In the Supreme Court of the State of Alaska

ROBIN L. PEPPER, *Appellant*,	)	
v.	)	
ROUTH CRABTREE, APC, RICHARD L. CRABTREE, AND CRI, LLC AKA CHECKRITE OF ANCHORAGE, *Appellees*.	)	Supreme Court No. S-13042 Superior Court No. 3AN-07-08568 CI

Appeal from a Final Judgment of the Superior Court,
Third Judicial District at Anchorage,
The Honorable Mark Rindner, Presiding

OPENING BRIEF OF APPELLANT ROBIN PEPPER

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STATUTORY AND CONSTITUTIONAL PROVISIONS

The Alaska Unfair Trade Practices and Consumer Protection Act provides, in relevant part: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful." AS 45.50.471(a). The Act further provides: "In interpreting AS 45.50.471 due consideration and great weight should be given the interpretations of 15 U.S.C. § 45(a)(1) (§ 5(a)(1) of the Federal Trade Commission Act)." AS 45.50.545.

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article I, Section 5 of the Alaska Constitution provides: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Article I, Section 6 of the Alaska Constitution provides: "The right of the people peaceably to assemble, and to petition the government shall never be abridged."

JURISDICTIONAL STATEMENT

Appellant Robin Pepper appeals from the Superior Court's order of January 11, 2008, granting the defendants' motion to dismiss her complaint in its entirety (Exc. 71–84), and the accompanying final judgment, dated February 19, 2008, dismissing this action with prejudice (Exc. 85). The notice of appeal was timely filed on March 20, 2008. This Court has appellate jurisdiction under AS 22.05.010 and Alaska Appellate Rule 202(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Alaska's Unfair Trade Practices and Consumer Protection Act exempt unfair and deceptive debt-collection practices that occur in the context of litigation?
2. Does the Petition Clause of the First Amendment immunize debt collectors from liability for otherwise actionable unfair and deceptive debt-collection practices that occur in the context of litigation?

STATEMENT OF THE CASE

Although debt-collection practices have been regulated by consumer-protection statutes for more than thirty years, the trial court in this case is the first and only court in the nation to hold that the First Amendment's Petition Clause confers absolute immunity on those who use unfair and deceptive means to collect debts from consumers through litigation.

That sweeping and unprecedented ruling is all the more surprising because this case involves conduct that is routinely and traditionally the subject of consumer-protection litigation against debt collectors. In this case, the debt collectors failed to provide a disabled, incompetent consumer with written notice, as required by law, before suing to collect a debt from her, and then attempted to obtain a default judgment against her based on a false representation as to her competency, without notifying the legal services lawyers whom they knew represented her. In this scenario, it is the *debt collectors*' conduct that threatened to deprive the consumer of *her* access to a judicial forum. Far from running afoul of the values protected by the constitutional right to petition, holding debt collectors accountable for such unscrupulous conduct upholds those values by ensuring that both debt collectors and consumers will have full and fair access to the courts.

A. The Facts

1. *The Parties.* The plaintiff, Robin Pepper, is an indigent, mentally disabled woman who lives in Anchorage (Exc. 2, 4). Ms. Pepper suffers from bipolar disorder and, over the past ten years, has been in and out of treatment at the Alaska Psychiatric Institute approximately 15 to 20 times, ranging from three-to-four day stays to month-long stays (Exc. 4). During the period that the events in this case took place, Ms. Pepper was not legally competent and, from 2004 through 2007, had a legal guardian responsible for representing her interests (Exc. 4, 67).

The defendants are three debt collectors—Routh Crabtree, a debt-collection law firm based in Anchorage, Richard Crabtree, a collections lawyer and principal of that firm, and CRI, LLC, also known as Checkrite of Anchorage (Exc. 2). (For simplicity's sake, all three debt collectors will be referred to collectively in this brief as "Routh Crabtree" unless otherwise noted.)

2. *Routh Crabtree's Efforts to Collect from Ms. Pepper.* This case arises out of Routh Crabtree's use of unfair and deceptive practices in attempting to collect a debt arising out of dishonored checks issued by Ms. Pepper (Exc. 1, 5). In Alaska, before debt collectors can resort to legal action seeking monetary penalties against a consumer alleged to have written a dishonored check, they must make a "written demand" on the consumer. AS 9.68.115. The demand must be "personally delivered or sent

by first class mail to the address shown on the dishonored check, advising the issuer that the check has been dishonored and explaining the civil penalties" that may apply. *Id.* Debt collectors are also required, under the federal Fair Debt Collection Practices Act (FDCPA), to send a "written notice" to the consumer within five days of first communicating about the debt. 15 U.S.C. § 1692(g)(a). The notice must state the amount of the debt and the name of the creditor and must give the consumer notice of his or her right to dispute and obtain verification of the debt. *Id.*

Routh Crabtree attempted to collect from Ms. Pepper without giving her notice: It did not deliver notice to her personally, mail notice to the address of her check, or mail notice to any address at which it knew her to reside (Exc. 2). Instead, Routh Crabtree sent a notice to an address at which Pepper had never lived and, indeed, where no building even existed (Exc. 2). Then, on December 29, 2006, Routh Crabtree filed a collection action against Pepper, seeking the amount of the dishonored checks and civil penalties under AS 9.68.115, even though Pepper had never received notification or a demand for repayment (Exc. 3).

Alaska law requires that an attorney who knows that a party is represented by counsel inform the opposing attorney that he or she intends to take a default before doing so. *See, e.g., Kenai Peninsula Borough v. English Bay Village Corp.*, 781 P.2d 6, 8 n.2 (Alaska 1989). On April 25, 2007, Alaska Legal Services (ALS) notified Routh Crabtree that it was

representing Pepper, that Routh Crabtree had failed to perfect service on her, and that if and when it did perfect service, ALS would file an answer and counterclaims (Exc. 4). However, only a month later, Routh Crabtree applied for and obtained a default against Pepper, without making any effort to inform ALS of its intention to take a default (Exc. 4).

To obtain the default against Pepper, the defendants swore out an affidavit to the court stating that Pepper was not incompetent, relying on a Defense Manpower Data Center search certificate (Exc. 4). Such a certificate, however, makes no reference to a person's competency, and as noted above, Pepper was in fact incompetent throughout the events in this case (Exc. 4, 67).

B. Procedural History

1. *Pepper's UTPA Action*. Pepper, represented by ALS, filed this action on July 16, 2007, alleging that Routh Crabtree's collection practices violated the Alaska Unfair Trade Practices and Consumer Protection Act (UTPA), and seeking declaratory relief, injunctive relief, and damages (Exc. 1-6).

Pepper's six-page complaint alleges a single count under the UTPA (Exc. 5 ¶¶ 22–35), based on 21 paragraphs of factual allegations describing Routh Crabtree's collection efforts. The allegations focus overwhelmingly on issues of notice—specifically, Routh Crabtree's failure to provide Pepper with written notice before attempting to collect from her (Exc. 2–5 ¶¶ 11–

13, 15–16, 21), its failure to notify ALS of its intention to seek a default against her, even though it knew she was represented by counsel (Exc. 2 ¶¶ 11–13, 15–16, 21), and its attempt to obtain a default against her based on a false representation as to her competency (Exc. 4 ¶ 20). Thus, Pepper did not challenge—and does not challenge here—the right of Routh Crabtree or Checkrite to access the courts to collect debts. Rather, Pepper attacked the *means* by which Routh Crabtree had attempted to collect from her.

Routh Crabtree responded to the lawsuit by filing a motion to dismiss, arguing that applying the UTPA to its collection practices would violate the Petition Clause of the First Amendment, Section 1.6 of the Alaska Constitution, and the separation-of-powers doctrine under Alaska law (Exc. 10). The Superior Court granted the motion to dismiss on January 11, 2008 (Exc. 71–84) and issued a final judgment on February 19, 2008 (Exc. 85).

2. *The Superior Court's Decision.* Although it ultimately dismissed Ms. Pepper's complaint in its entirety, the Superior Court acknowledged the "problematic" implications of Routh Crabtree's position (Exc. 81) and later described the immunity question presented by this case as an "unresolved" and "cutting edge" issue (Exc. 153). The court noted that Routh Crabtree's argument "rel[ied] exclusively" on a single Ninth Circuit decision—*Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006)—that had narrowly construed the federal Racketeer Influenced and Corrupt

Organizations (RICO) Act based on the *Noerr-Pennington* doctrine, so that the statute did not impose liability based on the content of prelitigation demand letters (Exc. 76). The Superior Court identified four problems with applying *Sosa* to this case (Exc. 81).

First, the Superior Court observed that *Sosa* had extended the *Noerr-Pennington* doctrine to "conduct incidental to a lawsuit," without explaining how to apply the doctrine's "sham" exception—which generally turns on the merit of the underlying lawsuit itself—to such incidental activity (Exc. 81). Second, the court found *Sosa* "impossible to reconcile" with *State v. O'Neill Investigations*, 609 P.2d 520 (Alaska 1980), which held that Alaska's UTPA covers, among other things, debt collectors' demands for payment based on false or misleading threats of legal action (Exc. 82). Third, the court found it "difficult to reconcile" *O'Neill*'s mandate that Alaska courts must construe Alaska's UTPA liberally with the notion that statutes should be construed narrowly to protect petitioning activity (Exc. 82). And finally, the court recognized *O'Neill*'s holding that the First Amendment's Free Speech Clause does not prevent the state from regulating debt-collection practices to the extent that they are deceptive, and acknowledged that an analogous rule might also apply under the Petition Clause (Exc. 82).

The court, however, sidestepped the dilemmas posed by "*Sosa*'s over-expansive approach" by broadly characterizing Ms. Pepper's entire

complaint as seeking to impose liability based on "core litigation activities" that are "clearly protected by the Petition Clause" (Exc. 83–84) (characterizing complaint). Construing *Noerr-Pennington* as a "generic rule of statutory construction," the court held that Alaska's UTPA did not "clearly" cover any of the conduct at issue in the lawsuit and accordingly granted Routh Crabtree's motion to dismiss the complaint in its entirety (Exc. 84).

3. *Routh Crabtree's Motion for Attorney's Fees.* Following the Superior Court's order of dismissal, Routh Crabtree moved for an award of attorney's fees against Ms. Pepper in the amount of $20,350 (Exc. 86–94). Initially, the court denied the motion, explaining that Pepper's action was "not frivolous" and that the defendants had "prevailed based on the immunity conferred by the Petition Clause, an unresolved issue under Alaska law and somewhat 'cutting edge' issue nationally." (Exc. 153–154). However, Routh Crabtree moved for reconsideration of that order (Exc. 155–159), which the trial court granted on May 28, 2008 (Exc. 164–165). Given Ms. Pepper's "status as being indigent and suffering from mental illness," however, and "to assure that similarly situated litigants are not unduly deterred from filing claims under the UTPA," the court halved the defendants' requested hourly rate and granted an award of $7,631.25 in fees against Ms. Pepper. (Exc. 164-165, 166).

STANDARD OF REVIEW

The Superior Court's decision to dismiss this action may be affirmed only if it appears that Ms. Pepper "can prove no set of facts which would entitle [her] to relief." *Valdez Fisheries Dev. Ass'n, Inc. v. Alyeska Pipeline Serv. Co.*, 45 P.3d 657, 664 (Alaska 2002). That determination is made *de novo*, accepting all of the allegations in Ms. Pepper's complaint as true for purposes of review. *Id.* The statutory and constitutional questions in this appeal are questions of law to which this Court must apply its independent judgment, adopting the rule of law that is most persuasive in light of precedent, reason, and policy. *See Smallwood v. Cent. Peninsula Gen. Hosp.*, 151 P.3d 319, 322 (Alaska 2006) (considering whether to exempt certain conduct from the scope of the UTPA); *K&K Recycling v. Alaska Gold Co.*, 80 P.2d 702, 724 n.66 (Alaska 2003) (considering whether to extend Petition-Clause immunity); *Doe v. Alaska Super. Ct.*, 721 P.2d 617, 628 n.14 (Alaska 1986) (same).

SUMMARY OF ARGUMENT

To avoid what it regarded as a difficult constitutional problem, the trial court in this case interpreted Alaska's Unfair Trade Practices Act in a manner that excludes from its coverage a wide range of unfair and deceptive collection practices that occur in the context of litigation. But such practices—including the "sewer service" practices alleged here, in which debt collectors attempt to obtain default judgments by failing to

notify consumers of the proceedings—have historically been held actionable under the Federal Trade Commission Act, the Fair Debt Collection Practices Act, other states' unfair-trade practices, and the Alaska statute itself. The trial court's decision is incompatible with that settled practice and is therefore manifestly incorrect as a matter of statutory construction, particularly because the Alaska Act expressly requires courts to give great weight to analogous federal precedent.

The trial court reached its conclusion not by analyzing the language, history, or purpose of the Alaska statute—or even by examining the specific allegations in this lawsuit—but by relying instead on what it regarded as a broad constitutional imperative supplied by the First Amendment's Petition Clause. The trial court was mistaken. Nothing in the United States or Alaska Constitutions required the trial court to distort the Alaska statute as it did. To the contrary, Petition-Clause jurisprudence, although undeveloped, supplies several clear principles to which the trial court failed to adhere.

First, the First Amendment's Petition Clause must be read in parity with its Free Speech Clause, to prevent deceptive commercial communications by debt collectors that are unprotected by the Free Speech Clause from becoming immunized merely because they are made in the form of a petition. Second, the Supreme Court's *Noerr-Pennington* doctrine is designed to distinguish protected political activity with a

commercial impact from unprotected commercial activity with a political impact, and the reach of the doctrine is limited by that underlying purpose. The doctrine is also limited by a "sham" exception—which excludes baseless litigation activity—and is further limited by its status as a rule of statutory construction rather than a justification for blanket immunity. Finally, context matters a great deal in Petiton-Clause matters, and misrepresentations that would be protected in the political arena are not protected when made to a court. This is so in part because unethical and deceptive litigation conduct can have the effect of depriving opposing litigants of *their* right to a judicial forum. This case is a perfect illustration of that principle: Here, it was the *debt collectors*' conduct that threatened to deprive the consumer of *her* right to redress in court.

ARGUMENT

I. ALASKA'S UNFAIR TRADE PRACTICES ACT COVERS UNFAIR AND DECEPTIVE DEBT-COLLECTION PRACTICES THAT OCCUR IN THE LITIGATION CONTEXT.

In its landmark opinion in *State v. O'Neill Investigations*, this Court held that Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) "stands as a sentinel against unethical and unscrupulous conduct on the part of independent debt collection businesses operating in the state," and that the application of the Act to debt-collectors' communications does not "chill constitutionally protected speech." 609 P.2d 520, 523, 531 (Alaska 1980).

The decision below dramatically curtails *O'Neill*'s holding, excluding from the Act's coverage a broad swath of cases in which debt collection is carried out, as it so often is, through litigation. *See Heintz v. Jenkins*, 514 U.S. 291, 297 (1995) (describing "litigating" as "simply one way of collecting a debt"). The trial court's decision has no basis in the language, purpose, or history of the UTPA and runs counter to the interpretation of analogous state laws as well as longstanding federal precedent. *See, e.g.*, *id.* at 292 (unanimously concluding that federal Fair Debt Collection Practices Act "applies to a lawyer who 'regularly,' *through litigation*, tries to collect consumer debts.") (emphasis in original).[1]

O'Neill emphasized that, under AS 45.50.545, Alaska courts must give "due consideration and great weight" to federal precedent interpreting the Federal Trade Commission Act, and observed that concern over the "unscrupulous acts and practices of independent debt collection agencies" had "culminated in 1977 in Congress's enactment of the Fair Debt Collection Practices Act" (FDCPA). *O'Neill*, 609 P.2d at 524, 523 n.6.

[1] As the trial court acknowledged, *O'Neill* itself involved facts that would appear to be excluded from the reach of the statute under Routh Crabtree's theory of the case. The defendant in that case, too, collected debt arising out of dishonored checks from Alaska consumers and many of the allegations involved false or misleading threats concerning legal action. This Court held that "[t]hreats by debt collection agencies of imminent legal action when no such action is actually contemplated is a deceptive act or practice," 609 P.2d at 535, and noted that, under the FDCPA, "collection agencies now have an affirmative duty to furnish alleged debtors with (*Footnote continued...*)

Because the FDCPA was "aimed specifically at eliminating harassment and deception in the methods employed by independent debt collection agencies," *id.* at 523 n.6, and because it "expand[ed] already existing Federal Trade Commission jurisdiction over unfair or deceptive acts and practices of collection agencies," *id.* at 530, *O'Neill* repeatedly drew on both the FDCPA and earlier FTC precedent in interpreting the UTPA's coverage. *See id.* at 523 n.1 (adopting FDCPA's definition of "debt collector"); *id.* at 523 nn.2-6 (citing FDCPA's legislative history); *see also Barber v. Nat'l Bank of Alaska*, 815 P.2d 857, 861 (Alaska 1991) (describing the UTPA as "the state counterpart" to the FDCPA, and reading its coverage as parallel).

Indeed, "many of the proscriptions in the FDCPA were modeled on earlier FTC decisions proscribing the same type of conduct," ROBERT J. HOBBS, FAIR DEBT COLLECTION 339 (5th ed. 2004), and any violation of the FDCPA is, by definition, a violation of the FTC Act. *See* 15 U.S.C. § 1692*l*. Thus, case law under the FDCPA, as well as older case law under the FTC Act, is particularly instructive in examining the Alaska Act's coverage of collection practices.[2]

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detailed information regarding the amount owed," *id.* at 530—precisely the duty that Routh Crabtree failed to honor here.

[2] As this Court discussed in *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, the original Alaska UTPA enacted in 1970 was "based on legislation developed in large part by the Federal Trade Commission." 101 P.3d 1047, 1053–54 (Alaska 2004) (citing legislative history). In 1974, the Act was amended to parallel the declaration of unlawfulness contained in the FTC Act and to add the "due consideration

(*Footnote continued...*)

There is no doubt that the original FTC Act, even prior to the enactment of the FDCPA, covered deceptive and unfair practices in the context of collection litigation. For example, in the 1970's, the FTC took enforcement action against several companies that engaged in the practice of obtaining default judgments by bringing collection actions in forums distant from consumers' homes. *See, e.g.*, *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976); HOBBS, FAIR DEBT COLLECTION, at 345–46 (discussing history of these cases).[3] Paralleling the FTC Act, states' unfair-trade-practices statutes likewise deem "forum abuse" by debt collectors an actionable unfair practice.[4]

In *Aguchak v. Montgomery Ward Co.*, this Court examined the same practice (specifically, obtaining a default judgment by filing a debt-collection action in Anchorage against residents of a remote Alaskan village) and held that it violated the due process rights of consumers whose

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and great weight" interpretative rule, which was designed to "enable . . . the courts of this state" to draw from federal precedent and promote "uniformity in unfair trade laws." *Id.* at 1053 (quoting governor's transmittal letter).

[3] Consent orders have been entered under the FTC Act against numerous defendants engaging in similar practices. *See, e.g.*, *FTC v. Leasecomm Corp.*, No. 03-11034RFK (D. Mass. 2003), *available at* www.ftc.gov/os/2003/05/leasecommstip.htm; *J.C. Penney Co.*, 109 F.T.C. 54 (1987); *Marathon Oil Co.*, 92 F.T.C. 422 (1978); *S.S. Kresge Co.*, 90 F.T.C. 222 (1977); *Montgomery Ward Co.*, 84 F.T.C. 1337 (1974).

access to a judicial forum was thereby denied. 520 P.2d 1352 (Alaska 1974). Similar concerns are raised where, as here, debt collectors engage in a practice of obtaining defaults without properly notifying consumers or their counsel. As *Aguchak* noted, "[b]y requiring special forms advising default judgment debtors of exemptions and how to claim them, our legislature has recognized that defendants in collection actions, like the instant one, often are legally unsophisticated, frequently appear without counsel and may be minimally educated." *Id.* at 1357. Notably, in discussing the procedural abuses in debt-collection suits, *Aguchak* favorably cited *Barquis v. Merchants Collection Association*, 496 P.2d 817 (Cal. 1972), a seminal California decision holding that similar conduct constituted an unfair and deceptive trade practice. *See Aguchak*, 520 P.2d at 1357 (citing *Barquis* and noting that "the bulk of collection suit defendants, due to indigency, cannot afford to engage counsel" and that "the difficulties of locating counsel in the outlying areas of Alaska exacerbate the already substantial impediments to defense of the collection suit"); *Barquis*, 496 P.2d at 826-28 (discussing FTC Act precedents and observing that obtaining default judgments by filing suits that consumers

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[4] *See, e.g.*, *Yu v. Signet Bank*, 82 Cal. Rptr. 2d 304 (1999); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140 (Mass. 1976); *Celebrezze v. United Research, Inc.*, 482 N.E.2d 1260 (Ohio App. 1984); *see generally* Alan K. Chen, *Due Process As Consumer Protection: State Remedies For Distant Forum Abuse*, 20 AKRON L. REV. 9, 10–13 (1986).

cannot meaningfully defend is a "common abuse in the debt collection field").

When Congress passed the FDCPA, it was sufficiently concerned about abuses in collection litigation that it included a specific provision—under the heading "Legal actions by debt collectors"—requiring that "[a]ny debt collector who brings any legal action on a debt against any consumer" must bring the action only in a judicial district where the consumer resides or entered into the transaction, or in which the property is located. 15 U.S.C. § 1692i. "This section is built upon standards developed by the FTC and the courts," HOBBS, FAIR DEBT COLLECTION, at 241, and Congress's stated purpose in enacting the provision was to eliminate debt collectors' practice of attempting to obtain default judgments by bringing actions that debtors could not defend. *See* S. REP. NO. 95-382, at 5, 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. The provision has been broadly applied to collection actions and attorney debt collectors. *See Fox v. Citicorp Credit Servs.*, 15 F.3d 1507, 1515 (9th Cir. 1994) (expansively construing the statutory phrase "any legal action on a debt" in light of broad congressional purpose); Federal Trade Commission, *Staff Commentary on the FDCPA*, 53 Fed. Reg. 50097-02, 50109 ("This provision applies to lawsuits brought by a debt collector, including an attorney debt collector, when the debt collector is acting on his own behalf or on behalf of his client.").

Ms. Pepper alleges a practice that is closely related to the "forum abuse" problem—namely, a practice of attempting to obtain default judgments against consumers, many of whom are, as here, indigent or incompetent, by failing to properly serve process, or by preparing false affidavits as to competency or other status. That practice is commonplace enough to have acquired a term of art—"sewer service"—defined as "[t]he fraudulent service of process on a debtor by a creditor seeking to obtain a default judgment." BLACK'S LAW DICTIONARY 1372 (7th ed. 1999). The practice has been held actionable under both abuse-of-process law and consumer-protection law, including the FDCPA. *See Bowens v. Mel S. Harris and Assocs., LLC,* 2008 WL 619162, at *2 (W.D.N.Y. 2008) (allowing abuse-of-process and FDCPA claims arising out of "sewer service" to go forward where collector served process on consumer at an address where he had never lived, and where collector knew or should have known he did not live); *Phillipe v. Amer. Exp. Travel Related Servs.*, 571 N.Y.S.2d 711 (N.Y. App. Div. 1991); *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970) (allowing federal government to seek injunction against "long-standing and systematic practice of obtaining default judgments against economically disadvantaged defendants by means of the technique known with apt inelegance as 'sewer service'").

A related, but more specific, abuse in the debt-collection context is the practice of obtaining default judgments against military personnel

stationed overseas. Congress enacted legislation specifically targeting this practice. Under the Soldiers' and Sailors' Civil Relief Act (now known as the Servicemembers' Civil Relief Act, or SCRA), debt collectors may not obtain a default judgment without filing an affidavit "stating whether or not the defendant is in military service and showing necessary facts to support the affidavit." 50 U.S.C. § 521(b)(1). Obtaining a default judgment by filing a false non-military affidavit is a federal crime.[5] The practice is also actionable under the FDCPA and state unfair-trade-practices statutes. In one recent case, a federal court held that a debt collector had violated the FDCPA, the SCRA, the Washington Consumer Protection Act, and the Washington Collection Agency Act by bringing proceedings to garnish a soldier's military pay while he was on active duty in Saudi Arabia. *See Sprinkle v. SB&C Ltd*., 472 F. Supp. 2d 1235 (W.D. Wash. 2006).

Liability for such unconscionable practices—and presumably for violations of several of the provisions of the SCRA itself—would be precluded under Routh Crabtree's view of the Petition Clause, a view that cannot be reconciled with any of the forum-abuse, sewer-service, or

[5] *See United States v. Kaufman,* 453 F.2d 306 (2d Cir. 1971) (affirming conviction of a debt collector on 90 counts of making false "non-military" affidavits for purpose of obtaining default judgments in violation of the Soldiers' and Sailors' Civil Relief Act); *see also Heritage East-West v. Chung & Choi,* 785 N.Y.S.2d 317, 324 (N.Y. City Civ. Ct. 2004) (landlord and its attorney sanctioned for filing six "patently false" affidavits of investigation of non-military status in order to obtain default judgments and warrants of eviction).

military-affidavit cases discussed above. Nor can it be reconciled with decisions of the same trial court that decided this case. In 2004, that court held that lawyers' debt-collection practices are covered by the UTPA and that a debt collector-attorney was liable under the Act for negligently or intentionally filing a lawsuit to collect time-barred debt. *See Hendricks v. Advanced Debt Recovery, Inc.*, Case No. 3AN-04-5009 CI (Alaska Super. Ct. 2004) (Rindner, J.). The court relied on *In the Matter of Wilson Chemical Co.*, 64 F.T.C. 168 (1964), a case in which the FTC held that an attorney who drafted a deceptive collection letter was liable for deceptive practices under the FTC Act, and *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987), the leading FDCPA case concerning liability arising out of suits seeking to collect time-barred debt.[6] More broadly, the trial court's decision is incompatible with numerous decisions under other states' UTPA statutes, under which it is a deceptive practice for

[6] *Accord Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (debt collector violates the FDCPA when it threatens or pursues litigation "to collect on a potentially time-barred debt that is otherwise valid"); *Goins v. JBC & Assoc.*, 352 F. Supp. 2d 262 (D. Conn. 2005); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330 (D.N.M. 2000). Filing suit on time-barred debt is likewise an unfair practice under state unfair-trade-practices statutes. *See, e.g., Klewer v. Cavalry Invs.*, 2002 WL 2018830 (W.D. Wisc. 2002); *Taylor v. Unifund Corp,*. 2001 WL 1035717 (N.D. Ill. 2001).

a debt collector to sue for more than the amount due[7] or to attempt to seek litigation costs and fees despite settlement of the litigation.[8]

Finally, as already noted, the trial court's decision is at odds with longstanding precedent under the FDCPA, which has now been on the books for more than thirty years. In 1986, Congress specifically amended the Act to make clear that attorneys who regularly collect consumer debts are subject to its protections. *See* Pub. L. No. 99-361, 100 Stat. 768 (1986) ("Any attorney who collects debts on behalf of a client shall be subject to the provisions of [the Act]."). That amendment was a direct response to congressional concerns about the increase in debt collection abuses by high-volume collection law firms. *See* H.R. REP. NO. 99-405 (1985). The amendment reflected a growing recognition that abuses carried out by lawyers acting as debt collectors can be more, not less, harmful to consumers than those of non-lawyers: "Abuses by attorney debt collectors are more egregious than those of lay collectors because a consumer reacts with far more duress to an attorney's improper threat of legal action than to a debt collection agency's committing the same practice." *Corssley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989).

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[7] *See, e.g., Chrysler Credit Corp. v. Walker*, 488 So. 2d 209 (La. Ct. App. 1986); *Davis Lake Cmty. Ass'n*, 530 S.E. 2d 865 (N.C. App. 2000); *Vaughan v. Kalyvas*, 342 S.E. 2d 617 (S.C. Ct. App. 1986).

[8] *Evergreen Collectors v. Holt*, 803 P.2d 10 (Wash Ct. App 1991).

Any doubt about the FDCPA's coverage of collection attorneys and their attempts to collect debts through litigation was removed by the United States Supreme Court a decade later in *Heintz v. Jenkins*, 514 U.S. 291 (1995). In *Heintz*, the Court unanimously concluded that the FDCPA "does apply to lawyers engaged in litigation," *id.* at 294, based on the FDCPA's amended definition of debt collector and the fact that Congress repealed any exemption for lawyers "in its entirety, without creating a narrower, litigation-related exemption to fill the void." *Id.* at 294–95. *Heintz* held that a litigating attorney exception "falls outside the range of reasonable interpretations of the Act's express language." *Id.* at 298. In the wake of *Heintz*, it is clear that "all litigation activities, *including formal pleadings*, are subject to the FDCPA," with certain limited exceptions that are not applicable here. *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007) (emphasis added); *see id.* at 228 ("The FDCPA clearly defines the parties and activities it regulates. The Act applies to law firms that constitute debt collectors, even where their debt-collecting activity is litigation.").

More specifically, the "the vast majority of courts have concluded that the broad statutory language applies to documents filed in legal proceedings." *Hartman v. Asset Acceptance Corp.*, 467 F. Supp. 2d 769,

779 (S.D. Ohio 2004).[9] Many of these courts have specifically rejected various immunity and public-policy arguments on the grounds that "[f]orbidding debt collectors from making false statements to courts accords with the FDCPA's purpose of protecting consumers from unfair and harassing debt collection practices." *Todd v. Weltman, Weinberg & Reis, Co., L.P.A.*, 348 F. Supp. 2d 903, 914 (S.D. Ohio 2004), *aff'd*, 434 F.3d 432, 435-37 (6th Cir. 2006) (rejecting debt collectors' claim of "absolute immunity" from FDCPA liability for false statements in garnishment proceeding); *accord Jordan v. Thomas & Thomas*, 2007 WL 2838474 (S.D. Ohio 2007). To exempt false statements made to courts from FDCPA coverage "would allow collectors, under circumstances such as those alleged in the instant case, to accomplish through official legal proceedings the unfair and harassing practices expressly prohibited by the

[9] *See, e.g., Miller v. Wolpoff & Abramson*, 321 F.3d 292 (2d Cir. 2003) (verified complaint filed in state collection action); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469 (7th Cir. 2000) (complaint in state-court bad check action falsely alleging collector was "subrogated" to rights of creditor); *Billsie v. Brooksbank*, 525 F. Supp. 2d 1290 (D.N.M 2007); *Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942 (S.D. Ohio 2005) (complaint and affidavit); *Kelly v. Great Seneca Fin. Corp.*, 443 F. Supp. 2d 954 (S.D. Ohio 2005) (same); *Todd*, 348 F. Supp. 2d at 914 (same); *Jacquez v. Diem Corp.*, 2003 WL 25548423 (D. Ariz. 2003) (writ of garnishment signed by debt collector); *Campos v. Brooksbank*, 120 F. Supp.2d 1271 (D.N.M. 2000) (fee affidavit and deposition notice); *Tomas v. Bass & Moglowski, P.C.*, 1999 U.S. Dist. LEXIS 21533 (W.D. Wis. 1999) (summons and complaint filed in state replevin action).

FDCPA." *Id.* at *7. The same reasoning supports the parallel application of state unfair-trade-practices statutes.[10]

In sum, the courts have consistently interpreted the FTC Act, state UTPA statutes, and the FDCPA to apply *in the very manner* that the trial court suggested would be unconstitutional. And as discussed in detail below, not a single court, state or federal, has held that these statutes are unconstitutional as applied to the litigation conduct of debt collectors generally, or the specific conduct alleged in this case, and nothing in the United States or Alaska Constitutions requires a different result.

II. THE PETITION CLAUSE DOES NOT IMMUNIZE UNFAIR AND DECEPTIVE DEBT-COLLECTION PRACTICES.

A. Petition-Clause Principles

The final clause of the First Amendment protects "the right of the people . . . to petition the Government for redress of grievances." U.S. CONST. amend. I. "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). But unlike the freedoms of speech, religion, and association, the courts seldom consider the petition right in isolation, and its jurisprudence remains

[10] *See, e.g.*, *Campos*, 120 F. Supp. 2d at 1273–75; *Billsie v. Brooksbank*, 525 F. Supp. 2d at 1295.

relatively undeveloped. A few basic principles, however, can be stated with confidence.

1. ***Parity between the Speech and Petition Clauses.*** Like other First Amendment freedoms, "the right to petition is not an absolute protection from liability." *Cardtoons v. Major League Baseball Players Ass'n*, 208 F.3d 885, 891 (10th Cir. 2000) (en banc). Thus, the Supreme Court has held that even a citizen writing a letter to the President—perhaps the most classic form of petitioning, mirroring the ancient tradition of petitioning the King—is not immune from liability for allegedly false statements contained in that letter. *See McDonald*, 472 U.S. 482-83. "The right to petition is guaranteed; the right to commit libel with impunity is not." *Id.* at 485. In explaining its reasons for rejecting the claimed immunity, *McDonald* articulated an important principle of parity between the speech and petition clauses:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and *there is no sound basis for granting greater constitutional protection to statements made in a petition* to the President than other First Amendment expressions.

Id. (internal citations omitted and emphasis added).

Thus, where liability is claimed to arise out of false or deceptive communications, the courts have not immunized otherwise actionable

communications simply because they are "made in a petition." *Id.* The speech and petition clauses afford the same level of constitutional protection to such communications. *Id.* at 485 (holding that "the Petition Clause does not require the State to expand" protection of alleged defamatory speech beyond that which is accorded under the speech clause); *see Cardtoons*, 208 F.3d at 891-92 (explaining that if a defendant "were being sued for libelous statements made in a litigation document filed with the court, *McDonald* would clearly allow the libel suit to continue as a matter of constitutional law").

2. *The Noerr-Pennington doctrine.* By contrast, where liability is premised not on misrepresentations or deceptive conduct alone but rather on the very act of attempting to politically influence the government—particularly through collective industrial activity—the courts have taken a different approach. The *Noerr-Pennington* doctrine arose out of two such cases in the antitrust context: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70 (1965). *Noerr* involved a Sherman Act action against the railroad industry, which had jointly lobbied for legislation that would limit competition in the trucking industry. The Court held that the railroads were immune from suit because "the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of government

action with respect to the passage and enforcement of laws." *Noerr*, 365 U.S. at 138.

The *Noerr-Pennington* doctrine "rests ultimately upon a recognition that the antitrust laws, 'tailored as they are for the business world, are not at all appropriate for application in the political arena.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) (quoting *Noerr*, 365 U.S. at 141). The doctrine is based on both statutory and constitutional grounds. *See Cardtoons*, 208 F.3d at 888 (extensively discussing the doctrine's twin rationales); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 399 (1978) (noting "two correlative principles" on which *Noerr* immunity rests). The statutory ground is that extending antitrust liability to petitioning activity would "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Noerr*, 365 U.S. at 137. The constitutional ground is that construing the Sherman Act to extend to political activity would "raise important constitutional questions" implicating the right to petition, and the courts should not "lightly impute to Congress an intent to invade" that right. *Id.* at 137–38.

In addition to the distinction between protected political activity and regulated commercial activity, *Noerr-Pennington* is also limited by the so-called "sham" exception: "Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not

immunized by the First Amendment right to petition." *Bill Johnson's Rests., Inc. v. NLRB,* 461 U.S. 731, 743 (1983); *accord McDonald*, 472 U.S. at 484.

In keeping with the statutory rationale of *Noerr-Pennington*, the doctrine is usually characterized as a "rule of statutory construction." *Sosa*, 437 F.3d at 931. And although the doctrine has been applied in a variety of non-antitrust contexts (including National Labor Relations Act and the Racketeer Influenced and Corrupt Organizations Act cases), courts have been reluctant to freely extend the doctrine into new contexts. *See Cardtoons*, 208 F.3d at 888–90.

3. *Context matters.* Whether an activity is protected under *Noerr-Pennington* depends a great deal on the "context and nature of the activity." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 504 (1988); *see Venetian Casino Resort, L.L.C. v. N.L.R.B.*, 484 F.3d 601, 613 (D.C. Cir. 2007) ("context matters"). A lobbying campaign "enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations." *Allied Tube & Conduit Corp.*, 486 U.S. at 500 (emphasis added). Neither "[a] misrepresentation to a court" nor "misrepresentations made under oath at a legislative committee hearing"

enjoy immunity simply because they are aimed at influencing governmental action. *Id.* at 504.

B. The Petition Clause Does Not Provide Greater Protection to Deceptive Communications Than the Speech Clause.

In *O'Neill*, this Court rejected a debt collector's First-Amendment challenge to the UTPA, holding that the Act, as applied to unfair and deceptive debt-collection practices, does not "chill constitutionally protected speech." *O'Neill*, 609 P.2d at 531. Because "[t]he speech in question involves communications regarding alleged debts," it "falls within the rubric of commercial speech" and is subject to regulation. *Id.* And because the Act's "prohibition extends only to unfair or deceptive speech," its consumer protections are "permissible and even necessary to ensure that the stream of information regarding alleged debts will flow 'cleanly.'" *Id.* at 532.[11]

In deciding to curtail *O'Neill*'s reach in cases where that "unfair or deceptive speech" is made in the form of a petition, the trial court failed to adhere to *McDonald*'s principle of First Amendment parity—the principle that deceptive communications do not enjoy greater First Amendment protection merely because they are made in the context of petitioning. Just

[11] *O'Neill* further observed that "[e]ven if false or misleading speech were given full first amendment protection as false political speech has, the weight it would be given when balanced against the state's interest in (*Footnote continued...*)

as the UTPA's "prohibition extends only to unfair or deceptive speech," it extends only to unfair or deceptive communications in the context of litigation. *Id.* In dismissing this case, however, the trial court effectively concluded that two identical communications—one in a collection demand letter, for example, and the other in a litigation document—can be treated differently.

By granting "greater constitutional protection" to otherwise actionable communications made in the context of petitioning, the trial court arrived at precisely the result that the Supreme Court condemned in *McDonald*. 472 U.S. 485; *accord Doe v. Super. Ct.*, 721 P.2d 617, 627 (Alaska 1986) (rejecting claim of absolute Petition-Clause immunity under both the U.S. and Alaska Constitutions because creating such immunity would improperly "elevate the petition clause to special first amendment status by affording greater protection to statements made in a petition"); *Wickwire v. Alaska*, 725 P.2d 695, 703 n.7 (Alaska 1986) (reaffirming that "Alaska's Constitution provides no greater protection to speech because it is contained in a petition to government officials rather than expressed in another manner") (citing *McDonald* and *Doe*).

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protecting consumers against deceptive or unfair practices in trade or commerce would be *de minimis*." *Id.* at 532 n.43.

C. The Petition Clause Does Not Immunize Misrepresentations in the Litigation Context.

Consistent with its decision in *McDonald*, the United States Supreme Court has never held that misrepresentations in the judicial process are immunized by the Petition Clause and has consistently suggested just the opposite. *California Motor Transportation Co. v. Trucking Unlimited*, the case in which the Court first extended its *Noerr-Pennington* analysis to petitions before courts and administrative agencies, stressed important differences between petitioning in political versus adjudicative settings. 404 U.S. 508 (1972). The Court noted that Congress had "traditionally exercised extreme caution" in regulating political activities, but that the same was not true of the judicial process, where there are sanctions for abusive or unethical conduct, for example, and liability for perjury and fraud. *Id.* at 513. Accordingly, the Court explained, misrepresentations in the judicial process are not immunized:

> There are many other forms of illegal and reprehensible practice which may be corrupt in the administrative or judicial processes and which may result in antitrust violations. *Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process*.

Id. (emphasis added).

One reason for this limitation on *Noerr-Pennington* immunity is that misrepresentations by a litigant may have the effect of unfairly depriving the opposing party of his or her right to access the courts—just as

Routh Crabtree's deceptive conduct threatened to deprive Pepper of hers. Abuse of the judicial process, the Court explained, often has the consequence of "effectively barring respondents from access to agencies and courts" and "[i]nsofar as the administrative or judicial processes are involved, action of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* That insight is particularly applicable to the practices at issue in this case—namely, attempting to collect a debt by obtaining a default against an incompetent consumer without prior notice to the consumer or to the consumer's counsel.

Over a decade later, in *Allied Tube*, the Court returned to the misrepresentation limitation when it distinguished between a "publicity campaign directed at the general public, seeking legislation or executive action," which "enjoys antitrust immunity even when the campaign employs unethical and deceptive methods," and "less political arenas," in which "*unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations*." *Allied Tube & Conduit Corp.*, 486 U.S. at 500 (emphasis added). Echoing the reasoning of *McDonald*, the court stated that neither "[a] misrepresentation to a court" nor "misrepresentations made under oath at a legislative committee hearing" enjoy immunity simply because they are aimed at influencing governmental action. *Id.* at 504; *see also BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002). Routh Crabtree's

immunity theory—under which even the most glaring misrepresentations by debt collectors would be immunized from liability under the UTPA—is hard to square with *California Motor Transport* and *Allied Tube*.

Its theory is also in tension with *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991), a case in which the Supreme Court held that the *Noerr-Pennington* doctrine immunized the defendant from antitrust liability, but specifically permitted suit against the same defendant to go forward under South Carolina's Unfair Trade Practices Act. *Id.* at 384. Although the Court unfortunately did not explain its reasons for distinguishing between the federal antitrust and state-law unfair-and-deceptive-practices statutes, the ruling strongly suggests that *Noerr-Pennington* does not reach consumer-protection statutes that specifically regulate deceptive commercial activity, such as Alaska's Unfair Trade Practices Act. [12]

[12] *See DirecTV, Inc. v. Cephas*, 294 F. Supp. 2d 760, 767 (M.D.N.C. 2003) ("[C]ounterclaims brought under the NCDCA and the UDTPA do not have a chilling effect on good faith litigation. Since both statutes prevent only unfair and deceptive acts, parties bringing or threatening to bring meritorious, good faith claims cannot by definition be subject to liability under the NCDCA or the UDTPA."); *DirecTV, Inc. v. Cavanaugh*, 321 F. Supp. 2d 825, 842 (E.D. Mich. 2003) ("[I]t is difficult to see how subjecting DIRECTV to liability under the MCPA would chill its right to petition the government and seek redress. At issue in this motion is not DIRECTV's right to use demand letters as a means of encouraging settlement, but rather its use of false or misleading statements in the demand letters. If Cavanaugh's allegations are proven at trial, punishing DIRECTV will not deter future use of demand letters.").

D. Every Court to Consider the Question Has Rejected Petition-Clause Immunity for Unfair and Deceptive Debt-Collection Practices.

This case is neither the first time that a debt collector has attempted to challenge the constitutionality of a statute regulating unfair and deceptive practices nor the first time that a debt collector has made the very argument that Routh Crabtree made below. This Court has already rejected the suggestion that the UTPA unconstitutionally chills the legitimate communications of debt collectors, s*ee O'Neill*, 609 P.2d at 531, and courts have consistently rejected the suggestion that it is "unconstitutional to apply the FDCPA to attorneys working in their capacity as litigators." *Newman v. Checkrite Cal., Inc.*, 912 F. Supp. 1354, 1364 (E.D. Cal. 1995). Neither decisions such as *O'Neill* and *Newman*, nor the passage of time, however, have stopped debt collectors from inventing new and more creative theories with which to challenge the application of the FDCPA and its state-law counterparts to their conduct.

Routh Crabtree's Petition-Clause argument, in particular, has been raised and rejected in an unbroken series of recent decisions. These decisions have emphasized that (1) the Petition Clause, like the right to free speech, is not absolute, and the unconscionable, deceptive, and abusive conduct regulated falls outside constitutional protection; (2) the Supreme Court's decision in *Heintz v. Jenkins*, because it addressed the very conduct at issue in such arguments, is entitled to considerable weight and

forecloses any narrowing interpretation of the statute; and (3) even if petitioning activity itself were burdened, the Petition Clause does not protect meritless litigation.

Most recently, in *Reyes v. Kenosian & Miele, LLP*, 2008 WL 171070 (N.D. Cal. 2008), a federal district court in California surveyed the various decisions rejecting debt collectors' immunity arguments and rejected, based on *Heintz*, the "assertion that the First Amendment, as a matter of law, protects the filing of a state court complaint from the reach of the FDCPA." *Id*. at *6.

Two other recent federal district court decisions, *Delawder v. Platinum Financial Services Corp*., 443 F. Supp. 2d at 942, and *Kelly v. Great Seneca Financial Corp*., 443 F. Supp. 2d. at 959-60, are representative. In *Delawder*, the court relied on the fact that *McDonald* imposed limitations on the Petition Clause parallel to those imposed under the Free Speech clause, and held that "even if immunity under the right to petition could be extended to complaints filed under the FDCPA, it would not provide immunity for the conduct alleged here, that is, the filing of a complaint knowing that it was unfounded." *Delawder*, 443 F. Supp. 2d at 950. The decision in *Kelly* also recognized that the debt collectors' Petition-Clause argument runs parallel to their argument based on common-law litigation immunity (an argument that has also been uniformly rejected by the federal courts), and that neither argument can be reconciled with the

Supreme Court's decision in *Heintz*: "[W]hether the historical antecedents for common law immunity emanate from First Amendment concerns, or from underpinnings of the Anglo-American privilege for judicial proceedings, the defendants' immunity arguments cannot overcome the unambiguous text of the statute and the unambiguous holding of *Heintz v. Jenkins*, which this Court must follow." *Kelly*, 443 F. Supp. 2d. at 959-60.

Yet more recent decisions—several of them in cases involving a single collection law firm—have rejected the same or similar arguments. *See, e.g., Gionis v. Javitch, Block, Rathbone, LLP*, 2007 WL 1654357, at *2 (6th Cir. 2007) (rejecting law firm's argument that the right to petition under the First Amendment immunized it from FDCPA liability for litigation conduct); *Lee v. Javitch, Block & Rathbone*, 484 F. Supp. 2d 816, 821-22 (S.D. Ohio 2007) (same); *Williams v. Javitch, Block & Rathbone, et al*, 480 F. Supp. 2d. 1016 (S.D. Ohio 2007) (same); *Gionis v. Javitch, Block & Rathbone*, 405 F. Supp. 2d 856, 864 n.4 (S.D. Ohio 2005) (same); *DirecTV, Inc. v. Cavanaugh*, 321 F. Supp. 2d 825 (E.D. Mich. 2003) (extensively discussing Petition-Clause jurisprudence in the context of collection demands and observing that "it is difficult to see how subjecting [the defendant] to liability would chill its right to petition the government and seek redress" because the defendant was alleged to have made false or misleading statements; "[a]t best, it will encourage the company to

investigate carefully its accusations and to be precise in the language it uses" in future cases).

Similarly, several other courts have rejected arguments seeking immunity based on an amalgam of the common-law litigation privilege and the First Amendment's Petition Clause. *See*, e.g., *Hartman*, 467 F. Supp. 2d at 769; *Blevins v. Hudson & Keyse, Inc.*, 395 F. Supp. 2d 655 (S.D. Ohio 2004); *Barany-Snyder v. Weiner*, 2007 WL 210411, at *10 (N.D. Ohio 2007); *cf. Rouse v. Law Offices of Rory Clark*, 465 F. Supp. 2d 1031 (S.D. Cal. 2006) (rejecting debt collector's motion to dismiss on grounds that collection activity constituted protected petitioning activity under California's SLAPP statute). Routh Crabtree has presented no contrary authority. Despite numerous persistent attempts over the past several decades, no debt collector has yet managed to convince a state or federal court that the FDCPA or one of its state-law counterparts is unconstitutional as applied to actions that are either incidental to, or directly a part of, collection litigation.

III. EVEN IF PETITION-CLAUSE IMMUNITY COULD BE EXTENDED TO UNFAIR AND DECEPTIVE DEBT-COLLECTION PRACTICES AS A GENERAL MATTER, SUCH AN EXTENSION WOULD BE UNWARRANTED IN THIS CASE.

A. Ms. Pepper's Lawsuit Does Not Burden Defendants' Petitioning Activity or Inhibit Their Access to the Courts.

1. *An adverse judgment would not burden petitioning activity*. Even assuming it were proper as a general matter to extend Petition-Clause or *Noerr-Pennington* immunity to conduct prohibited by state unfair-and-deceptive-practices statutes, *but see City of Columbia*, 499 U.S. at 384 (specifically declining to do so), such an extension would be unwarranted in this case. Only liability that actually imposes a burden on *petitioning* is precluded under the *Noerr-Pennington* doctrine. *See Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) ("Because the *Noerr-Pennington* doctrine grows out of the Petition Clause, its reach extends only so far as necessary to steer the Sherman Act clear of violating the First Amendment. Immunity thus applies only to what may fairly be described as *petitions*, not to litigation conduct generally.") (emphasis in original).

In *Sosa*—the case on which Routh Crabtree relied most heavily below—the Ninth Circuit read *BE&K Construction*, 536 U.S. at 516, as requiring a three part analysis: first, the court must "identif[y] the burden that the threat of an adverse [judgment] imposes on the [defendants']

petitioning activities"; second, the courts must identify the "precise petitioning activity at issue, to determine whether the burden on that activity implicate[s] the protection of the Petition Clause"; and third, the statute must be construed, if possible, to eliminate that burden. *Sosa*, 437 F.3d at 930. This case doesn't make it past the first step, let alone the second or third, because an adverse judgment would impose no burden on petitioning.

The gravamen of Ms. Pepper's complaint is that Routh Crabtree failed to provide her with notice, both before and during the litigation, so that it could obtain a default against her—an instance of "sewer service," and a variant of the conduct at issue in the classic "forum abuse" cases. *Cf. Aguchak*, 520 P.2d 1352. An adverse judgment here would impose no burden on Routh's petitioning activity because no debt collector has a legitimate interest in pursuing collection litigation without notifying debtors, or in seeking to default incompetent debtors without notice to their lawyers or guardians. *See Calif. Motor*, 404 U.S. at 513 (litigation conduct that "effectively bars respondents from access to agencies and courts . . . cannot acquire immunity by seeking refuge under the umbrella of 'political expression'"); *Allied Tube*, 486 U.S. at 500 ("unethical and deceptive practices" that constitute abuses of the judicial process are not immune); *see also DirecTV v. Zink*, 286 F. Supp. 2d 873, 874 (E.D. Mich. 2003).

In any event, our research has not uncovered a single case in which a court has concluded that notice from one party to another—or, here, the *failure to provide notice*—constitutes petitioning activity worthy of absolute immunity under the Constitution. *See Theofel v. Farey-Jones*, 359 F.3d 1066, 1078-79 (9th Cir. 2004) ("We are skeptical that *Noerr-Pennington* applies at all to the type of conduct at issue. Subpoenaing private parties in connection with private commercial litigation bears little resemblance to the sort of governmental petitioning the doctrine is designed to protect."); *Freeman*, 410 F.3d at 1184 ("But discovery is merely communication between parties as an aid to litigation. It is not in any sense a communication to the court and is therefore not a petition."); *see also Starlite Dev. v. Textron Fin. Corp.*, 2008 WL 2705395, at *35 (E.D. Cal. 2008) (applying *Theofel*).

2. *The conduct here is not protected "incidental conduct."*

To be sure, the Ninth Circuit, alone among the federal appeals courts, has extended *Noerr-Pennington* immunity even to conduct deemed "incidental" or necessary to petitioning, even outside the antitrust context. *Compare Sosa*, 437 F.3d at 935 ("the law of this circuit establishes that communications between private parties are sufficiently within the protection of the Petition Clause to trigger *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity"), *with Venetian Casino*, 484 F.3d at 613-14 (declining to follow *Sosa* and explaining that

the "incidental conduct" extension has been "limited specifically to antitrust cases"). But, unsurprisingly, no court has held that the practice of failing to notify debtors of litigation constitutes legitimate incidental conduct that is necessary to petitioning in the same way that customary pre-suit demand letters might be thought necessary.

And even in antitrust cases, because "context matters," incidental activity will not be protected under *Noerr-Pennington* if its "'context and nature . . . make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws.'" *Venetian Casino*, 484 F.3d at 612 (quoting *Allied Tube*, 486 U.S. at 505). As demonstrated in Part I, the conduct challenged in this case is clearly "the type of commercial activity that has traditionally" been regulated under consumer-protection laws, and is not by any means "customary pre-litigation activity." *Id.* Indeed, there is no principled way to distinguish between the conduct here and the conduct at issue in the FTC Act, UTPA, and FDCPA cases involving "forum abuse" and "sewer service," or the conduct regulated by the "legal action" clause of the FDCPA, 15 U.S.C. § 1692i, or the federal Soldiers' and Sailors' Act. Such practices are "neither common features of litigation nor statutorily protected litigation privileges." *Venetian Casino*, 484 F.3d at 613 (distinguishing *Sosa*).

Finally, because the political interest in "sewer service" by debt collectors is non-existent, the values protected by the Petition Clause are

not implicated. *See Allied Tube*, 486 U.S. at 507 n.10 (explaining that *Noerr-Pennington* turns on whether the activity is "anticompetitive political activity that is immunized despite its commercial impact," as opposed to "anticompetitive commercial activity that is unprotected despite its political impact").

B. Even If This Lawsuit Burdened Protected Petitioning Activity, It Would Fall Within The "Sham" Exception to Immunity.

Even if the Court were to conclude that a judgment in Ms. Pepper's favor would burden conduct that is incidental but necessary to petitioning, extending *Noerr-Pennington* immunity to this case would nonetheless be unwarranted because the case would easily satisfy the "sham" exception to the doctrine, which exempts baseless conduct from immunity. Unfortunately, although this is an easy case, the law surrounding the exception is unsettled and poses difficult problems.

1. *The "sham" exception applies to the "incidental" conduct only.* The first unsettled question raised under the "sham" exception inquiry is one noted by the Superior Court (Exc. 81): Does the exception turn on whether the incidental activity at issue is baseless, or whether the litigation as a whole is baseless? In *Theofel*, the court answered this question in the context of alleged discovery abuse, where the defendants had allegedly improperly served a subpoena on the plaintiff's internet service provider in an attempt to get access to their email. 359

F.3d at 1079. After expressing its skepticism that *Noerr-Pennington* would extend to discovery between "private parties in connection with private commercial litigation" at all, the court declared: "Nevertheless, assuming *arguendo* the defense is available, it fails. *Noerr-Pennington* does not protect 'objectively baseless' sham litigation" and "[t]he magistrate judge found that the subpoena was 'transparently and egregiously' overbroad and that defendants acted with gross negligence and in bad faith." *Id.* (quoting *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)). Thus, the court looked only to whether the "incidental activity" was baseless, and rejected the suggestion that the exception applies only where the entire litigation is baseless:

> Defendants urge us to look only at the merits of the underlying litigation, not at the subpoena. They apparently think a litigant should have immunity for any and all discovery abuses so long as his lawsuit has some merit. Not surprisingly, they offer no authority for that implausible proposition. Assuming *Noerr-Pennington* applies at all, we hold that it is no bar where the challenged discovery conduct itself is objectively baseless.

Id.; *see also id.* at 1079 n.6 (noting that, to the extent that the sham exception also requires "subjective intent to use legal process to achieve the evil prohibited by the statute from which exemption is claimed," that prong too is satisfied because "the purpose of *any* objectively baseless subpoena is to uncover private information") (emphasis in original). Under that approach, *Noerr-Pennington* immunity here would turn on whether Routh Crabtree's conduct—failing to serve Pepper, failing to notify her counsel

before taking a default and seeking default despite her incompetency—was objectively baseless. Taking the facts alleged to be true, the allegations in the complaint are sufficient to overcome that standard.

2. *Assuming the "sham" exception applies to the whole litigation, what standard applies?* If—contrary to *Theofel*, 359 F.3d at 1079—the "sham" exception must be applied to the litigation as a whole, the relevant inquiry becomes less certain.

Bill Johnson's Restaurants, 461 U.S. 731, a non-antitrust case involving labor relations proceedings, articulated two tests concerning the merits of the prior state-court lawsuit that differ depending on the stage of litigation at which the merits of the case are assessed. First, as to whether an agency could *enjoin* an ongoing retaliatory suit, the test is whether the employer's lawsuit presents "a genuine issue of material fact." *Id.* at 745. Second, as to cases in which the agency must decide whether to impose *liability* as a result of a retaliatory state-court action, the test is quite different: "If judgment goes against the employer in the state court, . . . or if his suit is withdrawn or is *otherwise shown to be without merit*, the employer has had his day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case." *Id.* at 747 (emphasis added). Because this case is a non-antitrust case in which the prior litigation has already been conducted, the *Bill Johnson's* test applies: The

question would become whether Routh Crabtree's litigation was objectively lacking in merit because, among other things, it failed to satisfy the statutory prerequisite of notice to the debtor.

A different test has been applied to antitrust claims. *See Prof'l Real Estate Investors*, 508 U.S. at 57-58; *Gunderson v. Univ. of Alaska*, 902 P.2d 323, 328 (Alaska 1995). Under that test, the "lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and the baseless lawsuit must have been an attempt to "interfere directly with the business relationship of a competitor." *Id.* at 59-61. The difference between the two standards can be explained by the differences between the labor laws and the antitrust laws, differences that have a bearing on the relevant standard for consumer-protection cases, and debt-collection cases in particular.

First, unlike in the labor relations context, there is no congressional intent in the antitrust context that courts broadly read the statute to effect its purpose, and so it is more appropriate to restrict the scope of antitrust liability. *See Noerr*, 365 U.S. at 136-37; *cf.* Carol Rice Andrews, *After BK&E: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1317-18 (2003); *Cardtoons*, 208 F.3d at 888 (discussing ways in which the *Noerr-Pennington* cases are premised on features unique to the antitrust context). Given the obligation of Alaska courts to read the UTPA broadly to

effect its remedial purpose, this factor favors application of the *Bill Johnson's* standard in consumer-protection cases. *See O'Neill*, 609 P.2d at 527 (UTPA is "to be accorded a liberal construction"); *Brown v. Card Service Center*, 464 F.3d 450, 453 (3d Cir. 2006) ("Because the FDCPA is a remedial statute, we construe its language broadly, so as to effect its purpose.") (internal citations omitted).

Second, the differing standards are based on the fact that "the risk of litigation abuse is not as high in the antitrust setting as it is in the labor context, because the typical dispute is between commercial competitors" rather than parties with unequal power. Andrews, *Difficult Constitutional Question*, 39 HOUS. L. REV. at 1318. That factor also cuts in favor of applying the *Bill Johnson's* standard to consumer cases, given the specific concerns about abuses by debt collector-lawyers discussed earlier and the obvious disparities in power between debt collector-lawyers and unsophisticated consumers. As with the labor laws, "the need to curb litigation abuse and the congressional intent to do so are more evident under the [UTPA and FDCPA] than under antitrust laws." *Id.* at 1318.

The contrasting standards in *Bill Johnson's* and *Professional Real Estate Investors* set the stage for *BE&K Construction Co.*, 536 U.S. 516—a case involving a labor dispute between a non-union construction company and several unions. As one commentator has explained, the Supreme Court in *BE&K* "had an opportunity to resolve" some of the uncertainty arising

out of the different standards but instead "decided the case on narrow statutory grounds and corrected only the NLRB's standard for finding retaliatory motive" under the National Labor Relations Act. Andrews, *Difficult Constitutional Question*, 39 HOUS. L. REV. at 1324. Indeed, the three *BE&K* opinions by Justices O'Connor, Scalia, and Breyer left the state of the law somewhat less certain than before. Justice O'Connor's opinion, in particular, is opaque. *See id.* at 1330 (observing that "Justice O'Connor's opinion is difficult to follow" in large part because of "her pattern of starting a discussion and setting up an issue, only to dismiss the discussion and issue as not relevant to the question at hand"). Her opinion describes the two different standards represented by *Professional Real Estate Investors* and *Bill Johnson's*, but does not attempt to resolve any perceived tension between them or to define the universe of cases to which they apply. In fact, the opinion describes both standards as "consistent" with the First Amendment, *BK&E*, 526 U.S. at 531, and concludes that the Court "need not resolve whether objectively baseless litigation requires any 'breathing room' protection, for what is at issue here are suits that are not baseless in the first place." *Id.* at 532.

3. *The allegations in this case are sufficient to satisfy the "sham" exception under any applicable standard.* Whatever the resolution of the doctrinal problems left open by the Supreme Court, the allegations in this case would withstand a motion to dismiss under either of

the standards outlined above—that is, regardless of whether subjective motivation is a component of the inquiry.

First, the fact that Ms. Pepper did not prevail in the underlying collection litigation by reason of default is irrelevant to the analysis. *See T.F.T.F. Capital Corp. v. Marcus Dairy, Inc.*, 312 F.3d 90, 94 (2d Cir. 2002) ("We think that the district court erred when it found the sham litigation exception to *Noerr-Pennington* to be inapplicable on the basis of the default judgment rendered in the Connecticut action. . . . [A]lthough it is a winning lawsuit, a default judgment does not *ipso facto* constitute a determination of the 'objective reasonableness' of the lawsuit, especially in a case where the plaintiff claims that the judgment in the prior action was obtained through deceit."). To hold otherwise would have the perverse result of permitting a debt collector to prevail by denying a consumer access to a judicial forum, in the name of *protecting* the right to petition.

Second, although there has been little factual development in this case, Ms. Pepper has alleged that Routh Crabtree had "no basis to seek to recover" the amounts sought in its collection action because it had failed to comply with the notice requirement of AS 9.68.115, which is a statutory prerequisite to recovery (Exc. 3). Moreover, Pepper alleged that Routh Crabtree had been put on notice that she was represented by counsel and

nevertheless sought default against her without notifying her counsel, a pattern of conduct that suggests improper motive.[13]

Third, in light of the factual development necessary to establish the applicability of the sham exception, the Superior Court's decision to dismiss Ms. Pepper's suit in its entirety at the pleadings stage was error, even if one believes that the exception encompasses a subjective component in every case. In *K&K Recycling v. Alaska Gold Co.*, this Court declined to decide whether the *Noerr-Pennington* doctrine applied and allowed the case to go forward past the summary-judgment stage where there were genuine issues of material fact concerning the "reasonableness and motives" of the defendant's alleged petitioning. 80 P.3d 702, 724 (Alaska 2003) ("[W]e decline to decide if *Noerr-Pennington* should be extended to cover this case"). Cases like *K&K* show that the sham exception frequently cannot be determined even on summary judgment—let alone on the bare pleadings.[14] Thus, at the very least, it was premature for the trial

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[13] See *Hayes Family Ltd. P'ship v. Sherwood*, 2008 WL 2802400, at *1 (Conn. Super. 2008) ("*Noerr-Pennington* . . . does not apply because the petitioners have alleged a cause of action . . . for violation of the Connecticut Unfair Trade Practices Act" and "[a]s that claim is set forth it can be construed as a claim of sham or fraud").

[14] *See Capitol Records, Inc. v. Weed*, 2008 WL 1820667 (D. Ariz. 2008) (pleading stage too early where complaint alleged facts that could fall within "sham" exception); *Leadbetter v. Comcast Cable*, 2005 WL 2030799, at *5 (W.D. Wash. 2005) ("[I]t is too early for this Court to determine whether the record companies' lawsuit against plaintiff was a sham. . . . for purposes of *Noerr-Pennington* immunity when no discovery has been conducted in that case."); *Jarrow Formulas, Inc. v. Int'l*

(*Footnote continued*...)

court to dismiss Ms. Pepper's complaint on the basis of the *Noerr-Pennington* doctrine without considering whether the sham exception could be satisfied based on the allegations in the case.

Nutrition Co., 175 F. Supp. 2d 296, 311 (D. Conn. 2001) ("[T]he complaint has alleged sufficient facts, which, if proven, show that the defendants are not entitled to immunity under the *Noerr-Pennington* doctrine."); *Econ. Petroleum Corp. v. Paulasukas*, 2003 WL 22007018, at *17 (Conn. Super. 2003) ("[T]he evidence before the Court raises a genuine issue of material fact as to whether the Sellers' underlying claims were objectively baseless, and thus within the 'sham exception' to the doctrine."); *Pound Hill Corp. v. Perl*, 668 A.2d 1260, 1264 (R.I. 1996); *see also United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 26-27 (D.D.C. 2004) ("Because a determination of whether the challenged predicate acts constitute petitioning is a fact-intensive inquiry that can only be resolved at trial, Defendants are not entitled to summary judgment on the basis of the *Noerr-Pennington* doctrine.").

CONCLUSION

The Superior Court's order dismissing this action should be reversed, as should its order granting the defendants' motion for attorney's fees. The Court should hold that Alaska's Unfair Trade Practices Act does not exempt debt collectors from liability for unfair and deceptive practices that occur in the context of litigation and that neither the United States nor Alaska Constitutions confer immunity on such practices.

Respectfully submitted,

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APPELLATE RULE 513.5(c)(2) CERTIFICATE OF FONT

I hereby certify that this brief is formatted pursuant to Appellate Rule 513.5(c) in 13-point Georgia typeface.

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