IN THE SUPREME COURT OF THE STATE OF OREGON

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Plaintiff-Respondent,
Respondent on Review,

v.

JASON SANDERS,

Defendant-Appellant,
Petitioner on Review.

Multnomah County Circuit Court Case No. 14CV05489

A159821

S066455

OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF

On Appeal from the Judgment of the Circuit Court for Multnomah County, Honorable Eric J. Neiman, Circuit Court Judge

Court of Appeals Opinion Filed: June 20, 2018
Author of Opinion: Tookey, J.
Concurring Judges: DeHoog, P.J. and Hadlock, J.

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I. INTRODUCTION

The Oregon Trial Lawyers Association ("OTLA") files this brief as *amicus curiae* in support of Defendant-Petitioner on Review Jason Sanders ("Sanders"). OTLA files this brief in support of the rule that the common-law doctrine of account stated should not apply in the consumer debt context. That rule of law is consistent with the history underlying the doctrine, modern consumer laws and policies, and the balance of the equities at issue in the practice of consumer debt collection.

II. STATEMENT OF FACTS

For the purposes of this *amicus* brief, OTLA incorporates by reference and relies on the facts stated in the Court of Appeals opinion, *see Portfolio Recovery Assocs., LLC v. Sanders*, 292 Or App 463, 465–67, 425 P3d 455 (2018), supplemented by the Statement of Facts in Defendant Sanders' brief on the merits.

III. PROPOSED RULE OF LAW

The doctrine of account stated generally is limited to merchant dealings or transactions between equally sophisticated individuals engaged in an ongoing business relationship. The doctrine generally does not apply in the consumer context.

IV. ARGUMENT

This case arises out of an action for account stated brought for the purposes of collecting a debt. The case is just one example of the "flood" of debt collection cases that has inundated our state courts in the last decade. *See* Matthew Kish, *Debt Cases Flood Courts*, Portland Business Journal (Feb 25, 2011, 3:00 AM), https://www.bizjournals.com/portland/print-edition/2011/02/25/debt-cases-flood-courts.html (so describing such cases). Debt buyers and debt collectors—many of whom are in the practice of acquiring debts on a secondary debt market—have turned to the doctrine of account stated to collect on debts that otherwise are inadequately documented and therefore would be difficult to prove in court. *See generally* Nat'l Consumer Law Ctr., *Collection Actions: Defending Consumers and Their Assets* 103–11 (4th ed 2017). A cause of action for account stated offers a way of circumventing the absence of documentary evidence—in an account stated claim, the evidentiary scales tip in favor of the debt collector, who benefits from an "inference" of an existing agreement simply by offering into evidence a statement of an account. *See Portfolio Recovery Assocs., LLC*, 292 Or App at 472–73 (citing *Tri-County Ins., Inc. v. Marsh*, 45 Or App 219, 223–24, 608 P2d 190 (1980)).

A. An implied account stated is an "agreement" that arises when a creditor renders a bill and receives no reply.

Under Oregon's common law, "[a]n account stated is an agreement between persons who have had previous transactions of a monetary character fixing the amount due in respect to such transactions and promising payment." *Steinmetz v. Grennon*, 106 Or 625, 634, 212 P 532 (1923); *see also* Restatement (Second) of Contracts § 282(1) (1979) ("An account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due to the creditor."). "An agreement supporting an account stated cause of action may be express or implied from the circumstances." *Tri-County Ins., Inc.*, 45 Or App at 223. Thus, to state a claim for account stated, a creditor must show (1) the existence of some pre-existing debt or obligation of payment; and (2) the debtor's assent to the sum owed, either expressly or impliedly, by failure to object to the account statement within a reasonable time. *See also Mortensen v. Dayton Sand & Gravel Co.*, 143 Or 273, 274–75, 22 P2d 320 (1933) ("'[T]he material allegations in an action on an account stated are (1) that plaintiff and defendant came to an accounting together, (2) that on such accounting, defendant was found indebted to the plaintiff in a specified sum, (3) which defendant promised to pay, (4) and has not paid.'" (quoting *Foste v. Standard Life & Accident Ins. Co.*, 26 Or 449, 452, 38 P 617 (1894)). Where the debtor fails to object, its implied assent is binding, absent mistake or fraud. *See Holmes v. Page*, 19 Or 232, 233–34, 23 P 961 (1890).

The agreement forming the basis of an implied account stated therefore is based on *inaction* by one party with respect to the other. The consideration that forms the basis of that agreement is the stated account itself—that is, the resolution of a disputed account balance based on the prior dealings of the parties. *See Tri-County Ins., Inc.*, 45 Or App at 223 (noting that the new agreement is based on the previous monetary transactions of the parties). Indeed, the existence of a disputed account lies at the heart of the account stated doctrine, giving rise to the significance of the final statement as the potential agreed-upon amount owed. Account stated is "in the nature of a new promise" and "has all the force of a contract." *Holmes*, 19 Or at 233.

An account stated claim is, of course, useful to debt collectors today because it does not require evidence of the contract between the consumer and the original creditor. Indeed, the *only* evidence the claim requires is evidence of an account rendered—or a final account statement. *See generally* Emanwel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 Vt L Rev 339, 384 (2013) (describing the doctrine's "evidence-reducing qualities"). In today's consumer credit context, where debts often are sold on a secondary market and evidence of the original credit agreement often is unavailable, implied account stated often provides the only viable means for debt buyers to collect on a debt. *See* Fed. Trade

Comm'n, *The Structure and Practices of the Debt Buying Industry* at iii (Jan. 2013), available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf. But those "evidence-reducing qualities," while good for creditors, impose harsh and unfair burdens on consumers—the very consumers that our laws otherwise seek to protect—and only contribute to the "broken" system of debt collection. *See* Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010), *available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf (concluding that "[t]he system for resolving disputes about consumer debts is broken" and that "neither litigation nor arbitration currently provides adequate protection for consumers").

B. A cause of action for implied account historically has been limited to merchant dealings or transactions between equally sophisticated individuals engaged in an ongoing business relationship.

At common law, the doctrine of implied account stated was limited to dealings between merchants. *See, e.g.*, *Nodine v. First Nat'l Bank*, 41 Or 386, 390, 68 P 1109 (1902); *see also Freeland v. Heron, Lenox & Co.*, 11 US (7 Cranch) 147, 148 (1812). Thus, between merchants, "it [was] looked upon as an allowance of an account current, if the merchant that sees it does not object against it, in a second or a third post." *Sherman v. Sherman*, 23 Eng Rep 276,

276 (1692). The period of time allowed for an objection against the account was "a reasonable time"—a period set by merchant practices. *Id.*; *see also Tickel v. Short*, 28 Eng Rep 154, 154 (1750–1751) (explaining account stated as a rule of chancery and "of merchants").[1]

The doctrine undoubtedly has been expanded over time, courts having extended it beyond the context of merchant dealings to other transactions between and among businesses, involving parties of equally sophisticated means, who are engaged in ongoing business relationships. *See, e.g.*, *Nodine*, 41 Or at 390 ("At one time this rule applied to accounts between merchants only, but it has now become so extended as to embrace practically every kind of transaction involving the relation of debtor and creditor, and applies to a bank and its customer or depositor."). The expansion occurred over the course of the nineteenth and early twentieth centuries, before the doctrine fell largely into disuse. *See generally* Turnbull, 38 Vt L Rev at 352–53 (describing the historical evolution of the doctrine of account stated and noting the "resurrection" it has undergone over the course of the last decade).

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[1] The historical merchant dealings limitation of the doctrine of account stated makes good sense. Merchant dealings provide a basis for the inference of assent to a new agreement to pay a disputed amount. Traditional contract principles otherwise generally require some action or affirmative conduct to manifest acceptance of an offer; silence and inaction are typically insufficient. *State Land Board v. United States*, 222 Or 40, 48, 352 P2d 539 (1960), *rev'd on other grounds*, 366 US 643, 81 S Ct 1278, 6 L Ed 2d 575 (1961).

C. The modern cause of action for account stated should likewise be limited to transactions between equally sophisticated individuals engaging in ongoing business relationships, and should not apply in the consumer context.

Unfortunately, recent decades have seen the doctrine of account stated expanded even further—to consumer debt collection actions brought by debt buyers and debt collectors against everyday consumers. Between 2001 and 2010, over 1900 accounted stated cases were reported, corresponding with the rise in the secondary debt market and the increase in household debt across the country. *See* Turnbull, 38 Vt L Rev at 353 (citing Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* at 12–13 (2013)). The cases generally are brought by debt buyers—many of whom don't have an original copy of the consumer contract. *See, e.g.*, Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* at iii; Sam Glover, *Has the Flood of Debt Collection Cases Swept Away Minnesotans' Due Process Rights?*, 35 Wm Mitchell L Rev 1115, 1122 (2009) (so describing account stated actions by original creditors versus debt buyers).

For several reasons, OTLA urges this Court to curb the expansion of the account stated doctrine and limit its application to transactions between merchants or equally sophisticated individuals engaged in an ongoing business relationship.

First, as explained above, such a limitation is consistent with the doctrine's historical roots, which center on merchant dealings. Merchant

dealings largely involved an established course of conduct and, therefore, clear merchant-to-merchant expectations. Based solely on that course of conduct and those expectations, the law fairly can infer one merchant's implied assent to the other—that is, based on the absence of any stated objection. Consumer credit transactions are much different, as they lack any established course of conduct and are often coupled with a disparity in expectations and/or mutual understanding of how the law works. Consumers frequently are unaware of their rights in the context of a debt collection, and that is particularly so when the creditor or debt buyer pursues against the debtor an ancient, common-law remedy the consumer has never heard of.[2] In those circumstances, without any understanding of the legal effect of their action or inaction, the debtor's conduct alone cannot suffice as a manifestation of assent.[3]

Second, and in a similar vein, limiting the doctrine of account stated to business dealings between equally sophisticated parties or merchants is consistent with the doctrine's theoretical underpinnings, which are based on the parties' prior course of dealings as a means to inform the implied assent that arises when one party does not reply to a statement of account. Put somewhat

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[2] Oregon State Bar, *Debtor's Rights* (July 2016), https://www.osbar.org/public/legalinfo/1021_DebtorsRights.htm (making no mention of the legal effect of action or inaction as it relates to an account stated, and noting that "[t]he fact that you do not respond to the debt collector's notice cannot be used as evidence that you owe the debt").

[3] A consumer's lack of awareness of the legal effect of action or inaction is only compounded when it's not clear what law applies, as was the case here.

differently, litigants cannot establish, and courts cannot find, what a "reasonable time" to object should be in the absence of a prior course of dealing between individuals engaged in ongoing business relationships. The consumer credit context rarely provides circumstance in which that determination fairly can be made.

Third, applying the doctrine of implied account stated in the consumer debt collection context imposes assumptions upon consumer credit transactions that do not reflect reality. Under the doctrine, the law assumes that the consumer, by failing to reply to the creditor or debt collector's statement, agrees that the debt is accurate and promises to repay it. But that assumption likely is wrong in most consumer cases. There are many reasons a consumer may not respond to a creditor or debt collector's statement—the consumer may not be able to pay it; the consumer may not understand who it's from, particularly if it has already been sold on the secondary market; or the consumer may not, for one reason or another, understand what the statement means. Each of those reasons seems far more likely to explain the consumer's failure to respond than the assumption underlying the implied account stated doctrine—that the consumer's having ignored the bill means that she agrees to pay it.

Fourth, the doctrine potentially is inconsistent with federal law to the extent that it gives the creditor, rather than the debtor, the benefit of an "inference" that a debt is correct and due. *See Portfolio Recovery Assocs., LLC*,

292 Or App at 474 (explaining that the existence of the statement gives the creditor the benefit of an inference that the debtor agreed that the statement was accurate). By stark contrast, federal law, including the Truth in Lending Act (TILA), 15 USC §§ 1601–1667c, places the burden squarely on the creditor to prove that disputed charges are authorized under the parties' agreement. *See* 15 USC § 1643(a)(1)(B). Similarly, the Fair Credit Billing Act (FCBA), 15 USC § 1666, imposes an obligation on the creditor, not the debtor, to investigate any alleged errors in billing, and does not even mandate that the debtor notify the creditor of the error. Under the doctrine of account stated, those burdens are flipped—if a consumer identifies an error on the account statement, the burden falls squarely on her to articulate the error to the creditor and, later, offer enough evidence to overcome any inferences that the law draws against her.

V. CONCLUSION

For the foregoing reasons, OTLA urges this Court to consider seriously the propriety of the implied account stated doctrine—upon which many collection actions rely—in the consumer debt collection context. In that context, the balance of power is tipped sharply against the consumer, who is less sophisticated, has fewer resources, and potentially begins from an already difficult position—in which he or she cannot pay the debt. Applying the doctrine of implied account stated in the consumer context is inconsistent with the doctrine's historical and theoretical underpinnings, established consumer

law and policy, and the realities and expectations of the everyday consumer. The Court should hold in this case that the doctrine does not and cannot apply in such circumstances.

DATED this 23rd day of May, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 2,447.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

DATED this 23rd day of May, 2019.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 23, 2019, I directed the original **OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Robert E. Sabido and Julie A. Smith, attorneys for Respondent on Review; and Bret A. Knewtson and Mark G. Passannante, attorneys for Petitioner on Review, using the court's electronic filing system.

I further certify that on May 23, 2019, I directed the **OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF** to be served upon Jeffrey A. Topor and Tomio Buck Narita attorneys for Respondent on Review, by mailing a copy, with postage prepaid, in an envelope addressed to:

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