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Background Brief on …

The Unlawful Trade Practices Act

Unlawful Trade Practices Act

The Unlawful Trade Practices Act (UTPA) is one tool consumers can use to recover damages that occur as a result of deceptive sales or business practices. The UTPA was enacted in 1971 and is largely based on the Uniform Deceptive Trade Practices Act. *See O.R.S. 646.605-646.656*. The UTPA provides individuals with a right to sue for deceptive practices with the sale of real estate, goods, or services. Additional recovery powers are given to the Attorney General and district attorneys.

In 2013, the Attorney General opened 98 formal investigations into UTPA violations and currently has approximately 200 open and active cases. Of the cases in 2013, 21 were against new and used car dealers, nine against construction contractors, seven against RV dealers, and seven against work-from-home opportunities. Several investigations crossed state lines and involved multiple states' efforts. In 2013, the Attorney General resolved 40 cases through voluntary agreements, settled seven cases out of court, and pursued four lawsuits in state court.

The UTPA is designed to protect consumers from bad business practices. As such, only actors who are engaging in unlawful practices in the course of the actor's business, vocation, or occupation are subject to the act. Actions outside of a business, vocation, or occupation do not fall within the UTPA. Similarly, the consumer must have obtained goods or services for the primary purpose of personal, family, or household uses. A court makes a two-part inquiry into whether real estate, goods, or services were for primarily personal, family, or household uses. First, the court would determine whether the item or services are customarily bought by a substantial number of consumers for personal, family, or household purposes, and then whether the goods or services were in fact purchased by the plaintiff for personal, family, or household purposes.[1]

The UTPA does not cover landlord/tenant disputes, business transactions with a pawnbroker, or any insurance-related matters.

Prohibited Conduct

The UTPA prohibits both general and specific conduct. Generally, the UTPA says that a person engages in unlawful practices if, in the course of business, the person:

- employs unconscionable tactics when selling, renting, or disposing of real estate, goods, or services; and
- fails to deliver the goods or services, or refuses to refund money to the consumer for undelivered goods.

Unconscionable tactics are broadly defined to include:

- knowingly taking advantage of a customer's physical infirmity, ignorance, or illiteracy;
- knowingly permitting a customer to enter into a transaction from which the customer will derive no material benefit;
- knowingly taking advantage of disabled veteran or disabled servicemember; or
- permitting a customer to enter into a transaction with knowledge that the customer will not have a reasonable probability of paying the financial obligation when due.

Specifically, the UTPA prohibits over 72 acts. These include:

- passing off goods or services as that of another;
- causing confusion or misunderstanding on the source, approval, affiliations, or ties of a particular good, or service;
- misrepresenting the characteristics, ingredients, uses, benefits, quantities, or qualities of real estate, goods, or services;
- misrepresenting second-hand items as new or original;
- making false or misleading representations of fact about the real estate, goods, or services of the customer or another;
- misrepresenting the credit availability or nature of transaction or obligation incurred by the customer;
- advertising real estate, goods, or services with the intent to not provide the items advertised;
- making false or misleading statements about prizes, contests, or promotions used to publicize a product, business, or service;
- organizing or inducing membership into a pyramid club;
- failing to disclose any known material defect at the time of delivery of real estate, goods, or services;
- manufacturing, selling, or supplying thermometers or thermostats containing mercury;
- tampering with vehicle odometers;
- failure to adhere to health spa contract laws; or
- failure to disclose to a buyer that a vehicle has been used in the manufacturing of controlled substances.

This section of the UTPA includes many more acts or omissions that are unlawful practices. [2]

Telephone and Door-to-Door Solicitations

The UTPA also governs telephone and door-to-door solicitations. Within 30 seconds of initiating a door-to-door or telephone conversation with a potential customer, a salesperson must:

- identify him or herself and the person he or she represents;
- explain the purpose of the call or visit;
- describe the goods, or services offered for sale in commonly understood terms; and
- inquire whether the person being solicited is interested in listening to a sales presentation.

[1] *Searle v. Exley Express, Inc.* 278 Or 535 (1977).

[2] ORS 646.607 https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013ors646.html.

If the potential customer indicates they are not interested, then the call or visit must end.

Remedies

An individual may bring an action for any of the specific acts prohibited by ORS 646.608, but only a prosecuting attorney (District Attorney or Attorney General) may bring an action for the more general "unconscionable tactics" outlined in ORS 646.607.

Within a private right of action, any consumer who suffers any ascertainable loss of money or property as a result of willful use of an unlawful practice may recover actual damages or $200, whichever is greater, plus punitive damages and attorney fees. ORS 646.638(1). An "ascertainable loss" means a loss that is capable of being discovered, observed, or established, *Scott v. Western International Surplus Sales, Inc.*, 267 Or 512, 515 (1973), but the degree of specificity needed to show actual damages is still under discussion within the courts.

A suit brought by an individual may also claim an award for punitive damages if the court determines that punitive damages are warranted. (See ORS 31.730, *Williams v. Philip Morris, Inc.*, 193 Or App 527 (2004)).

Additionally, the court may award attorney fees to a plaintiff if the plaintiff is the prevailing party. The court may only award attorney fees to a defendant if the defendant prevails and there was no reasonable basis for bringing the action. Statute also allows the court to "provide any equitable relief the court considers necessary or proper." ORS 646.638(1).

The Attorney General or District Attorney has additional remedies available to it. The prosecuting attorney may issue investigative demands, requiring potential defendants to be deposed, produce relevant documents, or answer interrogatories. The prosecuting attorney may also bring a suit to stop any alleged wrongful conduct.

UTPA actions may also be made as a class action.

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