

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

11 FEB 10 PM 3:00

BY RONALD R. CARPENTER

CLERK

NO. 84855-6

BYRON L. CARPENTER

2011 FEB 22 A 9:35

FILED

SUPREME COURT OF THE STATE OF WASHINGTON

CHAD M. CARLSEN and SHASTA CARLSEN; husband and wife,
individually and on behalf of a Class of similarly situated Washington
families; and CARL POPHAM and MARY POPHAM, husband and wife,
individually and on behalf of a Class of similarly situated Washington
families,

Plaintiffs,

v.

GLOBAL CLIENT SOLUTIONS, L.L.C., an Oklahoma limited liability
company; ROCKY MOUNTAIN BANK & TRUST, a Colorado financial
institution; JOHN AND JANE DOES A-K,

Defendants.

**BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF WASHINGTON**

ROBERT M. MCKENNA
Attorney General

ROBERT A. LIPSON
Assistant Attorney General
WSBA #11889
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 389-2513

**FILED AS
ATTACHMENT TO EMAIL**

ORIGINAL

TABLE OF CONTENTS

I.	INTEREST OF AMICUS	1
II.	ISSUES ADDRESSED BY AMICUS	1
III.	STATEMENT OF THE CASE	2
IV.	ARGUMENT	3
	A. Introduction.....	3
	B. Debt Settlement Companies Are “Debt Adjusters” Under the DAA, and Consequently the Statutory Fee Limitation Provisions Apply to Them.	5
	C. There Is an Implied Cause of Action Under §874A and <i>Bennett</i> Against Global and Rocky for Aiding and Abetting Debt Settlement Companies that Violate the DAA.	7
	D. Helping Debt Settlement Companies Violate the DAA Can Also Result in Aiding and Abetting Liability Under § 876(b).....	11
	E. The CPA Contemplates Liability for Aiding and Abetting.....	14
	F. Joint and Several Liability May Also Exist.	16
V.	CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<i>Allen v. American Land Research</i> , 95 Wn.2d 841, 631 P.2d 930 (1981).....	16
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	8, 10, 17
<i>Browning v. Slenderella Sys. of Seattle</i> , 54 Wn.2d 440, 341 P.2d 859 (1959).....	9, 10
<i>Cain v. Dougherty</i> , 54 Wn.2d 466, 341 P.2d 879 (1959).....	13
<i>Cazzanigi v. General Elec. Credit Corp.</i> , 132 Wn.2d 433, 938 P.2d 819 (1997).....	10
<i>Couch v. Steel</i> , 118 Eng. Rep. 1193 (Q.B. 1854)	7
<i>Doherty v. Federal Trade Comm'n</i> , 392 F.2d 921 (6th Cir. 1968)	15
<i>Federal Trade Comm'n v. Neovi, Inc.</i> , 604 F.3d 1150 (9th Cir. 2010)	15
<i>First Nat'l Bank v. Shoreline Concrete Co.</i> , 91 Wn.2d 230, 588 P.2d 1308 (1978).....	17
<i>Halberstam v. Welch</i> , 705 F.2d 472 (D.C. Cir. 1983).....	12
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	7
<i>Martin v. Sikes</i> , 38 Wn.2d 274, 229 P.2d 546 (1951).....	13

<i>Naches Valley Sch. Dist. v. Cruzen</i> , 54 Wn. App. 388, 775 P.2d 960 (1989).....	9
<i>Schweikert v. Venwest Yachts</i> , 142 Wn. App. 886, 176 P.3d 577 (2008).....	6
<i>Thomas v. Casey</i> , 49 Wn.2d 14, 297 P.2d 614 (1956).....	13
<i>Tyner v. Department of Soc. and Health Serv.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	8
<i>Westview Inv. v. U.S. Bank N. A.</i> , 133 Wn. App. 835, 138 P.3d 638 (2006).....	17
<i>Wingert v. Yellow Freight Sys.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002).....	8

Statutes

RCW 4.22.070(1)(a)	16
RCW 4.22.070(1)(b)	17
RCW 5.40.050	13
RCW 18.28	1
RCW 18.28.010	5
RCW 18.28.010(1).....	6
RCW 18.28.010(2).....	6
RCW 18.28.080	6, 8
RCW 18.28.090	8
RCW 18.28.100	8
RCW 18.28.190	10

RCW 19.86	1
RCW 19.86.920	14

Administrative Decisions

<i>In Re Citicorp Credit Serv.</i> , 116 F.T.C. 87 (1993)	14, 15
<i>In Re Litton Indus.</i> , 97 F.T.C. 1 (1981)	16
<i>In Re ValueVision Int'l</i> , 132 F.T.C. 338 (2001)	15

Regulations

Telemarketing Sales Rule, 75 Fed. Reg. 48,458 (August 10, 2010).....	4
--	---

Other Authorities

Christine Hauser, <i>Bank Losses Lead to Drop in Credit Card Debt</i> , N.Y. Times, Sept. 24, 2010.....	4
D. Zeigler <i>Rights, Rights of Action and Remedies: An Integrated Approach</i> , 76 Wash. L. Rev. 67, 73-74 (2001).....	8
Nathan Isaac Combs, <i>Civil Aiding and Abetting Liability</i> , 58 Vand. L. Rev. 241 (2005).....	12
<i>Restatement (Second) of Torts</i> § 874A (1979).....	7, 11, 17
<i>Restatement (Second) of Torts</i> § 876(a) (1979).....	16
<i>Restatement (Second) of Torts</i> § 876(b) (1979).....	11, 12, 13, 15, 17

I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. This case, which is here on certified questions from the United States District Court for the Eastern District of Washington in a private class action, asks this Court to interpret provisions of the Washington Debt Adjusting Act (“DAA”), RCW 18.28, which to date has no reported case law. Interpretation of the DAA affects the public interest because a violation of the DAA is also a per se violation of the Consumer Protection Act, RCW 19.86 (“CPA”), and because the Attorney General enforces the CPA, it has an interest in the development of DAA case law. The Attorney General also has enforcement authority pursuant to the DAA, and so is interested for that reason, too. Lastly, this case gives the Court an opportunity to address issues relating to the appropriate tests for civil aiding and abetting liability in the context of consumer protection statutes, and because this affects the CPA, it is of significant interest to the Attorney General.

II. ISSUES ADDRESSED BY AMICUS

The Attorney General files this brief with respect to Certified Questions 3 and 4.

Question 3 asks whether the DAA and its statutory fee limitations apply to the debt settlement companies that Global Client Solutions (“Global”) and Rocky Mountain Bank & Trust Company (“Rocky”) work

with and serve. Question 3 is addressed in Section IV.B. of this brief. The answer to Question 3 is "yes."

Question 4 asks whether there is an implied private cause of action against Global and Rocky if they helped debt settlement companies violate the DAA, in light of the fact that the DAA also makes aiding and abetting a criminal misdemeanor. Question 4 is addressed in Section IV.C.-F. of this brief. The answer to Question 4 is "yes." One who helps another violate the DAA can be civilly liable as an aider and abettor. Depending on the facts, there are four legal theories to support this result.

III. STATEMENT OF THE CASE

Debt settlement companies, which are a type of debt adjuster, sell their programs to debt-ridden consumers who can't pay their unsecured debts. The vast majority of these debts are credit card debts. The programs involve consumers stopping monthly payments to their unsecured creditors and instead setting money aside in a bank account established pursuant to a plan and instructions from the debt settlement company. After the debt settlement company's fees are paid, the consumer's funds begin to accumulate in the account and eventually are used by the debt settlement company to try to negotiate a settlement of the consumer's debts at a discount after the debts have gone into default and aged. From the consumer's standpoint these debt settlement programs are risky, often unsuccessful, and regularly leave the consumer worse off financially.

In two separate class actions, the District Court certified seven questions involving the DAA. One case is against Global and Rocky. Global performs accounting functions for consumers' accounts and processes money into and out of those accounts in accordance with the debt settlement company's program. Rocky is a bank at which plaintiffs' and thousands of other consumers' money is kept. The other lawsuit is against Freedom Debt Relief, a debt settlement company that sold its program to plaintiffs and works with Global and Rocky. Plaintiffs contend that debt settlement companies are "debt adjusters" under the DAA, that they violated the DAA, and that there is an implied civil cause of action against Global and Rocky for aiding and abetting those violations. Global and Rocky deny these contentions and moved to dismiss, resulting in the certified questions from the federal court.

IV. ARGUMENT

A. Introduction

The for-profit debt settlement industry has become a consumer problem of national significance. In concluding a rulemaking last fall, the Federal Trade Commission (FTC) noted:

In sum, debt settlement is a high-risk financial product that requires consumers simultaneously to pay significant fees, save hundreds or thousands of dollars for potential settlement, and meet other obligations....Failure leads to grave consequences – increased debt, impaired credit ratings, and lawsuits that result in judgments and wage garnishments....The injury...is substantial.

Telemarketing Sales Rule, 75 Fed. Reg. 48,458, 48,484-85 (August 10, 2010) (to be codified at 16 C.F.R. § 310.4) (“FTC Rulemaking”).

While holding themselves out as offering hope to consumers unable to meet their credit card debts, debt settlement programs have made most consumer’s problems worse. The scope of the problem is enormous because the consumer credit problem is enormous. Credit card debt in America exceeds \$830 billion. Christine Hauser, *Bank Losses Lead to Drop in Credit Card Debt*, N.Y. Times, Sept. 24, 2010, at B1. According to the Federal Reserve and the FTC, 6.58 percent of all recent credit card debt was delinquent. *See* FTC Rulemaking 75 Fed. Reg. at 48,505. Since 78 percent of households have credit cards, this means over 8.3 million consumers have delinquent credit card debt. *Id.* at 48,504.

Most consumers who enter debt settlement programs drop out after paying all or part of the debt settlement company’s fees. According to the debt settlement industry’s own statistics, the drop out rate is almost 66 percent. *Id.* at 48,472. Of that 66 percent, 65 percent leave the programs with no settlements. *Id.* at 48,473.

These statistics and the FTC’s conclusion that it needed to address the “deceptive and abusive practices of debt relief service providers” are the reasons why the FTC enacted a new rule banning advance fees for debt settlement companies. *Id.* at 48,465. However, the FTC rule is prospective, and applies only to contracts signed after October 27, 2010. Consequently, state law with regard to matters that predate the new federal rule is especially important.

Global and Rocky are significant players in the debt settlement industry, and they work with and serve a major portion of the industry. Global services “over 500 debt settlement companies in the United States,” Global Client Solutions News Release, Jan. 28, 2010, <http://www.globalclientsolutions.com/news.html> (last visited November 22, 2010), and is the “leading provider of account management services to the debt settlement industry,” United States Organization for Bankruptcy Alternatives, <http://www.usoba.org/industry-vendors> (last visited November 22, 2010). Debt settlement accounts at Rocky are roughly fifty percent of the bank’s deposits. *See* Ct. Rec. 58-13 (Ex. Z Scott Decl – Cease and Desist Order.) Holding Global and Rocky accountable is important.

B. Debt Settlement Companies Are “Debt Adjusters” Under the DAA, and Consequently the Statutory Fee Limitation Provisions Apply to Them.

Question 3 inquires about the debt settlement companies that Global and Rocky work with and help. It asks whether those debt settlement companies are “debt adjusters” as defined by RCW 18.28.010, and if the statutory fee limitations apply to them. It also asks whether it matters that the consumer’s money, which is set aside pursuant to the debt settlement company’s plan and instructions, is held not at the debt settlement company but at Rocky and is processed into and out of the account by Global. The answer is that debt settlement companies are “debt adjusters,” and the statutory fee limitations apply to them.

When addressing a question of statutory construction the rule is to adopt the interpretation that best advances the legislative purpose. *Schweikert v. Venwest Yachts*, 142 Wn. App. 886, 893, 176 P.3d 577 (2008).

RCW 18.28.010(1) defines debt adjusting:

“Debt adjusting” means the managing, counseling, settling, adjusting, prorating, or liquidating of the indebtedness of a debtor, or receiving funds for the purpose of distributing said funds among creditors in payment or partial payment of obligations of a debtor.

RCW 18.28.010(2) defines a “debt adjuster” as one who engages in or holds himself out as being in the business of “debt adjusting” for compensation. Debt settlement companies are “debt adjusters” because they manage, counsel, settle, adjust, and liquidate consumers’ debts.

The DAA limits the fees that debt adjusters can take. RCW 18.28.080 states: “The total fee for debt adjusting services may not exceed fifteen percent of the total debt listed by the debtor on the contract.” Thus, the debt settlement company’s fees can be no more than 15 percent. When the fee can be taken is addressed by the next sentence in RCW 18.28.080. “The fee retained by the debt adjuster from any one payment made by or on behalf of the debtor may not exceed fifteen percent of the payment.” In other words, the debt settlement company’s fee is earned when the creditor is paid, and not until then. A debt settlement company taking fees (other than a minor set-up fee as provided for in the DAA) before the debt is settled violates the statute.

Global and Rocky misread Question 3 as asking whether Global and Rocky are debt adjusters. That is not what Question 3 asks, and consequently their argument does not address the question. Question 3 asks if the fee limitation applies to debt settlement companies where the consumer's money is held at a bank, such as Rocky, in a custodial account and the transactions into and out of that account are processed and managed by a company such as Global. The answer is "yes." The fee limitations apply to those debt settlement companies.

C. There Is an Implied Cause of Action Under §874A and Bennett Against Global and Rocky for Aiding and Abetting Debt Settlement Companies that Violate the DAA.

The *Restatement (Second) of Torts* § 874A (1979), followed and cited by Washington courts, is considered the basis for an implied private right of action arising from a statutory violation. Section 874A states:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to injured members of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.¹

¹ Finding an implied cause of action from a statute that is silent or vague about the existence of a private remedy has a historic lineage. In *Couch v. Steel*, 118 Eng. Rep. 1193 (Q.B. 1854), Lord Campbell relied on older English law to opine "in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for recompence for a wrong done to him contrary to the said law." The idea that where there is a legal right, there should also be a legal remedy is also found in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). There Chief Justice Marshall quoted Blackstone: "(I)t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.... (F)or it is a settled and invariable

In *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), this Court relied upon § 874A as well as federal cases to fashion the Washington test for an implied statutory private cause of action. The test is:

[F]irst, whether the plaintiff is within the class for whose “special” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Id. at 920-21. In *Tyner v. Department of Soc. and Health Serv.*, 141 Wn.2d 68, 77-78, 1 P.3d 1148 (2000), this Court again relied on § 874A and *Bennett* to determine if an implied cause of action existed. Likewise, in *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 849-50, 50 P.3d 256 (2002), the test was used again to determine whether the statute there, which was otherwise silent or vague about a civil cause of action, conferred that right. Application of the three-part *Bennett* test confirms that the DAA implies a private right of action against aiders and abettors.

First, the statute was intended to benefit and protect consumers such as plaintiffs. The statute limits the timing and amount of fees that a debt adjuster can take. RCW 18.28.080. The statute voids all contracts where the fees are more than the maximum amount allowed. RCW 18.28.090. The statute mandates disclosures. RCW 18.28.100.

principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” *Id.* at 163 (quoting 3 W. Blackstone, *Commentaries* at 23). See also D. Zeigler *Rights, Rights of Action and Remedies: An Integrated Approach*, 76 Wash. L. Rev. 67, 73-74 (2001).

These and the other statutory provisions of the DAA are there to protect consumers, and consumers are the class the statute intends to benefit.

Second, legislative intent supports recognizing an implied cause of action and providing a remedy to protect consumers against those who aid and abet other violators. Not only is the DAA a remedial statute and therefore to be liberally construed to protect consumers, *see Naches Valley Sch. Dist. v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989) (“remedial statute should be liberally construed to effect its purpose”), but the fact that the DAA also makes aiding and abetting a criminal misdemeanor indicates the legislature’s intent to create a right of protection, which supports an implied cause of action. *Browning v. Slenderella Sys. of Seattle*, 54 Wn.2d 440, 445-46, 341 P.2d 859 (1959), illustrates this principle. *Browning* was an early race discrimination case. Washington’s statute made discrimination a criminal misdemeanor but was silent about a private cause of action. *Slenderella* discriminated against Ms. Browning, and Browning sued. This Court asked, “Is there a civil cause of action available to the person discriminated against in violation of that statute?” *Id.* at 443. This Court answered “yes” and held that even though the statute was a criminal misdemeanor statute, a private cause of action would lie and implied a civil cause of action from the existence of the criminal misdemeanor sanction.

A cause of action for damages can arise from a violation of our public accommodation act (RCW 9.91.010), notwithstanding the statute is criminal in form.... This court takes the position that the statute, while penal in form, is remedial in nature and effect and gives to the person

wrongfully discriminated against a civil remedy....Neither the administrative procedures, nor the penal provisions preclude the bringing of a civil action for damages, as is done here, for the violation of a right protected by the penal statute.

Id. at 445-46. Not only did the misdemeanor penalty not preclude a civil remedy, it was, along with the fact that the statute was remedial, the reason this Court implied a civil cause of action. The same reasoning should apply here.

Furthermore, as this Court noted in *Bennett*, legislative intent for an implied cause of action arises because courts must “assume that the legislature is aware of the doctrine of implied statutory causes of action and also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce these rights.” 113 Wn.2d at 919-20.

In addition, there are also no factors here that indicate a lack of legislative intent to create an implied cause of action. There is no indication in the DAA that the criminal penalty should be exclusive, RCW 18.28.190. There is no indication that private remedies against aiders and abettors once existed in the DAA but were later eliminated. There is no provision of a private remedy against aiders and abettors elsewhere in the statute, such that one might reasonably assume it was the only one the legislature intended. *See Cazzanigi v. General Elec. Credit Corp.*, 132 Wn.2d 433, 445, 938 P.2d 819 (1997) (no additional cause of action could be implied in that case but reaching that conclusion only because the statute there explicitly provided plaintiff with a specific,

private remedy against the defendant elsewhere in the statute, such that one had to reason it was the entire remedy intended by the legislature.) Here, because the DAA does not give plaintiffs an explicit private remedy against aiders and abettors, implying a cause of action is consistent with *Cazzanigi*, notwithstanding defendants' argument to the contrary.

Finally, implying a cause of action against aiders and abettors is consistent with the purpose of the DAA, which is to protect consumers. Implying a cause of action will help consumers be made whole by all who participate in and profit from illegal debt adjusting schemes. It will also support the Attorney General in deterring and enjoining those who assist. An implied cause of action will help both consumers and law enforcement.

D. Helping Debt Settlement Companies Violate the DAA Can Also Result in Aiding and Abetting Liability Under § 876(b).

Aiding and abetting liability under § 876(b) of the *Restatement (Second) of Torts* (1979) and Washington law exists independently and irrespective of whether there is also an implied cause of action in the DAA for aiding and abetting under § 874A. While § 874A and the Washington cases following it address whether there is an implied cause of action for aiding and abetting inherent in the DAA based on the statute's language and the legislature's intent, § 876(b) and its cases address aiding and abetting liability based on knowledge of a wrongful act and lending substantial assistance.

Section 876(b) is the *Restatement's* formulation of general civil aiding and abetting liability. See Nathan Isaac Combs, *Civil Aiding and*

Abetting Liability, 58 Vand. L. Rev. 241, 254-56 (2005). To establish liability for aiding and abetting a wrong committed by a third party, a plaintiff must show that the aider and abettor “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” § 876(b). There must be a wrongful act of some kind by a third party, in this case by the debt settlement company, plus knowledge on the part of Global and Rocky that the debt settlement company is breaching some duty, in this case violating the DAA or the CPA. Rocky’s and Global’s assistance must also be substantial. As noted in the official comments to § 876(b): “[T]he one (who aids and abets) is himself a tortfeasor and is responsible for the consequences of the other’s acts.” Comment d.

Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), contains a good analysis of shared or joint and several civil liability theories, including aiding and abetting. The Court discussed § 876(b) as a basis for civil aiding and abetting liability, stating that three elements are needed:

- (1) the party whom the defendant aids must perform a wrongful act that causes an injury;
- (2) the defendant must be generally aware of his role as part of an overall illegal or tortuous activity at the time that he provides the assistance;
- (3) the defendant must knowingly and substantially assist the principal violation.

Id. at 477. The court also distinguished civil aiding and abetting from other forms of joint and several liability, noting that “aiding and abetting focuses on whether a defendant knowingly gave substantial assistance to someone who performed wrongful conduct...” *Id.* at 478.

While few Washington cases discuss civil aiding and abetting, those that do acknowledge § 876(b) and the possibility of civil aiding and abetting liability. In *Cain v. Dougherty*, 54 Wn.2d 466, 471, 341 P.2d 879 (1959), this Court applied § 876(b) to determine whether civil aiding and abetting existed for an auto accident; in *Thomas v. Casey*, 49 Wn.2d 14, 17-18, 297 P.2d 614 (1956), this Court analyzed § 876(b) as a basis for civil liability, although it ultimately reached its ruling on other grounds; and in *Martin v. Sikes*, 38 Wn.2d 274, 278-79, 229 P.2d 546 (1951), this Court noted that aiding and abetting a wrong can result in civil liability.

If there is a wrong or a breach of duty by a third party, aiding and abetting liability should be implied against the helper if the three elements of § 876(b) are met. If plaintiffs can prove that the debt settlement companies that Global and Rocky helped were violating the DAA, then that is evidence of a breach of duty, and goes to proving the first of the three elements for civil aiding and abetting under § 876(b). Violation of a statute, while no longer negligence per se except in limited circumstances not applicable here, is evidence of negligence or breach of duty. RCW 5.40.050. If the debt settlement companies Global and Rocky worked with and served violated the DAA, that is evidence of the kind of third-party wrongdoing needed to establish the first element of aiding and abetting liability under § 876(b). Then, if Global and Rocky knew or were generally aware that their debt settlement companies were violating the DAA, and if the assistance they gave was substantial, then Global and Rocky should be liable for civil aiding and abetting under § 876(b).

E. The CPA Contemplates Liability for Aiding and Abetting.

A violation of the DAA automatically results in a per se violation of the CPA, so if the debt settlement companies violated the DAA, they also violated the CPA. RCW 18.28.185. Under consumer protection law, one who helps another commit a CPA violation can also be liable. Because the CPA is a remedial statute and is to be liberally construed, RCW 19.86.920, this rule is not surprising. Thus, if Global and Rocky helped a debt settlement company violate the CPA, Global and Rocky should also be liable under the CPA.

In construing the CPA, Washington courts should be guided by decisions of the federal courts and final orders of the Federal Trade Commission (FTC). RCW 19.86.920. FTC cases and final orders are therefore significant.

The FTC has imposed the kind of helper liability urged here against Global and Rocky. *In Re Citicorp Credit Serv.*, 116 F.T.C. 87 (1993), is illustrative. Citicorp was a processor of credit card transactions. A travel club was one of the many businesses for which Citicorp processed credit card transactions. The travel club had many unhappy customers because of its business practices, and that unhappiness resulted in a large number of credit card charge-backs. The FTC charged Citicorp with violating the federal counterpart of the CPA because it "continued to process credit card transactions...when it knew or should have known that such transactions resulted from" illegal acts, and thus Citicorp

“substantially assisted and aided and abetted” in violating the law. *Id.* at 88. The FTC’s final order and consent decree required Citibank to monitor its business customers and to stop doing business with them if there were excessive charge-backs, evidencing this legal principle: One who knew or should have known that another’s act was illegal and gives substantial assistance is also liable. *See also Federal Trade Comm’n v. Neovi, Inc.*, 604 F.3d 1150, 1156 (9th Cir. 2010) (holding website used by scammers to create and deliver unauthorized checks liable under the FTC Act because the website “facilitated, or contributed to, ill intentioned schemes” citing other FTC cases for the proposition that one who has “facilitated and provided substantial assistance” is also liable); *In Re ValueVision Int’l*, 132 F.T.C. 338 (2001) (FTC final order and consent decree holding cable television home shopping network liable for its role in making and disseminating deceptive claims regarding products sold on its channel); *Doherty v. Federal Trade Comm’n*, 392 F.2d 921, 928 (6th Cir. 1968) (ad agency held liable for misleading ad because it “knew or should have known” the claims were deceptive).

As with § 876(b) aiding and abetting liability, helper liability under consumer protection law also requires substantial assistance. However, whereas § 876(b) liability requires that a defendant knew or at least was generally aware of its role as part of an overall wrongful act, helper liability under consumer protection law only requires that the helper knew or should have known that the other’s act was wrongful.

Similarly, one who enables another to carry out an illegal act by providing the other with the means and instruments to do so is “equally as responsible.” *In Re Litton Indus.*, 97 F.T.C. 1, 48 (1981) (final FTC order against a company who provided substantial assistance in misleading ad campaign). Known as the “means and instrumentality” doctrine, it is another form of helper liability this Court has acknowledged. *See Allen v. American Land Research*, 95 Wn.2d 841, 847, 631 P.2d 930 (1981) (“It has long been held under federal law that one may not escape liability by putting into the hands of another the means and instrumentalities by which to defraud others.”).

If Global and Rocky knew or should have known that a debt settlement company was violating the DAA and gave substantial assistance, or if Global and Rocky provided the means and instrumentality to violate the law, then they should be liable under consumer protection law.

F. Joint and Several Liability May Also Exist.

Joint and several liability may apply depending on the facts ultimately determined by the trial court. Washington law specifically provides for joint and several liability for wrongdoing by those acting in concert. RCW 4.22.070(1)(a) states: “A party shall be responsible for the fault of another person...where both were acting in concert...” Section 876(a) of the *Restatement (Second) of Torts* (1979) cited by Washington courts, similarly provides for liability against a defendant who “does a

tortious act in concert with the other or pursuant to a common design with him.” See *Westview Inv. v. U.S. Bank N. A.*, 133 Wn. App. 835, 853, 138 P.3d 638 (2006). Here, if the trial court finds that the debt settlement companies and defendants acted in concert to violate the DAA or to otherwise commit a wrong, then joint and several liability would apply².

V. CONCLUSION

Certified Question 3 should be answered “yes.” Debt settlement companies are debt adjusters under the DAA, and are subject to its provisions, including its fee limitation provisions.

Certified Question 4 should also be answered “yes.” Civil aiding and abetting liability can lie against Global and Rocky for any of four reasons. First, § 874A and *Bennett* imply a cause of action in the DAA for aiding and abetting. Second, § 876(b) provides for aiding and abetting liability if Global and Rocky knew or were generally aware that the debt settlement companies were violating the DAA, and they gave substantial assistance. Third, under consumer protection law if Global and Rocky substantially assisted a debt settlement company in violating the DAA and knew or should have known that the debt settlement company was

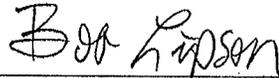
² In addition to joint and several liability based on acting in concert, Global and Rocky could also be jointly and severally liable with a debt settlement company as concurrent tortfeasors under RCW 4.22.070(1)(b) in an appropriate case. Concurrent tortfeasors are those whose independent acts breach separate duties, but combine to produce an indivisible injury. *First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978). To be jointly and severally liable as concurrent tortfeasors, the plaintiff must be fault-free and the debt settlement company, Global, and Rocky must all be named defendants and have judgment rendered against them in the same action. Here because the debt settlement company was sued separately in a different lawsuit, joint and several liability with the debt settlement company based on being concurrent tortfeasors is not appropriate.

violating the law, or if Global and Rocky provided the means and instrumentality for the debt settlement company to violate the law, then they are liable. Lastly, if Global and Rocky acted in concert with any of the debt settlement companies, joint and several liability would apply.

This Court should answer certified Questions 3 and 4 in the affirmative and refer the case back to the District Court for the necessary factual determinations to apply the law.

RESPECTFULLY SUBMITTED this 9th day of February, 2011.

ROBERT M. MCKENNA
Attorney General



ROBERT A. LIPSON
Assistant Attorney General
WSBA #11889
Attorneys for Amicus Curiae
Attorney General of Washington