

AGENDA

- 4:30 - 5:00 Overview of Oregon Unlawful Trade Practices Act
- 5:00 - 5:30 Discussion of recent state and private enforcement actions
- 5:30 - 6:00 Questions, answers and discussion

BIOGRAPHIES OF PRESENTERS

Assistant Attorney General Cheryl Pellegrini is the attorney-in-charge of the Oregon Department of Justice's Financial Fraud/Consumer Protection section. Pellegrini is experienced in both criminal prosecution and civil law enforcement. She previously served as attorney-in-charge of the Business Activities Section, which represents many of the state's professional licensing boards.

Justin M. Baxter of Baxter & Baxter, LLP practices exclusively in the area of consumer litigation, emphasizing fair credit reporting, unlawful debt collection, and unlawful trade practices. He has lectured on the FCRA for the Oregon Law Institute and on consumer law for the Northwestern School of Law of Lewis and Clark College. He has authored a litigation manual on the FCRA for West Publishing's Causes of Action series. He is a member of the Executive Committee of the Oregon State Bar Consumer Law Section.

Terrence Slominski of Slominski & Associates practices in the areas of real estate, mortgage and business law. He has been a member of the Oregon State Bar since 1981 and is a member of the Executive Committee of the Oregon State Bar Consumer Law Section.

OSB ANTITRUST AND TRADE PRACTICES SECTION

CLE "Oregon's Unlawful Trade Practices Act - Everything You Wanted To Know About The UTPA"

July 8, 2003

OUTLINE

I. INTRODUCTION AND OVERVIEW

A. PRIVATE ACTIONS UNDER THE UTPA

- ACTIONS UNDER ORS 646.608(1)(u)

B. ACTIONS BY THE ATTORNEY GENERAL

- ACTIONS UNDER 646.607

C. OPPORTUNITIES AND LIMITATIONS ON THE COORDINATION OF PRIVATE ACTIONS WITH DOJ ACTIONS

II. LIVE ISSUES AND RECENT CASE DEVELOPMENTS

A. ARE LOANS COVERED UNDER THE UTPA? CULLEN V. INVESTMENT STRATEGIES

B. APPLICABILITY OF THE UTPA TO FINANCIAL INSTITUTIONS

C. RECOVERY OF NONECONOMIC DAMAGES - RATHGEBER V. HEMENWAY

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UNLAWFUL TRADE PRACTICES ACT

The Department of Justice coordinates its consumer protection work with other persons who share the goal of deterring, stopping, and punishing unlawful conduct. This outline represents an effort to assist those who may have similar aims. **Nothing in this outline constitutes a rule or policy, nor are any of the opinions expressed herein a statement of the State's legal position.**

- I. Broad policy of Unlawful Trade Practices Act (UTPA).
 - A. For a general history of the evolution of Oregon's UTPA see Ralph J. Mooney, *The Attorney General As Counsel for the Consumer: The Oregon Experience*, 54 OR L.REV., 117 (1975).
 - B. "The general policy of the UTPA is to discourage deceptive trade practices and to provide a viable remedy for consumers who are damaged by such conduct." *Raudebaugh v. Action Pest Control, Inc.*, 59 Or App 166, 171 (1982); *Wolverton v. Stanwood*, 278 Or 341, 345 (1977). "Oregon's Unlawful Trade Practices Act (UTPA) is a comprehensive statute for the protection of consumers." *State ex rel. Redden v. Discount Fabrics*, 289 Or 375, 382 (1980); *See also Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 561 (2001) ("[i]t is unquestionable that Oregon has a significant interest in protecting its citizens from deceptive trade practices.").
 - C. Private enforcement of the UTPA serves the public interest.
 1. "The civil action authorized by ORS 646.638 is designed to encourage private enforcement of the prescribed standards of trade and commerce in aid of the act's public policies as much as to provide relief to the injured party." *Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or 127, 134 (1984). The UTPA "is to be interpreted liberally as a protection to consumers." *Redden*, 289 Or at 386 n.8; *Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n.4 (1977).
 - D. Specific Business Practices Enumerated in the UTPA: While the UTPA applies to many other business practices, the following business activities are specifically addressed:
 1. Pyramid Clubs. ORS 646.609.
 2. Telemarketing and Door to Door Sales. ORS 646.611
 3. Manufactured Dwelling Dealers. ORS 646.648
 4. Late Fees on Delinquent Cable Service Accounts. ORS 646.649.
 5. Contest and Sweepstakes Solicitations. ORS 646.651.

6. No-Call Violations. ORS 646.569

II. Elements of a UTPA case: Plaintiffs need not prove the elements of common law fraud to prevail on a UTPA claim. *Redden*, 289 Or at 383-84 (1980).

A. Proper plaintiffs:

1. Private parties: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of willful use or employment by another person of a method, act or practice declared unlawful by ORS 646.608 or 646.648, may bring an individual action in an appropriate court to recover actual damages or \$200, whichever is greater. The court or the jury, as the case may be, may award punitive damages and the court may provide such equitable relief as it deems necessary or proper." ORS 646.638(1).

Corporations are eligible to bring UTPA claims: In *Goodyear Tire & Rubber, Inc. v. Tualatin Tire & Auto, Inc.*, 129 Or App 206, 217 (1994), Tualatin's UTPA counterclaim was reinstated by Court of Appeals on grounds that a corporation is a "person" for purposes of ORS 646.638(1). "Person means...corporations, trusts, partnerships, incorporated or unincorporated associations..." ORS 646.605(4). See discussion on p. 5 on the scope of transactions covered by the UTPA.

2. Prosecuting Attorneys: "A prosecuting attorney who has probable cause to believe that a person is engaging in, has engaged in, or is about to engage in an unlawful trade practice may bring suit in the name of the State of Oregon in the appropriate court to restrain such person from engaging in the alleged unlawful trade practice." ORS 646.632(1). "Prosecuting Attorney" includes the Attorney General and the district attorney of a county where a violation occurs. ORS 646.605(5).
3. Privity issues: "There is no requirement that the representations which constitute a willful violation of the Act be made to the injured consumer." *Raudebaugh v. Action Pest Control, Inc.*, 59 Or App 166, 171 (1982). "As the majority sees it, then, the UTPA requires only that there be a causal connection between the unlawful act and the harm; no vendor-vendee or other seller-consumer relationship between the parties is necessary." *Id.* at 175 (Gillette, J., dissenting).

B. Proper Defendants/ Transactions giving rise to liability.

1. A Government agency (state or federal) is not a “person” for purposes of Oregon’s UTPA and therefore is not liable for violations of the Act. *See* ORS 646.605(4). *See also* *Bretton v. State Lottery Commission*, 41 Mass App Ct 736, 738, 673 NE 2d 76 (1976)(State Lottery is not a “person” for purposes of Massachusetts unfair and deceptive trade practices act).
2. Business, vocation, or occupation: “A person engages in an unlawful practice when in the course of the person’s business, vocation or occupation the person” does a specified act. ORS 646.608(1). Focus is on the defendant. “The statute should be applied only to those unlawful practices which arise out of transactions which are at least indirectly connected with the ordinary and usual course of defendant’s business, vocation or occupation.” *Wolverton*, 278 Or at 345. (applying UTPA to sale of rebuilt engine by a gas station operator who had sold and installed one other engine).
 - a. Examples of *included* transactions.
 - (1) A patient brought a UTPA action against her dentist for installation of a defective bridge. *Investigators, Inc. v. Harvey*, 53 Or App 586, 588 (1981). Court relied upon Webster’s New International Dictionary (3d ed. 1976) to conclude that “a dentist who regularly offers his services to the public is engaged in a ‘business, vocation or occupation.’” *Id.* at 591.
 - (2) “[P]rofessionals who are subject to agency regulation are not immune from the UTPA for conduct performed in their professional dealings that violates the UTPA.” *Kulongoski v. Cunning*, 139 Or App 515, 517 (1996). The UTPA applies even to “closely regulated professions,” where a board supervises/regulates the practice because the focus of the UTPA is “to provide redress for consumers who have suffered. . . because of the action of a person in providing services or goods for that consumer’s use.” *Harvey*, 53 Or App at 591-92.
 - (a) Chiropractors. “The UTPA is applicable to health professionals who commit the unlawful practices it prohibits in the course of providing professional services, and the statutory criteria rather than the professional standards of care are

**ATTORNEY GENERAL'S UTPA ADMINISTRATIVE RULES
ORS 646.608(1)(u)**

DIVISION 20

MISLEADING PRICE REPRESENTATIONS

- 137-020-0010 Trade Practices Act (Reference Price Rule)
- 137-020-0015 Misleading Use of "Free" Offers
- 137-020-0020 Motor Vehicle Price Disclosure
- 137-020-0025 Mobile Home Consignment
- 137-020-0030 Updating
- 137-020-0040 Adoption of Federal Credit and Leasing Law
- 137-020-0050 Motor Vehicle Advertising
- 137-020-0100 Plain Language

GASOLINE ADVERTISING

- 137-020-0150 Gasoline Price Advertising
- 137-020-0160 Sales Practices

REGISTRATION OF TELEMARKETERS

- 137-020-0200 Definitions
- 137-020-0201 Registration
- 137-020-0202 Filing Information
- 137-020-0203 Information to Be Provided Each Prospective Purchaser
- 137-020-0205 Refusal to Issue or Renew Registration; Revocation or Suspension of Registration
- 137-020-0250 Loan Brokers and Misleading Activities
- 137-020-0300 Unordered Real Estate, Goods, or Services

CONTEST, SWEEPSTAKES AND PRIZE NOTIFICATION RULES

- 137-020-0410 Definitions and Exemptions
- 137-020-0420 Rules of Unique Application to Contests
- 137-020-0430 Rules of Unique Application to Sweepstakes

137-020-0440 Prohibitions Applicable to All Promotions (Including Schemes, Sweepstakes, and Contest)

137-020-0460 Requests for Removal from Sweepstakes Promotion Mailing List; Additions to List of Persons to Whom Sweepstakes Promotions May Not Be Mailed

MANUFACTURED DWELLING RULES

137-020-0505 Manufactured Dwelling Rules

137-020-0520 Definitions

137-020-0535 Unfair Trade Practices

137-020-0550 Manufactured Dwelling Purchase Agreement; List of Regulating Agencies

137-020-0565 Landlord's Written Site Improvement Disclosure Statement

137-020-0600 Misrepresentation of Notarial Powers; Notice of Notarial Powers and Fees

USED MOTOR VEHICLE MEDIATION PILOT PROGRAM (no longer in effect)

137-020-0705 Purpose

137-020-0707 Definitions

137-020-0709 Standards and Guidelines for Mediation

137-020-0711 Mediator Qualifications and Training

137-020-0713 Costs of Participation, Collection of Data