

HOW THE OREGON SUPREME COURT'S DECISION IN *STATE v. MARSH & MCLENNAN COMPANIES* IMPACTS THE OREGON SECURITIES LAW

**Presented by
Keith Ketterling and Scott Shorr¹**

1. ***State of Oregon v. Marsh & McLennan Companies, Inc.*, ___ Or. ___, 2012 WL 6212518 (Dec. 13, 2012) (Attached as Exh. A)**

A. Issues

- i. Does ORS 59.137, Oregon's new remedial statute for securities misrepresentations in non-privity/secondary market purchases, require proof of reliance?
- ii. If ORS 59.137 requires proof of reliance, may reliance be presumed under the "fraud on the market doctrine"?

B. Background of Statute (Attached as Exh. B)

- i. ORS 59.137 (Senate Bill 609/House Bill 3666 (2003)) – Relatively recent remedial statute created mostly to provide cause of action where plaintiff/purchaser is not in privity or has no relation to defendant/seller and purchases on secondary market. Different in this respect than ORS 59.115, which is generally thought to require either privity, direct passing of title, or some relationship between buyer and defendant.

¹ Keith Ketterling and Scott Shorr are shareholders at Stoll Berne and focus much of their practice on securities and general commercial litigation. Their CV's are attached at Exhibit C. Together with the Department of Justice, Stoll Berne represents the State of Oregon in the *Marsh* case, but the comments at this CLE are not on behalf of the State of Oregon or any party and are intended only to generate a discussion regarding the Oregon Securities Laws.

- ii. Note: Mostly benefits State of Oregon PERS Fund. Most cases involving purchases on secondary market that involve national securities are subject to preemption under SLUSA (Securities Litigation Uniform Standards Act) if part of a “class action” or MDL’ed into a class action. State pension funds are exempt from SLUSA preemption.

C. Holdings

- i. ORS 59.137 requires proof of reliance.

Note: Court found reliance element, without any text expressly requiring reliance, based on language requiring proof that damages were “caused by” a violation of ORS 59.135. Court concluded that ORS 59.135 does not provide elements of cause of action.

- ii. However, proof of reliance may be presumed under the statute as it is under the federal securities law “fraud on the market” doctrine where the buyer purchases on an open and efficient market. The presumption is rebuttable.

D. Open Issues

- i. Issues relating to 59.115: Likely should not impact ORS 59.115 or case law interpreting that statute. Court concluded ORS 59.115 did not provide significant context for interpretation of ORS 59.137. Statutes are dissimilar.

See Everts v. Holtmann, 64 Or. App. 145, 152, *rev den*, 296 Or 120 (1983) (court of appeals holding that ORS 59.115 does not require proof of reliance).

- ii. Did not address whether proof of reliance is required in omission cases (as it is not under federal securities laws).

- iii. Did not address what proof is required to rebut the presumption of reliance and remanded to Court of Appeals for that purpose, but the standard for rebutting the presumption is well-established under the federal securities laws.
- iv. The Oregon Supreme Court did not address dormant Commerce Clause challenge/constitutional issue raised by Marsh.
- v. The Oregon Supreme Court did not address whether proof of scienter is required by ORS 59.137, but statutory text indicates it is not required against primary violators (or even aiders and abettors as part of plaintiff's proof) and trial court in *Marsh* ruled it was not required.