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Drug Testing Compliance Group v. DOT Compliance Service Amicus Brief Dckt. 43458

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DRUG TESTING COMPLIANCE GROUP,
LLC,

Plaintiff-Respondent,

v.

DOT COMPLIANCE SERVICE, JEFF
MINERT, DAVID MINERT, and RYAN
BUNNELL,

Defendants-Appellants.

Supreme Court Docket No. 43458-2015
Ada County Docket No. CV-OC-2014-15652

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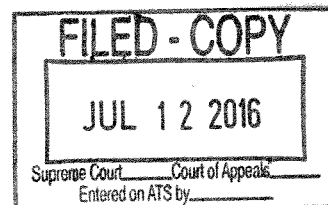
BRIEF OF AMICUS CURIAE

APPEAL FROM THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

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INTEREST OF AMICUS CURIAE

The Attorney General, on behalf of the State, enforces the Idaho Telephone Solicitation Act (ITSA), title 48, chapter 10, Idaho Code, and the Idaho Rules of Telephone Solicitation and Pay-Per-Telephone Call Services (ITSR), IDAPA 04.02.02.000 *et seq.* The ITSA and ITSR require certain telephone solicitors to register with the Attorney General at least 10 days before conducting business in Idaho.

The Idaho Legislature included the registration mandate in the ITSA for certain, non-exempt telephone solicitors to help further the law's stated purposes, which include protecting purchasers from misleading telephone solicitations and insuring competition and fair dealings between telephone solicitors. When a telephone solicitor conducts business without registering with the Attorney General, the telephone solicitor's unlawful business practices undermines the ITSA's purposes and its regulatory framework.

The consequences for failing to register are potentially significant. At issue in this case is the consequence that an unregistered telephone solicitor faces under Idaho Code § 48-1007(2), which reads:

If a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is null and void and unenforceable.

In other words, a telephone solicitor who should have registered, but failed to do so, may be pleased with the telephone sales he made, but under Idaho Code § 48-1007(2), those sales are null and void.

This case concerns, in part, the application and interpretation of Idaho Code § 48-1007(2).¹ Plaintiff-Respondent Drug Testing Compliance Group, LLC, ("DTC Group"), sued

¹ The Attorney General expresses no opinion or position on whether the ITSA's registration requirement or Idaho Code § 48-1007(2) affects the validity of DTC Group's claim for tortious interference with contract.

Defendant-Appellant DOT Compliance Service (“DOT Compliance”) in Ada County District Court for tortious interference with DTC Group’s sales contracts. At the time the lawsuit was filed, both companies conducted business in Idaho as telephone solicitors. From their Treasure Valley, Idaho locations, the companies, which sold similar services, competed for customers throughout the United States. However, DTC Group, which acknowledged it needed to register with the Attorney General as a telephone solicitor, was not registered when it made the telephone sales that formed the basis of DTC Group’s claim against DOT Compliance for tortious interference with its sales contract.

DOT Compliance raised DTC Group’s failure to register at the conclusion of the jury trial in DOT Compliance’s Motion for a Directed Verdict. District Court Judge Richard D. Greenwood (“district court”) denied DOT Compliance’s Motion for a Directed Verdict, finding generally that a purchaser, not a third-party, had the option under Idaho Code § 48-1007(2) to void a sales contract with an unregistered telephone solicitor, and it was best to leave enforcement of the registration requirement to the Attorney General.

The district court’s interpretation and application of the term “void” in Idaho Code § 48-1007(2) is incorrect. Rather than recognizing that “void” means nonexistent, the district court applied the definition of “voidable.” Idaho case law discusses the legal differences between “void” and “voidable” and those cases, along with the language and legislative purposes of the ITSA, warrant this Court’s correction of the district court’s finding.

Because affirming the trial court’s ruling could impair the legislative purposes of the ITSA, the Attorney General appears as *amicus curiae* in this matter to (a) inform the Court about the ITSA’s registration requirement, (b) explain the importance of the “void” standard in Idaho Code § 48-1007(2), and (c) encourage this Court to uphold the plain language of this section.

ARGUMENT

I. The Legislature, Recognizing the Risks and Abuses Associated with Telephone Solicitations, Crafted the ITSA to Address the Risks and Abuses That Arise From Commercial Telephone Calls, But Also Acknowledged That Not All Telephone Solicitors Must Register

Two years before the ITSA's enactment in 1992, approximately 300,000 telephone solicitors called more than 18 million Americans every day,² generating over \$435 billion in sales.³ When asked in a survey about their view of telephone sales calls, 67% of consumers described telephone solicitations as "very annoying."⁴ The Alliance Against Fraud in Telemarketing estimated that, in 1991, American consumers lost \$10 billion to telemarketing fraud.⁵ That same year, in a memorandum to the Legislature, the Attorney General reported his office received over 300 telemarketing fraud complaints and estimated that telephone sales scams cost Idahoans \$40 million.⁶

Recognizing the seriousness of these statistics and resolving to address the increasing problem of Idahoans losing money to deceptive telephone solicitations, the Legislature passed the ITSA, including a section that requires telephone solicitors to register with the Attorney General.⁷ Twenty-four years later, Idaho Code § 48-1004—the ITSA's registration section—

² H.R. Rep. No. 102-317 at 7 (1991).

³ *Id.*

⁴ *Id.* According to the survey, only computer-generated sales calls received more "very annoying" ratings from consumers.

⁵ Att'y Gen. Mem. to Idaho S. State Affairs Comm. in Support of H.B. 525 (Telephone Solicitation Act) (Feb. 19, 1992) (on file with the Attorney General). A recent Harris Poll survey commissioned by the maker of TrueCaller™ (a Caller ID app) found that approximately 27 million Americans lost money to telephone scams in 2015, representing a 54% increase from 2014. Scam calls reportedly cost adults \$7.4 billion last year. Complete survey results and methodology are available at <https://blog.truecaller.com/2016/01/22/truecaller-survey-27m-americans-lost-average-7-billion-in-phone-scams-2015> (visited Jun. 28, 2016).

⁶ Att'y Gen. Mem. to Idaho S. State Affairs Comm. in Support of H.B. 525 (Telephone Solicitation Act) (Feb. 19, 1992) (on file with the Attorney General).

⁷ Idaho Code § 48-1001(1)-(2), which provides the Legislature's findings and intent for enacting the ITSA reads:

remains unaltered, and the Attorney General's enforcement of the ITSA through the years has helped to fulfill the statutory purposes and Legislative intent of the ITSA.

A. Idaho Code § 48-1004(1)(a) Requires Telephone Solicitors, Unless Exempted under Idaho Code § 48-1005, to Register with the Attorney General Before They Conduct Telephone Solicitations Either to or from Locations in Idaho

The ITSA is remedial legislation and is interpreted broadly to fulfill its legislative intent and purpose.⁸ The ITSA defines a “telephone solicitor” as:

any person who, on his own behalf or through other persons or through use of an automatic dialing-announcing device [makes an] unsolicited telephone call to a purchaser for the purpose of asking, inducing, inviting, requesting, or encouraging the purchaser to purchase or invest in goods or services during the course of a telephone call.⁹

A telephone solicitor, unless exempt under Idaho Code § 48-1005,¹⁰ must register with the Attorney General at least 10 days before “conducting business” in Idaho. The phrase “conducting business,” defined in Idaho Code § 48-1002(2), means “making telephone solicitations either to or from locations within the state of Idaho.”

(1) The use of telephones for commercial solicitation is rapidly increasing. This form of communication offers unique benefits, but also entails special risks and the potential for abuse. Many Idaho residents and businesses have lost money or suffered harm primarily as a result of out-of-state telemarketing abuse. For the general welfare of the public and in order to protect the integrity of the telemarketing industry, the following provisions of law are deemed necessary.

(2) It is the intent of the legislature in enacting this chapter to safeguard the public against deceit and financial hardship, to insure, foster and encourage competition and fair dealings among telephone solicitors by requiring adequate disclosure, and to prohibit representations that have the capacity, tendency, or effect of misleading a purchaser. The provisions of this chapter are remedial, and shall be construed and applied liberally to accomplish the above-stated purposes.

⁸ See Idaho Code § 48-1001(2).

⁹ Idaho Code § 48-1002(12).

¹⁰ In Appellants' Brief, DOT Compliance incorrectly states several times that *all* telephone solicitors must register with the Attorney General and provide purchasers with a three-day notice of their right to cancel. See, e.g., Appellants' Br. 5, 16, & 26 (Jan. 13, 2016). On the contrary, Idaho Code § 48-1005 lists categories of telephone solicitors who are exempt from these requirements.

Section 48-1005 of the ITSA identifies categories of telephone solicitors who are excluded from the registration requirement.¹¹ Accordingly, if a telephone solicitor's activities fall within one or more of these delineated exemptions, the telephone solicitor may conduct telephone solicitations without registering with the Attorney General.¹² The Legislature's specific identification of "exempted telephone solicitors"¹³ demonstrates lawmakers' considered effort to limit the ITSA's scope to telephone solicitors (a) who primarily use unsolicited telephone calls to reach potential purchasers,¹⁴ and (b) who operate beyond the oversight of other regulatory authorities.¹⁵

The ITSA's registration mandate is set forth in Idaho Code § 48-1004(1). Subchapters C and D of the ITSR¹⁶ outline the registration process and explain what factors the Attorney General, during the 20-day review period, considers when deciding whether to issue a registration certificate. The registration process requires only that the applying telephone solicitor file a completed and accurate registration application¹⁷ with the Attorney General and pay a \$50 application fee.¹⁸

¹¹ The ITSR refers to telephone solicitors whose activities fall within Idaho Code § 48-1005 as "exempted telephone solicitors." *See* Idaho Admin. Code 04.02.02.020.06.

¹² In any action or proceeding to enforce the ITSA, the person claiming the exemption bears the burden of establishing that it applies. *See* Idaho Code § 48-1005(2).

¹³ Idaho Admin. Code 04.02.02.020.06 defines the term "exempted telephone solicitor."

¹⁴ A telephone solicitor who generates less than 60% of his annual sales through telephone solicitations is exempt, along with a telephone solicitor who calls only prior purchasers and a telephone solicitor who maintains a location in Idaho and generates at least 90% of his sales at his Idaho location. *See* Idaho Code § 48-1005(1)(a), (b), & (g).

¹⁵ A telephone solicitor who is licensed by a federal or Idaho agency—excluding the Idaho Secretary of State—is exempt if the agency has authority to revoke the issued license. *See* Idaho Code § 48-1005(1)(d). A publically-traded telephone solicitor who is subject to the SEC's authority is exempt under Idaho Code § 48-1005(1)(h).

¹⁶ *See generally* Idaho Admin. Code 04.02.02.030, *et seq.*, (Registration) and 04.02.02.040, *et seq.*, (Telephone Solicitor Disclosure-Office of the Attorney General).

¹⁷ Idaho Admin. Code 04.02.02.030 requires the Attorney General to provide the registration application for telephone solicitors. A downloadable registration application, along with detailed instructions, is available on his website at www.ag.idaho.gov.

¹⁸ *See* Idaho Code § 48-1006(3)(a)-(b); Idaho Admin. Code 04.02.02.030.

Much like Idaho's professional licensing and registration statutes,¹⁹ the telephone solicitor registration requirement, among other things, helps the Attorney General:

- identify the persons actively doing business in Idaho by requiring telephone solicitors to provide their current contact information;²⁰
- protect consumers from deceptive sales practices and encourage fair competition in the marketplace;²¹ and
- improve the business practices of those who register.²²

B. The Attorney General Enforces the ITSA, Including the Registration Requirement, Through a Variety of Formal and Informal Activities

The Attorney General and the district court have the same enforcement authority under the ITSA as they do under the Idaho Consumer Protection Act (ICPA).²³ Section 48-606(1)-(2) of the ICPA allows the Attorney General to file an action in district court against an alleged violator of the ITSA. Sections 48-606(2) and 48-607 of the ICPA empower the district court to order the violator to (a) comply with injunctive provisions, including the forfeiture of the telephone solicitor's registration, (b) pay consumer restitution and up to \$5,000 in civil penalties for each violation, and (c) reimburse the Attorney General for his fees and investigative costs.

¹⁹ See generally, title 54, chapters 1 through 54, Idaho Code (providing licensing and registration requirements for professions ranging from abstractors of title to genetic counselors).

²⁰ Idaho Admin Code 04.02.02.080 requires registered telephone solicitors to sign an irrevocable consent appointing the Attorney General as an agent to receive civil process in any action under the ITSA. Registered telephone solicitors must inform the Attorney General of any changes to their contact information. See Idaho Admin. Code 04.02.02.033.

²¹ See Idaho Code § 48-1001(1)-(2).

²² Pursuant to his authority under Idaho Code §§ 48-1004 and 48-1006, as well as the ITSR and the ICPA, the Attorney General reviews the telephone solicitor's scripts, oral cancellation notice, written confirmation notice, and advertisements to ensure they comply with the ITSA, the ITSR, the Idaho Consumer Protection Act, title 48, chapter 6, Idaho Code, and other applicable state and federal laws. The Attorney General suggests changes the telephone solicitor must make to his materials to comply with relevant laws and encourages the telephone solicitor to eliminate unprofessional or problematic language.

²³ See Idaho Code § 48-1006(1).

Through informal inquiries,²⁴ formal investigations,²⁵ court actions,²⁶ and court-approved settlement agreements,²⁷ the Attorney General enforces the ITSA's provisions, including its registration requirement. In the past year alone, the Attorney General entered into assurances of voluntary compliance with four separate telephone solicitors to ensure their continued compliance with the ITSA's registration requirement.²⁸

C. Any Contract of Sale or Purchase Between a Telephone Solicitor and a Purchaser Is Null and Void and Unenforceable if the Telephone Solicitor Violates the ITSA

A purchaser who suffers damages because of a telephone solicitor's alleged violation of the ITSA has the right under Idaho Code § 48-1007(1) to file a private cause of action against the telephone solicitor. The telephone sales contracts of a telephone solicitor who violates the ITSA are "null and void and unenforceable," pursuant to Idaho Code § 48-1007(2). This subsection imposes a significant penalty and effectively illustrates the importance the Legislature places on protecting purchasers and the marketplace from deleterious telephone solicitors. The consequence of losing all of their prior sales also gives telephone solicitors a substantial incentive to comply with the ITSA, including the registration requirement.

The Legislature's selection of the phrase "null and void and unenforceable," rather than using the term "voidable," is important for legal and statutory construction purposes. The terms "void" and "voidable" have unique meanings and are not interchangeable. "Void"—when applied to a purported contract—renders the purported contract nonexistent "in the eyes of the

²⁴ Under Idaho Code § 48-1006(3)(a), the Attorney General may require registering telephone solicitors to provide information necessary to help him enforce Idaho Code § 48-1006.

²⁵ Idaho Code § 48-611 authorizes the Attorney General to issue investigative demands seeking information and documentation from alleged unregistered telephone solicitors.

²⁶ See Idaho Code § 48-606(1).

²⁷ See Idaho Code §§ 48-606(4) (consent judgments) & 48-610 (assurances of voluntary compliance).

²⁸ *In re Att'y Gen. Investigation of BLAK, Inc.*, Ada County Case No. CVOT-1609524 (June 7, 2016); *In re Att'y Gen. Investigation of Vurv, LLC*, Ada County Case No. CVOT-1600689 (Jan. 26, 2016); *In re Att'y Gen. Investigation of DOT Compliance Services, LLC*, CVOC-1607047 (Apr. 18, 2016); *In re Att'y Gen. Investigation of Travel Council, LLC*, Ada County Case No. CVOT-1518817 (Nov. 12, 2015).

law.”²⁹ A “voidable” contract, on the other hand, is one that may be considered “unenforceable in an adversary proceeding.”³⁰ The Legislature’s use of the term “void” rather than “voidable” in Idaho Code § 48-1007(2) is not accidental.

In construing the ITSA, the rules of statutory construction control and the applicable rule in this instance is that the plain language of the statute must control.³¹ Courts assume the Legislature “means what is clearly stated in the statute” and will interpret a statute “to mean what the Legislature intended the statute to mean. . . .”³²

Throughout Idaho’s regulatory statutes, the Legislature demonstrates its understanding and intentional usage of “void” or “voidable.” For example, Idaho Code § 28-46-402(3) makes any payday loan executed in Idaho “void, uncollectible and unenforceable” if consummated in violation of the state’s payday lender licensing mandates. In contrast to the ITSA’s “void” standard, the ICPA allows an injured consumer to “treat any agreement” resulting from an unlawful business practice as “voidable.”³³ The ITSA’s plain language declares that the telephone sales contracts at issue here are void.

²⁹ *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 159 Idaho 813, 367 P.3d 208, 222 (2016). The Court’s finding, as it noted in *Syringa Networks*, “is consistent with the Black’s Law Dictionary definition of a void contract as ‘[a] contract that is of no legal effect, so that there is really no contract in existence at all.’” *Id.* (quoting Black’s Law Dictionary 374 (9th ed. 2009)). The Court continued, holding that “void contracts may not be rescinded because they are deemed never to have existed.” *Syringa Networks*, 159 Idaho 813, 367 P.3d at 222.

³⁰ *Barlow v. International Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1114 (1974)

³¹ *State v. Hillbroom*, 158 Idaho 789, 792, 352 P.3d 999, 1002 (2015) (explaining that statutory interpretation begins with the statute’s plain language, giving words their plain, usual, and ordinary meanings. When a statute’s language is unambiguous, effect must be given to the legislature’s clearly expressed intent.)

³² *Matter of Permit No. 36-7200*, 121 Idaho 819, 822, 828 P.2d 848, 851 (1992) (citations omitted).

³³ Idaho Code § 48-608(1). *See also Duspiva v. Fillmore*, 154 Idaho 27, 293 P.3d 651 (2013) (noting that, under Idaho Code § 48-608(1), a consumer may either treat his agreement as void or file a lawsuit for actual damages.)

D. The District Court Misinterpreted the ITSA's Void Standard

At trial, David Crossett, the owner and operator of DTC Group, testified that he was unaware of the ITSA's registration requirement until he received a letter from the Attorney General inquiring about DTC Group's telephone solicitation activities.³⁴ DTC Group subsequently submitted its telephone solicitor registration application to the Attorney General.³⁵ Because DTC Group was not registered at the time it entered into a number of telephone sales contracts, the validity of those sales contracts was an issue throughout the case, culminating in the district court's denial of DOT Compliance's motion for a directed verdict.

At the hearing on DOT Compliance's motion for a directed verdict, the district court recognized the ITSA applies to both parties' business practices.³⁶ However, the law, according to the district court, does not give DOT Compliance a right "to challenge [the] contracts or to have them declared void."³⁷ The district court referenced the hearing on DOT Compliance's motion for summary judgment where the court ruled that DOT Compliance lacked "standing" to raise the issue of whether DTC Group's sales contracts were void under the ITSA.³⁸ At that hearing, the district court explained that the purpose and language of the ITSA gives the consumer—"not anybody off the street"—the right to "declare" a contract "void and [un]enforceable" or "the option to finish out the contract."³⁹ The district court further stated:

[DOT Compliance's] motion for summary judgment is denied because, essentially, my interpretation of that statute is that it does not operate—it's not self-executing. And I think the consequences of reading of it as being self-executing would be pretty interesting, to say the least. Soon you'd have a whole bunch of people running around with money they collected just in this case, let alone who knows how many others, from people who are perfectly happy and

³⁴ See Tr. 227, ls. 9-19.

³⁵ See Tr. 227, ls. 20-23.

³⁶ Tr. 654, ls. 10-11.

³⁷ Tr. 654, ls. 12-15.

³⁸ Tr. 69, ls. 17-20.

³⁹ Tr. 68-69, ls. 23-13.

satisfied with the purchase that they made and the services that they received. And I don't know how you undo that.⁴⁰

In denying DOT Compliance's motion for a direct verdict, the district court expressed its concern about third parties having a right under the ITSA to void a purchaser's contract:

The implication is that would be pretty far-ranging because—not just in this context, but in others, someone could come in and people who were perfectly happy and content and relying on the existence of the contract who were not parties even to the dispute suddenly find themselves without the benefit of that which they thought they had.⁴¹

The Attorney General appreciates the district court's concern about third-parties having authority or "standing" to declare a telephone sales contract void and unenforceable in instances where the telephone solicitor violates the ITSA. The district court's concern appears to rest with the ramifications of Idaho Code § 48-1007(2), rather than its plain language, and this is beyond the district court's purview. The Legislature weighed the issues and policies before it and clearly and unambiguously decided that the telephone sales contracts of telephone solicitors who operate in violation of the ITSA, including those who fail to register, are null and void and unenforceable.

The district court's reasoning that Idaho Code § 48-1007(2) makes a contract "voidable" if it is executed in violation of the ITSA changes the wording of the statute. The language of the statute is unequivocal—"If a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is null and void and unenforceable." The phrase "null and void and unenforceable" means "nonexistent in the eyes of the law," and the district court's contrary finding fails to achieve the important and enduring purposes of the ITSA.

⁴⁰ Tr. 72, ls. 12-24.

⁴¹ Tr. 654, ls. 15-22.

Finally, the Attorney General recognizes that the “null and void” language of Idaho Code § 48-1007(2) appears in the ITSA’s section concerning private lawsuits. This does not mean, however, that only a “purchaser” may assert that a telephone sales contract of a telephone solicitor who violates the ITSA is null and void. On the contrary, the language of Idaho Code § 48-1007(2) does not support such a narrow reading.

The heading of section 48-1007 refers to private remedies, not to private causes of action. Further, while subsections (1) and (4) of section 48-1007 use the term aggrieved “purchaser,” subsection (2) does not. Rather, subsection (2) simply declares that if a telephone solicitor violates the ITSA, his sales contracts are “null and void and unenforceable.” No specific person or action is required under subsection (2) to render such a sales contract void.

CONCLUSION

The district court incorrectly concluded that an unregistered telephone solicitor’s contracts are “voidable” under Idaho Code § 48-1007(2). Based on the unequivocal language of the statute and the supporting case law, the Attorney General asks this Court to correct the lower court’s misinterpretation of Idaho Code § 48-1007(2) and to find instead that when the Legislature uses the term “void,” it means it.

Respectfully submitted this 12th day of July 2016.

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Consumer Protection Division

CERTIFICATE OF SERVICE

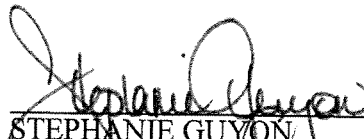
I hereby certify that on the 12th day of July, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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STEPHANIE GUYON
Deputy Attorney General