Whatever a statute's overall purpose might be, that purpose cannot trump the plain language of the statute, or justify reading the provision to say something other than what it says. Plaintiffs' alleged conduct violates the plain terms of the statute.

Plaintiffs also contend that even if ORS 646.607(1) or ORS 646.608(1)(b) were intended to apply to third-party debt collectors generally, it would be or "inappropriate," or even unconstitutional, to apply the statute to the litigation practices of lawyers who are engaged in debt collection. But nothing in the text of the statutes suggests an exception for lawyers. Nor is there any good reason to read such an exception into the provisions. On the contrary, there are good reasons not to have such an exception. In fact, when Congress initially enacted federal law to protect consumers from debt collection practices, it initially included an exception for lawyers. But it has long since repealed that exception, after it became clear that some of the lawyers who were operating debt collection businesses —business exactly like the one the plaintiffs operate—were taking advantage of consumers and were exploiting the lawyer exemption to attract business. For those reasons, the United States Supreme Court and other courts have recognized that consumer-protection laws that regulate debt collection practices *do* apply to the litigation practices of debt collection law firms exactly like that of plaintiffs. This court should reach the

same conclusion in interpreting the UTPA provisions here.

This court should affirm the judgment of the Court of Appeals.

ARGUMENT

The legislature enacted the UTPA to protect consumers by prohibiting a wide variety of predatory and unscrupulous practices. As correctly construed, among the practices that ORS 646.607(1) and ORS 646.608(1)(b) prohibit is the filing of deceptive and misleading debt collection lawsuits against unsophisticated consumers. In arguing to the contrary, plaintiffs urge this court to adopt a narrow interpretation of those provisions that would effectively shield plaintiffs from regulatory oversight and allow them to file deceptive lawsuits and take advantage of unsophisticated consumers. As explained below, that is not what the legislature intended.

To determine whether ORS 646.607(1) and ORS 646.608(1)(b) apply to plaintiffs' debt collection practices, this court must construe each of the two provisions using the familiar methodology for statutory construction—examining the text, context, and legislative history, and, to the extent that it necessary, applying appropriate canons of construction. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143(1993). Applying that method here shows that plaintiffs' debt collection practices fall squarely within the scope of each the two provisions.

A. ORS 646.607(1) prohibits any business—including a debt collection law firm like the Gordon firm—from using unconscionable tactics in collecting a debt.

1. The text and context of ORS 646.607(1) unambiguously demonstrate that the legislature intended it to apply to the tactics of third-party debt collectors like plaintiffs.

a. The plain, ordinary meaning of the statute's terms encompasses the tactics of third-party debt collectors.

The best evidence of the legislature's intent is the text of the statute. ORS 646.607(1) provides:

> 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;

That provision thus provides that an "unlawful practice" occurs if four criteria are met: (1) a "person" (2) who "in the course of the person's business, vocation or occupation" (3) "employs any unconscionable tactic (4) in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation[.]"

Here, the specific disagreement between the parties about the correct interpretation of that provision is narrow. Plaintiffs do not dispute that an attorney or law firm is a "person" for purposes of the provision,[3] nor do they

[3] Under ORS 646.605(4), the term "person" for purposes of the UTPA means "natural persons, corporations, trusts, partnerships, incorporated

Footnote continued…

dispute that filing a debt collection lawsuit constitutes acting "in the course of the person's business, vocation, or occupation." And they also do not dispute that their litigation practices in the course of those suits are "in connection with * * * collecting or enforcing an obligation." (BOM 17). Thus there is no dispute that the practices at issue meet three of the four criteria.

Where the parties part ways is in regard to what the legislature meant by the phrase "any unconscionable tactic." In ordinary parlance, "unconscionable" means "not guided or controlled by conscience : UNSCRUPULOUS" or "lying outside the limits of what is reasonable or acceptable." *Webster's Third New Int'l Dictionary* 2486 (unabridged ed. 2002). And the word "tactic" refers simply to "a device or expedient for accomplishing an end: MANEUVER." *Id.* at 2327. In addition, this court and the court of appeals have frequently noted that the legislature's purpose in including the term "any" is to make a provision "broadly inclusive." *See, e.g.*, *Totten v. New York Life Ins. Co*., 298 Or 765, 771, 696 P2d 1082 (1985) (use of the term "any" was intended to give an insurance policy's exclusion clause a broad meaning); *Oregon State Denturist Assn. v. Board of Dentistry*, 172 Or App 693, 702, 19 P3d 986 (2001) (the legislature's use of the article "any" indicated an intent that the definition be

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(…continued)
or unincorporated associations and any other legal entity except bodies or officers acting under statutory authority of this state or the United States."

"broadly inclusive").[4]

Taken together, then, the phrase "any unconscionable tactic" refers broadly to whatever kind of unscrupulous or unreasonable maneuvers a person might employ to achieve some end. That is an expansive definition, and one that by its terms would not be limited only to conduct that was target at a business's own customers, but would also include the unconscionable tactics employed by a third-party debt collector. The conduct that plaintiffs are alleged to have engaged in here thus falls easily within the scope of the statute's plain terms.

b. Plaintiffs' contention that the statute is limited to tactics employed against one's customers is not consistent with statute's text or context.

For their part, plaintiffs do dispute that their alleged misconduct fits within the ordinary, plain meaning of "any unconscionable tactic." Instead they argue that the legislature did not intend the phrase to have its ordinary meaning, but intended the phrase to mean something narrower.

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[4] The definition of the adjective "any" includes, as relevant here, "one indifferently out of more than two: one or some indiscriminately of whatever kind* * * used as a function word esp. in interrogative and conditional expressions to indicate one that is not a particular or definite individual of the given category but whichever one chance may select * * * b: one, no matter what one: EVERY." *Webster's Third New Int'l Dictionary 97* (unabridged ed. 2002) (emphases added).

Plaintiffs' argument focuses on ORS 646.605(9), which provides several examples of conduct that would constitute "unconscionable tactics":

> "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 service member or a service member in active service, or the spouse of a disabled veteran, disabled service member or service member in active service. * * *

Plaintiffs note that each of the four examples listed in that provision involves unsavory actions taken by a person against "a customer." Applying the principle of "ejusdem generis," plaintiffs reason that the legislature must have intended "unconscionable tactics" to be limited only to unconscionable actions that a person uses against customers. Plaintiffs thus contend, "[t]hrough 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." (BOM 20). Plaintiffs further reason that because the general purpose of the UTPA is to protect consumers, the legislature must have intended "unconscionable tactics" to be conduct involving not just anyone's "customers," but only those customers who are acting as consumers of the goods and services of the person engaging in the offending conduct. Plaintiffs thus ultimately arrive at the conclusion that the "more plausible" meaning of the phrase "any unconscionable tactic" is "any unconscionable tactic directed toward one's own customers." (BOM 21-23).

There are several difficulties with plaintiffs' interpretation, the most obvious of which is that it adds words to the statute that are not there. That is not a permissible method of interpreting a statute. ORS 174.010 (providing that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted"). The statute says "any unconscionable tactic," not "any unconscionable tactic directed toward one's own customers."

Another problem with defendant's argument is that it also ignores words that *are* there, and that is not allowed either. ORS 174.010. By its terms, the statute says "any" unconscionable tactic—without restriction. The legislature used the word "any" for a reason. Plaintiffs' narrowing construction fails to address or account for that. *C.f., Quintero v Bd of Parole & Post-Prison*

Supervision, 329 Or 319, 325, 986 P2d 575, 578 (1999) (interpreting statute that applied to "any decision * * * including" various examples as applying only to the examples would ignore the use of the word "any" and is not plausible). At the same time that the legislature used the word "any" in ORS 646.607(1), the legislature was careful to state in ORS 646.605(9) that the list of examples of unconscionable tactics in that provision is *not* exhaustive, indicating its intent that unconscionable tactics "includes but is not limited to" just those examples. That language demonstrates that the legislature's purpose in providing the examples was not to put a limitation on the kinds of conduct that was *necessary* to be "unconscionable," but rather to illustrate some of the conduct that could be *sufficient*. *See id*. (concluding that legislature's use of the phrase "any decision * * * including" followed by examples indicated examples were intended to illustrate not limit, and legislature reasonably could believe that an illustrative list would be helpful and include it on that basis). But plaintiffs' proposed interpretation runs counter to that express intent by proposing to find a significant necessary condition—the existence of a "customer" relationship—implicit in the examples themselves.

As noted, plaintiffs purport to find justification for flouting those basic tenets of statutory construction in application of the principle of *ejusdem generis*, but plaintiffs push the application of that principle beyond its breaking point. Where applicable, the principle of *ejusdem generis* "serves to confine the

interpretation of the general term according to one or more common characteristics of the listed examples." *State v Kurtz*, 350 Or 65, 74, 249 P3d 1271, 1276 (2011). But where, as here, the legislature has expressly signaled its intent that the examples it is providing are not to be regarded as restrictive or limiting, this courts should be wary of a party's suggestion that the legislature nevertheless intended to tacitly narrow the scope of the statute based on some common characteristic of the examples provided. *See id.* ("The legislature * * * can alter the calculus by signaling that it does not intend to confine the scope of a general term in a statute according to the characteristics of listed example.") *See also*, *Schmidt v. Mt. Angel Abbey*, 347 Or 389, 223 P3d 399 (2009).

This court should be especially cautious when the common characteristic identified across a set of examples has little or nothing to do with the legislature's purpose in providing the examples in the first place. Here, the legislature's purpose in providing the examples is to illustrate the kinds of conduct that would rise to the level of being "unconscionable": Collectively, they make clear that attempting to profit by knowingly taking advantage of a person's ignorance is a tactic sufficiently "unscrupulous" or "outside the bounds of what is reasonable or acceptable" as to be "unconscionable" for purposes of the statute. Yet plaintiffs are not asking the court to apply the principle of ejusdem generis to get a clearer picture of what "unconscionable" means. Rather, they are asking the court to use the principle of ejusdem generis

to infer the existence of an additional requirement—beyond unconscionability—about the kind of *relationship* that must exist between a business and a consumer who is affected by that business's unconscionable practices in order for the business's conduct to fall under the UTPA. If the legislature wanted to create such a relational requirement, it could have said explicitly. But this court should not infer the existence of such a requirement from a list of examples that were intended to illustrate the meaning of "unconscionable."

A much more likely explanation for the fact that the examples supplied by the legislature all describe transactions with a "customer" is simply that the vast majority of conduct actionable under ORS 646.607(1) is conduct by a business against its own customers. The statute applies to a business engaging in unconscionable tactics "in connection with the sale, rental or other disposition of real estate, goods or services, or collection or enforcement of an obligation," and most of the time that may indeed involve taking advantage of a customer. But just because the majority of the time the law applies to a certain category of offender, it does not follow that the law only applies to that category. What matters is the solution to the problem that the legislature adopted. *See South Beach Marina, Inc. v. Dept. of Rev.*, 301 Or 524, 531, 724 P2d 788 (1986) ("Statutes ordinarily are drafted in order to address some known or identifiable problem, but the chosen solution may not always be

narrowly confined to the precise problem. The legislature may and often does choose broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention."). The legislature may not have included a third-party debt collection example in its list of illustrative examples in ORS 646.605(9), but that is hardly a basis for ignoring the plain meaning of ORS 646.607(1).

c. Even assuming that the legislature intended the statute to apply only to unconscionable tactics employed against a "customer," it would still apply to a law firm's third-party debt collection.

Finally, even if the principle of ejusdem generis did apply here, it would not advance plaintiffs' argument. The most one possibly might infer from the application of ejusdem generis in this circumstance is that the legislature intended "unconscionable tactics" to be limited to those tactics that were directed at "a customer." But a law firm attempting to recover consumer debt from the customer of a client credit card company *is* interacting with "a customer." A customer is a person who buys and receives real estate, goods, or services. As the Court of Appeals correctly recognized, "each debtor that [plaintiffs] pursue a debt against is 'a customer' —that is, the debtor is a customer of the credit card company." *Gordon*, 276 Or App at 813. Indeed it

precisely *because* they are "customers" of the firm's clients[5] that plaintiffs are filing complaints against the debtors whom they sue. Those debtors are "customers" because they bought goods and services from plaintiffs' clients and they are in debt as a result. In filing lawsuits on behalf of its clients to recover that debt, plaintiffs' litigation tactics are tactics it employs against those customers.

As noted, plaintiffs try to avoid this result by adding words to the statute—they insist given the overall purpose of the statute is "consumer protection," that "a customer" must actually mean "a customer of the person engaged in the unconscionable tactic." (BOM 24-25). Respectfully, however, that is a non sequitur. The policy of the statute is indeed to protect consumers, and on that much the department wholeheartedly agrees. But those who are subjected to "unconscionable tactics" by debt collectors *are* consumers, even if they do not happen to be consuming the goods and services that the debt collector provides. It is by virtue of one's status as a consumer that one gets into debt in the first place. And the debt that plaintiffs and other debt collectors are trying to recover is consumer debt. It is thus entirely consistent with the UTPA's "consumer protection" purpose that ORS 646.607(1) would be

[5] Or in some cases, customers of lenders who then sold the debt to plaintiffs' clients.

intended to apply to debt collection practices against consumers by third-party collectors such as plaintiffs to recover consumer debt.

In fact, it would be inconsistent with the statute's purpose to read it otherwise. As noted, ORS 646.607(1) specifically applies to the use of unconscionable tactics in connection with, among other things, "collecting or enforcing an obligation." Thus, it is indisputable (and not disputed) that the legislature wanted the statute to apply to unconscionable tactics used in *debt collection*. Yet under plaintiffs' reading of the statute, the statute would not apply to debt collection at all, except in the circumstance in which a lender was collecting a debt from one of its own customers. But a substantial amount of debt collection is done by law firms and third-party collection agencies. Plaintiffs do not identify any plausible reason why the legislature would want to include debt collection yet exclude third-party debt collectors in that way. Nor is there any plausible reason for doing so: It makes no sense, from a policy perspective, that the legislature would be concerned with protecting a consumer who is subjected to unconscionable debt collection tactics by the person from whom they incurred the debt, yet not concerned with protecting that same consumer from the same unconscionable tactics if the consumer's debt happened to have given to third party to collect.

In short, plaintiffs' suggestion that this court construe ORS 646.605(9) as a tacit attempt by the legislature to narrow the scope ORS 646.607(1) and to "express[] its intent that there cannot be an unconscionable tactic unless the prohibited conduct is directed toward * * * a customer of the person committing the unconscionable tactics" conflicts with the text and purpose of the statute and is not plausible. ORS 646.607(1) applies to any unconscionable tactics in connection with collecting a debt, including plaintiffs' alleged litigation tactics.

2. The legislative history confirms that ORS 646.607(1) applies to third-party debt collection practices.

Even if the legislature's intent is clear from the statute's text, this court still may turn to the legislative history for confirmation of that intent. *See, e.g.*, *Janowski/Fleming v. Board of Parole*, 349 Or 432, 450, 245 P3d 1270 (2010) (reviewing the legislative history of unambiguous statute to confirm "what the legislature had in mind"). Here, the legislative history is consistent with the statute's plain text, and it does not support plaintiffs' contention that ORS 646.607(1) applies only to debt collection practices employed against one's own customers.

a. The legislature's general purpose in enacting ORS 646.607(1) was to expand the Attorney General's regulatory authority.

ORS 646.607(1) was first enacted in 1977 as Section 4 in Senate Bill (SB) 269 (1997). Or Laws 1977, Ch 195, § 4. By that time, the UTPA had

already been in place for six years.[6] To understand why the legislature adopted ORS 646.607(1), therefore, it is helpful first to back up six years to when the UTPA was first enacted.

In the 1960s and 1970s states around the country were adopting consumer-protection statutes, and the statutes generally took one of three forms —either they created a generally worded prohibition against unfair practices, which was litigated on a case-by-case basis, or else they actually enumerated a "laundry list" of specifically forbidden practices, or they did both.[7] Oregon's 1971 law, which was based on the Federal Trade Commission's proposed Unfair Trade Practices and Consumer Protection Law, took the third approach. In adopting what is now ORS 646.608, the legislature provided a "laundry list" of specifically enumerated unlawful practices. In addition, ORS 646.608(1)(u) includes a "catchall," which make it unlawful to "engage[] in any other unfair or deceptive conduct in trade or commerce." But Oregon's catchall is unusually narrow, because no conduct is actionable under that provision unless the

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[6] Oregon first adopted a consumer-protection statute in 1965, but the first statute was weak and ineffective. In 1971, the legislature repealed the earlier law and adopted the UTPA. *See* Ralph James Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience*, 54 Or L Rev 117, 119 (1975).

[7] *See* Mooney, *supra* note 7, at 120-22; *see also* Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 Or L Rev 639 (1994).

Attorney General has first promulgated a rule declaring that the specific conduct is an unfair conduct in trade or commerce. ORS 646.608(4).[8]

That context helps to explain what the legislature was doing in 1977 when it enacted ORS 646.607(1). That provision complemented the "laundry list" in ORS 646.608 and expanded the UTPA by adding a broader catchall prohibition that made it unlawful to "engage[] in any unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation." ORS 646.607(1). The new provision was enforceable only by the Attorney General or a district attorney, and (unlike the list of unlawful practices listed in ORS 646.608) it did not include a private right of action.[9]

Also in 1977, soon after it enacted ORS 646.607(1), the legislature passed the UDCPA. That law identified, in "laundry list" form, several specific debt collection practices that are unlawful. ORS 646.639. For each of the specific practices, the UDCPA created *only* a private right of enforcement— it

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[8] Commentators criticized that rulemaking requirement as unduly limiting the scope and flexibility of the law. *See* Mooney, *supra* note 7, at 122-23 (discussing, and lamenting, Oregon's unusually narrow catchall); Bender, *supra* note 8, at 646-47.

[9] The UTPA gives public enforcement authority to the Attorney General and to any district attorney. *See* ORS 646.605(5) (defining "prosecuting attorney"). In addition, the act allows for private enforcement actions for anyone aggrieved by violations of the specific practices listed in ORS 646.608. ORS 646.638.

did not create a separate cause of action enforceable by the Attorney General. Thus, the broader "catchall" in ORS 646.607(1) complemented the UDCPA in much the same way that it complemented ORS 646.608, but in the realm of debt collection: Under ORS 646.607(1), the Attorney General could bring actions for "any unconscionable tactics" by debt collectors, whereas under the UDCPA private citizens (but not the Attorney General)[10] could bring actions against debt collectors only for the specifically enumerated practices.

That history contradicts the notion that ORS 646.607(1) reaches debt collection only from one's own customers. The purpose was to give the Attorney General broad authority over unconscionable tactics in the realm of trade and commerce, including broad authority over practices by debt collectors generally.

b. One of the specific purposes of ORS 646.607(1) was to give the department authority to stop unconscionable tactics by any debt collectors.

Other aspects of ORS 646.607(1)'s history suggest even more directly that the statute was intended to authorize the department to investigate unlawful practices by *all* debt collectors, not just those who happened to be collecting debts from their own customers. At a committee hearing on Senate Bill 269,

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[10] That changed in 2009, when the legislature also gave the Attorney General explicit authority to enforce the various provisions of the UDCPA. ORS 646.607(6).

Paul Romain, Chief Counsel for the Consumer Protection Division of DOJ, the sponsor of that bill, testified at length about the purpose of that bill. He explained that the proposed legislation arose in response to *Haeger v. Johnson*, 25 Or App 131, 135, 548 P2d 532 (1976), a case in which the Court of Appeals held that the UTPA applied only to the "sale" of goods and services, and not to "loans" or "extensions of credit."[11] Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 269, Mar 7, 1977, Tape 12, side 1 (statement of Paul Romain).

Romain spoke about the purpose of Section 4, which was to bring debt collectors within the "jurisdiction" of DOJ. Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 269, Mar 7, 1977, Tape 12, side 1 (statement of Paul Romain). Romain explained to the committee that at that time, debt collectors were unregulated. *Id*. (explaining that "the problem that we have is that in actual collection of that obligation there is really nobody out there that regulates that"). Romain testified that Senate Bill 269 would change that and permit DOJ to have enforcement power over debt collectors,[12] even though the underlying "loans" or "extensions of credit" would remain exempt

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[11] The legislature added "loans" and "extensions of credit" to the definition of "real estate goods and services" in ORS 646.605(6) in 2010. Or Laws 2010, ch 94, § 1.

[12] Romain explained that because of the novelty of this provision, Section 4 would not allow for a private cause of action at that time. *Id*.

from the UTPA in light of *Haeger*:

> We do want jurisdiction over collection practices no matter who engages in collection practices. We need the jurisdiction over that. There's an awful lot of out-of-state collectors—most of the in-state collectors are reasonably good collectors—we have surprisingly little problem with them. But an awful lot of the out-of-state collectors give us an awful lot of problems. And we feel we should have jurisdiction over that.

Id. (tape counter 350).[13] Romain's testimony confirms that the underlying purpose of ORS 646.607(1) was to authorize DOJ to pursue debt collectors that engaged in "unconscionable tactics."

c. Plaintiffs' legislative history argument is without merit.

In looking for support in the legislative history for their position, plaintiffs do not confront the statements discussed above. Instead they focus on the measure summary that was distributed at the time that ORS 646.607(1) was enacted. That measure summary, they note, does not say anything about giving the Attorney General the authority to stop "litigation activities by lawyers" who

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[13] Mr. Romain also provided testimony for the bill that became the UDCPA. HB 2009 1977. In February 9, 1977 testimony to a House committee he discussed SB 269, which was also before the legislature at the time. According to the tape log, Romain described SB 269 as "not dealing at all with collection agencies, just consumer protection." Tape Log, House Committee on Consumer and Business Affairs, HB 2009 1977 (Feb 9, 1977). That statement is somewhat confusing, given that he told the legislature when discussing SB 269 that the department wanted jurisdiction over debt collectors of any kind. But a likely explanation is that Romain was indicating that unlike the UDCPA, which listed specific unlawful practices by collection agencies, SB 269 focused more broadly on unconscionable conduct to consumers by anyone.

have a consumer debt collection practice. But if the law were going to have that effect, they reason, it would not have gone unmentioned. From the lack of any mention in the measure summary, thus plaintiffs urge this court to infer that the legislature could not have intended to the law to have that effect. (BOM 29).

This court should decline to infer from the absence of any statement in the measure statement that the statute means something other than what it says. As this court has stated on a number of occasions, silence in the legislative history of a statute is a dubious basis from which to draw any reliable conclusions about the legislature's intent. *Lake Oswego Preservation Society v. City of Lake Oswego,* 360 Or 115, 129, ––– P3d ––– (2016) ("[N]egative inferences based on legislative silence are often unhelpful in statutory interpretation."); *Weldon v. Bd. of Lic. Pro. Counselors and Therapists*, 353 Or 85, 100, 293 P3d 1023 (2012) (declining to find legislative intent from silence). Here, the measure statement identified the most controversial elements of the bill, including issues about the extent to which the UTPA would cover landlord-tenant disputes. The absence of any mention of the authority of the department to stop unconscionable conduct by debt collectors very likely reflects the fact that the issue was not at all controversial. *See Wyers v. Am. Med. Response Nw., Inc.*, 360 Or 211, 226, 377 P3d 570 (2016) (noting that "a proposed legislative change to the status quo might not prompt comment precisely

because everyone understands that the law will have that effect or because supporters do not wish to draw attention to it"). But its absence certainly does not warrant ignoring the text of the bill as it was enacted.

In sum, the legislative history confirms the unambiguous meaning of ORS 646.607(1) as discerned from its text and context, that ORS 646.607(1) permits the department to investigate and initiate actions against third-party debt collector for the use of unconscionable tactics while collecting debts.

3. The relevant canons of construction also support the conclusion that the ORS 646.607(1) applies to plaintiffs' debt collection practices.

Where a statute remains stubbornly ambiguous even after examination of its text, context, and history, this court can resort to the canons of construction to help resolve the issue. There is no need to resort to canons here, because the text, context, and legislative history all unambiguously demonstrate that ORS 646.607(1) applies to plaintiffs' alleged misconduct. But in any event the relevant canons of construction only serve to further the same conclusion.

"It is * * * an ancient maxim that remedial statutes are to be construed liberally to effectuate the purposes for which they were enacted." *Halperin v. Pitts*, 352 Or 482, 495, 287 P3d 1069 (2012) (citation omitted). The UTPA is a consumer-protection statute and should be construed consistently with those purposes. *Cullen v. Investment Strategies, Inc.*, 139 Or App 119, 128, 911 P2d 936, 941 (1996) (citing *Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85,

90 n 4, 566 P2d 1177 (1977)). Here, ORS 646.607(1) is a part of legislation designed to protect consumers from the employment of "unconscionable tactics," including even in the collection or enforcement of an obligation. This court should not construe that provision in a way that would allow creditors to avoid liability under ORS 646.607(1) simply by hiring an agent, attorney, or other third party to do the exact same thing that the creditor could not do alone.

B. ORS 646.608(1)(b) also applies to the Gordon firm's debt collection activities.

The department has also alleged that plaintiffs' debt collection practices violate another provision in the UTPA, ORS 646.608(1)(b). Plaintiffs argue that they are beyond the reach of that provision, too, but their argument again flies in the face of the statute's plain text.

1. By its plain terms ORS 646.608(1)(b) applies to misleading practices by a third-party debt collectors such as plaintiffs.

ORS 646.608(1)(b) provides:

> (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:
>
> * * * * *
>
> (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

The statute thus provides that a person engages in an unlawful practice if

three conditions exist: (1) a "person," (2) "in the course of the person's business, vocation or occupation," (3) "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of *real estate, goods or services*." *Id.* (emphasis added). The term "real estate, goods or services" is, in turn, expressly defined. It 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." ORS 646.605(6) (emphasis added).

Taken together, ORS 646.608(1)(b) thus prohibits any person "in the course of his business or occupation" from causing "likelihood of confusion or of misunderstanding" as to, among other things, "the source, sponsorship, approval, or certification" of a "loan or an extension of credit."

By its plain terms that provision applies to the practices of third-party debt collectors who engage in practices that cause confusion about the source or amount of a debt that is owed. The department's allegations against petitioners are an example of that. Plaintiffs constitute "persons" under the statute. And the practices alleged are ones that plaintiffs undertook as part of their debt collection litigation business, and thus they were practices that occurred "in the course of [their] business."

In addition, the alleged practices are also ones that "cause likelihood of confusion or of misunderstanding" as to "the source" of a "loan or an extension of credit." As explained above, the department has alleged that the firm systematically files pleadings in which it asserts the right to recover credit card debt, and to obtain various fees, including interest and attorney's fees, without determining whether it actually has a right to those fees. In some instances it fails to attach a copy of the operative card-member agreement or attaches the wrong agreement. The effect of those practices is to cause confusion or misunderstanding as to the amount that is owed, where the loan originated, and to whom the money is owed. The alleged practices thus fall within the plain terms of the statute.

2. Plaintiffs' argument to the contrary ignores the text of the statute and is without merit.

In arguing that their debt collection practices are not subject to ORS 646.608(1)(b), plaintiffs make no argument based on the text whatever. Instead, they advance only a policy argument that is essentially a reprisal of the argument they advance regarding ORS 646.607(1). Thus, plaintiffs start from the premise that the "UTPA's purpose is to regulate the provision of real estate, goods, and services to consumers." (BOM 32). From that premise, plaintiffs reason that ORS 646.608(1)(b), as part of the UTPA, regulates only wrongdoing committed by a person in providing goods or services to that

person's customers related to the goods and services that the person provides, and not against a litigation adversary. Plaintiffs thus contend they are not subject to ORS 646.608(1)(b) because their "alleged wrongdoing" in this case involves only actions taken by plaintiffs in the course of representing its clients in litigation against debtors. "[N]one of the Gordon firm's alleged misconduct involved providing legal services to the alleged victims of the wrongdoing." (BOM 32).

But that argument is little more than an extended exercise in question-begging. Plaintiffs thus start from the assumption that the *only* purpose of the UTPA is to regulate wrongdoing committed by businesses in the course of providing goods or services to a consumer, and then concludes that no provision of the UTPA can reach conduct by a third-party debt collector. But plaintiffs provide no argument rooted in the text, context, or history of the statute that would justify its premise that the UTPA's purpose is limited in the way that it suggests. And the text and history of the statute demonstrate otherwise. The legislature expanded the reach of ORS 646.608(1) in 2010 when it added "loans" and "extensions of credit" to the definition of "real estate goods and services" in ORS 646.605(6). Or Laws 2010, ch 94, § 1. The previous year, it had made the UDCPA part of the UTPA by enacting ORS 646.607(6), which gives the Attorney General explicit authority to enforce the UDCPA against debt collectors. Furthermore, long before that, it had enacted ORS 646.607(1),

which, as already explained, gave the Attorney General the authority under the UTPA to stop deceptive practices against debt collectors. Given all of those provisions, plaintiffs' contention that the purpose of the UTPA is merely to "regulate the provision of real estate, goods, and services to consumers" is simply false. The UTPA is a remedial consumer-protection statute designed to protect consumers not just from those who try to sell them goods and services, but from any business—including a debt collection law firm—that would prey upon consumers in a variety of contexts, including debt collection.[14]

In short, both ORS 646.607(1) nor ORS 646.608(1)(b) apply to a debt collector's practices without regard to whether the debt collector is party to any "transaction" with the debtors they pursue. Both provisions, correctly construed, apply to plaintiffs' alleged conduct.

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[14] As an alternative, plaintiffs look for support in a dissenting opinion in a Court of Appeals case, *Raudebaugh v. Action Pest Control,* Inc., 59 Or App 166, 650 P2d 1006 (1982)). *See* BOM (34). At issue in *Radebaugh* was whether a home buyer had a cause of action under the UTPA against a home inspector for representations made by the inspector when preparing a report for the seller. In the department's view, the majority's conclusion that the UTPA did provide a cause of action was correct, and the dissenting opinion's analysis is contrary to the statute's plain text. But in any event, the dissenting opinion in that case is largely beside the point here, because the circumstances of that case were very different. Here, plaintiffs are not alleged to be indirectly liable to a consumer for misrepresentations that they made to someone else in the course of providing services to that someone else. Plaintiffs allegedly made misrepresentations directly to consumers about (among other things) plaintiffs' right to attorney fees, to the consumers' detriment.

C. Neither ORS 646.607(1) nor 646.608(1)(b) contains an exception for the tactics of lawyers engaged in litigation.

Plaintiffs also suggest at various points in their brief that even if ORS 646.607(1) or ORS 646.608(1)(b) might generally apply to debt collection practices against a non-customer, it would be "inappropriate" or even unconstitutional to apply the statute to the practices of a *lawyer* involved in debt collection litigation. (BOM 23; 29; 33; 44). Plaintiffs note that a lawyer's litigation practices are already subject to the rules of civil procedure and professional conduct, and they go so far as to suggest that oversight by an executive agency might violate the principle of separation of powers. But as discussed below, those arguments are ones that other courts have universally rejected and they are without merit

1. Neither statute's text includes an exception for a lawyer's debt collection litigation practices, and there is no good reason to insert such an exception into the law.

To begin with, plaintiffs' contention that a lawyer's litigation practices are exempt from the UTPA finds no support whatever in the actual text of the statute. By its terms, ORS 646.607(1) applies to any person who in the court of his business uses any unconscionable tactics in connection with collecting debts. Similarly, ORS 646.608(1)(b) applies to conduct engaged in the course of one's business. Nothing whatever in the text of either provision supports the

existence of an exception for lawyers filing debt collection lawsuits.[15]

Nor is there any good reason for this court to read such an exception into the law. The fact that other remedies exist for a lawyer's misconduct—under the rules of professional conduct or the rules of civil procedure—does not support an inference that ORS 646.607(1) and ORS 646.608(1) can never apply to such conduct. That is particularly true here, because whatever other remedies might exist, the very nature of plaintiffs' litigation business makes it unlikely that those other remedies could ever be adequate to protect consumers. The Gordon firm, and law firms like it, file thousands of debt collection lawsuits each year, typically against debtors who are unrepresented and have no knowledge of the law. Courts have no realistic ability to police the accuracy of those ex parte filings or to insure that an unrepresented defendant is being treated fairly. Thus, firms that operate a high-volume debt collection lawsuit

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[15] Many courts in other states have concluded that their respective unfair trade practice statutes do not provide a right of action for the exercise of professional skill by "learned" professionals like lawyers or doctors. But several courts have concluded that unfair trade practice statutes can apply to lawyers to the extent that the lawyer is engaged in the "entrepreneurial" or "business" aspects of the profession (including debt collection) as opposed to the pure practice of law. *See Kessler v. Loftus*, 994 F Supp 240, 242 (D Vt 1997) (discussing cases). In Oregon—as plaintiffs correctly concede—no categorical exception for the "learned professions" exists. (BOM 33). *See Porter*, 314 Or at 94 (recognizing that the conduct of a lawyer who files a lawsuit against a client to collect a non-existent debt would be actionable under ORS 646.608(1)).

business are engaging in a legal practice that by its very nature effectively evades oversight by the courts.

Congress's experience with federal debt collection protection laws provides a useful lesson. Congress enacted the FDCPA in 1977, the same year that Oregon enacted ORS 646.607(1). Unlike Oregon's laws, the FDCPA *did* include an express exception for lawyers. But in 1986, Congress repealed that exception because it had become aware of pervasive problems with law firms that—just like plaintiffs—were in the business of filing debt collection lawsuits. *See Schroyer v. Frankel*, 197 F3d 1170 (6th Cir 1999) (discussing rise and fall of the FDCPA's lawyer exception); *see also Heintz v. Jenkins*, 514 US 291, 299, 115 S Ct 1489, 131 L Ed 2d 395 (1995) (same). Congress determined that more attorneys than non-attorneys were actually engaged in debt collection, and attorneys were actually advertising their exemption under the FDCPA to solicit creditors. *Frankel*, 197 F3d at 1174-75. The exemption, in other words, was creating an incentive for debt collection to be funneled to lawyers to avoid oversight.

Even after Congress repealed that exception, debt collecting lawyers argued—just as plaintiffs do here—that the law still should not reach a lawyer's litigation practices. But the United States Supreme Court rejected that argument in *Heintz*. In particular, the Supreme Court concluded that lawyers in the business of regularly filing debt collection lawsuits are debt collectors for

purposes of FDCPA, and specifically concluded that the litigation practices of such lawyers is subject to regulation under that act. *Id*. at 298. Other courts reached the same conclusion under state statutes.[16]

Congress's experience with the FDCPA provides useful context for understanding what plaintiffs are asking the court to do in this case. Unlike the FDCPA, neither ORS 646.607(1) nor ORS 646.608(1) has ever had an exception for lawyers. What plaintiffs are doing in this case, therefore, is asking this court to read into ORS 646.607(1) and ORS 646.608(1) a lawyer exception like the kind that the FDCPA originally had, but that Congress has since repealed. In other words, plaintiffs are asking this court to insert into those statutes the very loop-hole that Congress realized was problematic and has since removed. All of the reasons that led Congress to repeal the lawyer exception in the FDCPA are reasons this court should reject plaintiffs' request. By their plain terms, ORS 646.607(1) and ORS 646.608(1)(b) apply to lawyers employing litigation practices like those that plaintiffs are alleged to have employed here.

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[16] *See, e.g.*, *Pepper v Routh Crabtree, APC*, 219 P3d 1017, 1025 (Alaska 2009) (holding Alaska UTPA applies to debt collection litigation practices and rejecting the claim that a debt collecting attorney "should receive a special exemption"); *Yelin v. Swartz*, 790 F Supp 2d 331 (ED Penn 2011) (debt collection by attorneys subject to Pennsylvania Unlawful Trade Practices and Consumer Protection act).

Plaintiffs also warn that allowing the UTPA to apply to a lawyer's litigation practices would "dramatically broaden" the scope of the UTPA, and would be an absurd and "unprecedented expansion" of the law, because it necessarily treats the lawyer and a client as "essentially identical." (BOM 29; 33). Plaintiffs reason that under the department's interpretation, every lawyer would be liable for the UTPA violations committed by the lawyer's clients. (BOM 33). But that is not so, and it misapprehends the source of plaintiffs' alleged UTPA liability in this case. The violations that plaintiffs are alleged to have committed are not violations committed by its clients and simply repeated by plaintiffs in its filings. They are violations that plaintiffs are alleged to have committed in the first instance, in the course of its own debt collection litigation business, directly to consumers, to the detriment of those consumers, and to the benefit of plaintiffs. Thus to the extent that that the alleged misconduct occurred, it was not in the exercise of legal judgment on behalf of the client, but as part of plaintiffs' own profit-making enterprise.[17]

[17] *See, e.g.*, *Yelin v. Swartz*, 790 F Supp 2d 331 (2011)(debt collection practice is an act in trade or commerce for purposes of Pennsylvania's trade practices act).

2. Construing the UTPA to prohibit the filing of deceptive pleadings like those alleged in this case is consistent with this court's case law.

Plaintiffs also argue that it would be "incongruous" for this court to conclude that a law firm's debt collection litigation practices could be subject to the UTPA because, they contend, this court has already concluded that such practices do not violate the Unlawful Debt Collection Practices Act. (BOM 36). But that argument rests on a false premise: This court has never concluded that a law firm engaging in the kind of misconduct at issue here is not subject to the UDCPA. This court has never considered that question, or anything remotely like it.

In *Porter v. Hill*, this court did conclude that a lawyer who filed a lawsuit to collect fees that the defendant denied were owed was not subject to the UDCPA. But the circumstances of that case are different from the circumstances here. In *Porter* the client argued that by filing a lawsuit to collect money that the client did not owe, the lawyer violated ORS 646.639(2)(k) of the UDCPA. This court rejected the client's argument, explaining 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 debt does not exist." *Porter*, 314 Or at 95. The court further noted the legislature's concern in enacting the UDCPA was not with collectors falsely claiming the existence or amount of the underlying debt"

but rather with "the use of abusive methods to pressure debtors to pay their debts." *Id* . at 92. This court thus concluded that ORS 646.639(2)(k) prohibited methods aimed at pressuring a person to pay off a debt, but does not prohibit a lawyer from filing a civil action to collect an alleged debt.

The circumstances here are different. The allegations here are that plaintiffs are operating as a debt collection litigation business and in the course of that business they regularly and repeatedly filing complaints claiming the right to attorney fees and interest without support, by making false or misleading representations that a contract gives rise to an award of attorney fees or interest, and by failing to disclose that they do not have the contract at the time of the complaint. Whether *that* kind of conduct might violate the UDCPA is not something that this court confronted in *Porter*.[18]

But be all of that as it may, the department did not seek review of the Court of Appeals UDCPA ruling. Thus whether plaintiffs' alleged practices also would constitute a violation of UDCPA is not an issue squarely raised on review.[19] Nor is it a question that this court needs to address in order to resolve

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[18] Indeed, as just explained, although this court has not yet confronted that issue, courts that *have* confronted it have concluded that consumer-protection statutes just like the UDCPA *do* apply to such conduct.

[19] Although the department chose not to cross-petition for review of the Court of Appeals' UDCPA ruling, plaintiffs' argument in this court assumes the correctness of the Court of Appeals' interpretation of the UDCPA, and thus

Footnote continued…

the issues that are before this court. But this court should reject plaintiffs' contention that it has already decided the question. The question here is whether plaintiffs' alleged conduct violated ORS 646.607(1) and ORS 646.608(1)(b); for the reasons already given, plaintiffs' alleged conduct did violate both of those provisions, and nothing in *Porter* or any of this court's other cases suggests otherwise.

3. Plaintiffs' assertion that the department lacks constitutional authority to regulate the practice of law also is without merit.

Plaintiffs also argue that the department lacks constitutional authority to regulate the "practice of law." (BOM 40). As an initial matter, that arguments is not properly before this court because it is one that plaintiffs specifically raised and lost in the trial court, yet they failed to file a cross appeal.[20] But in

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(…continued)
could be said to put the question back at issue. To the extent that this court reaches the issue, the Court of Appeals' construction of the UDCPA is not binding on this court. *See Weldon v. Bd. of Lic. Pro. Counselors and Therapists*, 353 Or 85, 91, 293 P3d 1023 (2012) (court has the obligation to correctly construe statutes, regardless of parties' arguments); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.").

[20] Although plaintiffs argue at some length that they were not required to cross appeal, their argument is based on a mistaken understanding of the trial court's judgment. Plaintiffs contend that they were not required to cross appeal because they were not seeking reversal of any part of the judgment, but were merely offering an alternative basis for affirming the judgment. That is not accurate. In the trial court, Gordon sought a declaration that the department lacked constitutional authority to regulate the practice of

Footnote continued…

any event it is without merit.

Legislation like the UTPA and UDCPA will not run afoul of Article III, section 1, "so long as it does not unduly burden or substantially interfere with the judiciary." *Circuit Court v. AFSCME*, 295 Or 542, 547, 669 P2d 314 (1983) (quoting *Sadler v. Oregon State Bar*, 275 Or 279, 285, 550 P2d 1218 (1976)). "Only an outright hindrance of a court's ability to adjudicate a case or the substantial destruction of the exercise of a power essential to the adjudicatory function will render legislation constitutionally defective under Article VII (Amended), section 1." *Id*. at 551.

The department is not interfering with the judiciary or its powers.

The UTPA gives the department authority to file a civil law suit to protect consumers. The department's authority to file such suits against lawyers does not alter or hinder or even affect the power of the judiciary to otherwise police the conduct of lawyers. Indeed, in any such actions, it is a trial court that ultimately decides whether a person's conduct violates the UTPA, and it is the court that ultimately decides whether to enjoin such practices. The power that the UTPA confers on the department is thus narrow. The use of that

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(…continued)
law, and the court issued a written Opinion and Order rejecting Gordon's argument and denying that relief. (TCF 310-14). The court then issued a General Judgment *that expressly incorporates that Opinion and Order*. (TCF 315). Gordon's argument could not possibly be an alternative basis for affirming a judgment that itself rejects that very argument.

power to prevent a debt collection law firm from filing deceptive pleadings is not unconstitutional.

CONCLUSION

This court should affirm the judgment of the Court of Appeals and reverse the judgment of the trial court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 29, 2016, I directed the original Brief on the Merits of Respondent on Review, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon R. Daniel Lindahl and Daniel N. Gordon, attorneys for Petitioners on Review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 11,090 words. I further 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(2)(b).

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