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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON ex rel. Ellen F. Rosenblum, in her official capacity as Attorney General of the State of Oregon,
Plaintiff-Petitioner on Review,

v.

LIVING ESSENTIALS, LLC, a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company,
Defendants-Respondents on Review.

Multnomah County Circuit Court
14CV09149

A163980
S068857

On petition for review of a decision of the Court of Appeals
On appeal from a judgment of the Multnomah County Circuit Court
The Honorable Kelly Skye

Opinion Filed: July 14, 2021
Author: Devore, J.
Concurring: Lagesen, P.J. and James, J.

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER ON REVIEW STATE OF OREGON

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SUMMARY OF ARGUMENT

In this case, the Court of Appeals held, incorrectly, that certain claims under Oregon's Unlawful Trade Practices Act (UTPA) require the State to prove that the unlawful practice in which the seller engaged was one that would materially affect consumers' purchasing decisions. *See generally State ex rel. Rosenblum v. Living Essentials LLC*, 313 Or App 176, 177–78, 497 P3d 730 (2021). That holding is inconsistent with the UTPA's text, which does not require proof of materiality, and does not comport with the statute's purpose of protecting Oregon consumers. It also undermines the very reason the UTPA exists, which was to provide a meaningful remedy to victims of consumer fraud and to deter marketplace misconduct.

Additionally, there are no constitutional concerns with applying the UTPA to potentially misleading conduct and statements that the provisions seek to avoid. Article I, section 8, of the Oregon Constitution simply cannot and should not be construed to limit the legislature's authority to make unlawful new unfair trade practices that arise as consumers, corporations, and societies change.

For those reasons, and for the additional reasons set forth below, OTLA urges this Court to reverse the decision of the Court of Appeals.

ARGUMENT

Oregon's UTPA was enacted as a comprehensive statute intended to protect consumers from unlawful trade practices. *Pearson v. Philip Morris*, 358 Or 88, 115, 361 P3d 3 (2015) (citing *State ex rel. Redden v. Discount Fabrics*, 289 Or 375, 382, 615 P2d 1034 (1980)). As such, the statute is to be construed liberally to effectuate that legislative intent. *See Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n 4, 566 P2d 1177 (1977) (stating that the UTPA's legislative history makes clear that the statute "is to be interpreted liberally as a protection to consumers").

The trade practices declared unlawful under the UTPA are expressly set forth in the statute's text. *See* ORS 646.608 (listing 79 unlawful trade practices). As relevant here, under ORS 646.608(1)(b) and (e), a person engages in an unlawful trade practice if, in the course of the person's business, vocation or occupation, the person

> (b) "[c]auses likelihood of confusion of or misunderstanding as to the source, sponsorship, approval, or certification of * * * goods or services"; or
>
> (e) "[r]epresents that * * * goods or services have * * * characteristics, ingredients, uses, benefits, quantities or qualities that the * * * goods or services do not have * * * *."

ORS 646.608(1)(b), (e). For UTPA purposes, a "representation" includes both "any assertion by words or conduct" and "a failure to disclose a fact." ORS 646.608(2).

The UTPA provides both private and public mechanisms for enforcement. The private mechanism for enforcement is set forth under ORS 646.638(1); under that section, a private individual who suffers an "ascertainable loss of money or property, real or personal" as a result of an unlawful trade practice may "bring an individual action in an appropriate court to recover actual damages or statutory damages of $200, whichever is greater." ORS 646.638(1). To prevail on a claim under ORS 646.638(1), the individual must establish that the ascertainable loss they suffered was caused by the unlawful trade practice. *Pearson*, 358 Or at 125–26 ("The key phrase is 'as a result of.' That phrase effectively requires that the unlawful trade practice *cause* the ascertainably loss on which a UTPA plaintiff relies.").

The public mechanism for enforcement is less burdensome and does not require proof of causation. But in some respects, it also lacks some teeth—under ORS 646.632(1), "a prosecuting attorney who has probable cause to believe that a person is engaging in * * * an unlawful trade practice may bring suit in the name of the State of Oregon * * * to restrain such [conduct]." ORS 646.632(1). In public enforcement actions, the State may also seek additional remedies, including restitution and disgorgement, by invoking a court's remedial power to "make such additional orders or judgments as may be necessary to restore to any person * * * any moneys or property, real or personal, of which the person was deprived by means of any practice declared

to be unlawful" under the UTPA. ORS 646.636. The State cannot, however, seek statutory or actual damages as provided for under the private cause of action.

I. ORS 646.608(1)(b) and (e) do not require proof of materiality.

Neither ORS 646.608(1)(b) nor ORS 646.608(1)(e) requires proof of materiality. For several reasons, such a requirement is inconsistent with the statue's text, this Court's caselaw construing that text, and the purpose the UTPA was intended to further.

A. The statute's text does not require proof of materiality.

First, the statute's text does not require proof of materiality. *Pearson*, 358 Or at 125 (under this Court's familiar paradigm for statutory construction, "[t]he starting point is the statute"). By its text, ORS 646.608(1)(b) makes unlawful conduct that "[c]auses likelihood of confusion of or misunderstanding as to the source, sponsorship, approval, or certification of * * * goods or services." There is no requirement that the seller's conduct be "material" to a consumer purchasing decision;[1] instead, ORS 646.608(1)(b) on its face reflects a legislative judgment that *all* conduct relating to "the source, sponsorship, approval, or certification of * * * goods and services" is "material" as a matter

[1] In fact, as explained below, there is not requirement that *any* consumer purchase be made, or any actual confusion result, before a seller violates ORS 646.608(1)(b).

of law. Nothing additional is required to establish a violation, and the Court of Appeals erred in holding otherwise.

So, too, with respect to ORS 646.608(1)(e). By its text, ORS 646.608(1)(e) again reflects the legislature's view that a seller cannot make representations that "goods or services have * * * characteristics, ingredients, uses, benefits, quantities or qualities that the * * * goods or services do not have." ORS 646.608(1)(e). Here, again, there is no requirement of "materiality," and instead the provision reflects a legislative judgment that *all* such representations are important as a matter of law—such that no additional proof of "materiality" is required.

Indeed, this Court has expressly stated as much. In *Searcy v. Bend Garage Co.*, this Court held that the legislature, in defining the term "representation" under the UTPA, "did not require that a concealed fact be material." 286 Or 11, 16–17, 592 P2d 558 (1979). The Court of Appeals distinguished *Searcy* on the ground that "its holding was limited to the definition of the term 'representation' under ORS 646.608(2)." *Living Essentials*, 313 Or App at 188 n 7. That is confusing, however, because not only did *Searcy* refer explicitly to ORS 646.608(1)(e) (as a trade practice requiring a representation), but its holding is not so limited. *Searcy* held that, with the exception of ORS 646.680(1)(t), "materiality" as an element does not appear anywhere in the UTPA. Stated another way, the Court held that the

UTPA's enumerated unlawful trade practices involving representations do *not* require that a concealed fact be material.

Likewise, in *Wolverton v. Stanwood*, 278 Or 709, 713, 565 P2d 755 (1977), the Court held that "[t]he elements of common law fraud are distinct and separate from the elements of a cause of action under the Unlawful Trade Practice Act and a violation of the Act is much more easily shown."[2] The Court of Appeals' rule is inconsistent not only with the clear rule of *Searcy*, but also with the rationale set forth in *Wolverton*.

In fact, *all* 79 unlawful trade practices set forth in ORS 646.608(1) reflect an independent and reasoned legislative judgment that the conduct involved in that trade practice was important enough to the legislature to warrant an explicit prohibition. Put differently, by way of ORS 646.608(1)(a) through (aaaa), the legislature already has made an independent determination that the conduct

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[2] As the Court of Appeals explained in *Raudebaugh v. Action Pest Control, Inc.*,

> "Had the legislature intended that a consumer prove all the elements of common law fraud in order to recover damages, it would have been unnecessary to create a cause of action by statute. ORS 646.656 provides that the remedies specified in the Act are in addition to all other civil remedies existing at common law. This indicates legislative intent to create a special remedy different from those that exist at common law."

59 Or App 166, 171, 650 P2d 1006 (1982).

involved is "material" to consumer purchasing decisions. Additional proof of materiality is not required.

B. The statute's purpose precludes a materiality requirement.

A materiality requirement also fails to further the UTPA's primary purpose of protecting Oregon consumers and Oregon markets.[3] By way of example, under the Court of Appeals' rule, a seller can make false representations about the goods it sells or the services it provides, so long as those false representations aren't "material." In other words, the Court of Appeals would give sellers license to lie to consumers about the qualities or characteristics of the sellers' products, so long as the seller later may argue that the lies they chose to tell was not "important." *See Webster's Third New Int'l Dictionary* 1231 (unabridged ed 2002) (defining "material" to mean "having real importance or great consequence"). That cannot be the rule the legislature intended in enacting the UTPA, and it is not a rule that protects consumers or the market in which those consumers conduct business. Instead, it is a rule that only invites misinformation—and, as a result, consumer distrust—to proliferate.

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[3] The Court of Appeals suggested that prohibiting sellers from making unimportant misrepresentations would not "serve to accomplish the purpose of the UTPA to prevent consumers from harm." But that's not the only purpose of the UTPA. The UTPA goes a step further—it exists to affirmatively *protect* consumers by protecting the transactions in which they engage and the market in which they conduct business. *See Denson*, 279 Or at 90 n 4.

Likewise, a materiality requirement fails to fulfill the more specific purpose that state legislatures sought further in enacting state consumer protection statutes. Before those statutes were enacted, marketplace misconduct—in the form of consumer fraud—traditionally was remedied through common-law fraud actions. *See generally* Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 Or L Rev 639, 639 (1994) (citing Dee Pridgen, *Consumer Protection and the Law* ch 2 (1994)). In practice however, such common-law remedies proved "inadequate to make exploited consumers whole; fraud pose[d] a rigorous gauntlet of proof which many consumers [we]re unable to run." *Id.* at 639–40. Without more than common-law fraud to remedy corporate misconduct, consumer complaints often were left unredressed, and "abuses undeterred." *Id.* at 640.

State legislatures responded by enacting laws, such as the UTPA, that bolstered marketplace protections by vesting concurrent enforcement authority in the Attorney General and private individual consumers. *Id.* Thus, as enacted, the UTPA "effectively displaced common law fraud as the remedy of choice"—and to make the remedy more meaningful, UTPA plaintiffs need only prove the elements set forth in statute, "rather than the more rigorous elements of fraud." *Id.*; *see also* Ralph James Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience*, 54 Or L Rev 117, 127 n 60 (1975)

(explaining that common-law causes of action were "unsatisfactory for consumer victims because of the serious pleading and proof difficulties they often presented"). A plaintiffs' burden of proof as to those elements is also lower. *See id.*; *see also Discount Fabrics*, 289 Or at 386 (declining "to extend to such proceedings the more rigorous degree or standard of proof required in an action for common law fraud"). And UTPA remedies are better than those under the common law; plaintiffs in a UTPA action may seek not only statutory damages, *see* ORS 646.638(1), but also potentially may seek attorneys' fees, *see* ORS 646.638(3); *see also* Mooney, *The Oregon Experience*, 54 Or L Rev at 127 n 60 (further explaining that if consumer victims were able to overcome difficulties of pleading and proof, "the actual damages ordinarily recovered were rarely enough to pay the victim's attorney").

The Court of Appeals' decision to import into the UTPA an element of common-law fraud, *see Strawn v. Farmers Ins. Co.*, 350 Or 336, 351–52, 258 P3d 1199 (2011) (setting forth those elements)—when the UTPA *itself* was designed to provide a remedy that common-law fraud could not—fails to further the purpose the legislature intended to serve when it enacted the UTPA. Indeed, it undermines that purpose, importing into the UTPA the very obstacles to consumer protection and remedying marketplace misconduct that gave rise to the UTPA in the first place.

The UTPA, in protecting consumers, must at the very least protect consumers' rights to accurate information about the products or services they purchase. And it must do so in a way that effectively remedies marketplace misconduct and deters future abuses, consistent with the remedy the UTPA was intended to afford. It cannot do that if proof of materiality is required. It is not, and the Court of Appeals erred in holding otherwise.

II. ORS 646.608(1)(b) and ORS 646.608(1)(e) protect against market injuries that may occur before a consumer purchasing decision.

Likewise, the Court of Appeals' rule does not align with the scope of injuries against which subsections (1)(b) and (1)(e) exist to protect. Both ORS 646.608(1)(b) and (1)(e) derive from the Lanham Act and seek to protect not only consumers, but also the market, from conduct that has the potential to impact consumers. *See generally Living Essentials*, 313 Or App at 188, 192 (reviewing the legislative history and explaining that the UTPA is derived from, among other sources, the Lanham Act); *Adidas Am., Inc. v. Calmese*, 662 F Supp 2d 1294, 1304 (D Or 2009) (citing *Shakey's Inc. v. Covalt*, 704 F2d 426, 431 (9th Cir. 1983)) (noting same). Thus, the conduct that each subsection prohibits may be conduct that results in injury *to the market*, not simply injuries to consumers through individual consumer transactions. *See generally 88¢ Stores, Inc. v. Martinez*, 227 Or 147, 153, 361 P2d 809 (1961) (likelihood of consumer confusion of source results in a market impact). Stated another way, subsections (1)(b) and (1)(e) are not UTPA violations that necessarily occur at

the point of sale; rather, they are violations that occur at the time of the conduct that it prohibits—*i.e.*, the creation of appreciable consumer confusion or the use of deceptive representations—*before* any consumer transaction takes place.

Requiring that each of a seller's misrepresentations be "material" to a consumer's purchasing decision does not align with that purpose, or the scope of marketplace injuries that the statute seeks to prevent. Again, the legislature has made clear its decision that certain conduct, representations, or omissions made by sellers in the course of their businesses are unlawful—*i.e.*, those relating to the source, sponsorship, approval, or certification of a product, *see* ORS 646.608(1)(b), or relating to the characteristics, ingredients, uses, benefits, quantities, or qualities of goods or services, *see* ORS 646.608(1)(e)—because they are likely to lead to consumer confusion or they simply are not true. Such conduct, representations, or omissions, when they do occur, poison the relevant market and may lead to, among other things, widespread misinformation, consumer confusion, distrust, and unfair competition. *See supra* n 8. The Court of Appeals' additional requirement—proof that the conduct, representation, or omission was "material to the consumer's decision to buy the product," *see Living Essentials*, 313 Or App at 187—imposes an element that not only does

not appear in the statute, but also does not align with the marketplace injuries against which legislature sought to protect.[4]

III. Neither ORS 646.608(1)(b) nor ORS 646.608(1)(e) raises constitutional concerns.

Finally, the Court of Appeals erroneously presumed that false or deceptive commercial speech is afforded constitutional protection. That is not the case. In *Twist Architecture & Design, Inc. v. Or. Board of Architect Examiners*, an unlicensed architect case, this Court recognized that "[f]alse or deceptive commercial speech" is not protected by the First Amendment. 361 Or 507, 522–23, 395 P3d 574 (2017) (citing *Friedman v. Rogers*, 440 US 1, 99 S Ct 887, 59 L Ed 2d 100 (1979)). Specifically, the Court held that "the false statements about pending licensure on respondents' website, when viewed in conjunction with information on the website about architectural projects in Oregon, *could* mislead Oregon consumers into believing that respondents were

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[4] The Court of Appeals erred in another respect relevant to this point. In analyzing whether subsection (1)(b) requires proof of materiality, the Court of Appeals did not consider the phrase "*likelihood of* confusion"; rather, it construed only the words "cause * * * confusion," effectively construing the trade practice to require actual consumer confusion. 313 Or App at 187 ("[F]or a seller's unlawful trade practice to 'bring into existence' or 'effect by authority' a 'state of being discomfited, disconcerted, chagrined, or embarrassed' or a 'lack of certainty' or 'power to distinguish, choose, or act decisively' with respect its product, the unlawful conduct *necessarily* must be material to the consumer's decision to buy the product." (Emphasis in original.)). But actual consumer confusion is not required under subsection (1)(b).

authorized to practice architecture in Oregon." *Id.* at 523 (emphasis added). Likewise, in *Friedman*, the U.S. Supreme Court explained,

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake. * * * The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."

440 U.S. at 9–10. Those holdings apply here. Free speech protections do not prohibit the State from protecting Oregon consumers and the markets in which they conduct business from the harms that result from the proliferation of misinformation, half-truths, or conduct otherwise resulting in consumer confusion or unfair competition.

That seems particularly so in a world where distrust and misinformation are extraordinarily high. *See* Edelman, 2021 Trust Barometer (Mar 2021), *available at* https://www.edelman.com/trust/2021-trust-barometer (surveying 28 countries and finding "an epidemic of misinformation and widespread mistrust of societal institutions"). As that occurs, Article I, section 8, cannot and should not be construed to limit the legislature's authority to make unlawful new unfair trade practice that arise as consumers, corporations, and society change. As this Court long has observed, the "'tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade.'" *Kamin v. Kuhnau*, 232 Or 139, 150–51, 374 P2d 912 (1962) (quoting 3 Restatement, Torts, Introductory Note to ch 35, at 450); *see also Vitro Corp. of Am. v. Hall*

Chem. Co., 254 F2d 787, 794 (6th Cir 1958) (same). That promise should continue today; as noted above, Article I, section 8's free speech protections cannot prohibit the State from protecting consumers—and ultimately, the market—from the real dangers of corporate or marketplace half-truths. The Court of Appeals' conclusion to the contrary should not stand.

CONCLUSION

For the foregoing reasons, OTLA respectfully urges the Court to reverse the decision of the Court of Appeals.

DATED this 24th day of January, 2022.

Respectfully submitted,

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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 3184.

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 24th day of January, 2022.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 24, 2022, I directed the original **BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER ON REVIEW STATE OF OREGON** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Rachel Lee and Michael J. Sandmire, attorneys for Defendant-Respondent on Review, using the court's electronic filing system.

DATED this 24th day of January, 2022.

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