

Enrolled Senate Bill 684

Sponsored by COMMITTEE ON COMMERCE

CHAPTER

AN ACT

Relating to consumer protection; creating new provisions; amending ORS 646.608; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 6 of this 2007 Act:

(1) **“Affiliated business” means a business or business location that is directly or indirectly controlled by, or under common control with, the business location listed in the notice of a going out of business sale or that has a common ownership interest in the merchandise to be sold at the business location listed in the notice of the sale.**

(2)(a) **“Going out of business sale” means a sale or auction advertised or held out to the public as the disposal of merchandise in anticipation of cessation of business, including but not limited to a sale or auction advertised or held out to the public as a “going out of business sale,” a “closing out sale,” a “quitting business sale,” a “loss of lease sale,” a “must vacate sale,” a “liquidation sale,” a “bankruptcy sale,” a “sale to prevent bankruptcy” or another description suggesting price reduction due to the imminent closure of the business.**

(b) **“Going out of business sale” does not include a sale conducted by a bankruptcy trustee or a court-appointed receiver.**

(3) **“Merchandise” means goods, wares or other property or services capable of being the object of a sale regulated under sections 1 to 6 of this 2007 Act.**

(4) **“Notice of intent” means a notice filed with the Secretary of State that a person intends to conduct a going out of business sale.**

(5) **“Person” has the meaning given that term in ORS 646.605.**

SECTION 2. (1) Except as provided in subsection (3) of this section, a person may not sell, offer for sale or advertise for sale merchandise at a going out of business sale unless the person has filed a notice of intent with the Secretary of State.

(2) **A person must display a copy of the notice of intent filed with the Secretary of State in a prominent place on the premises where the going out of business sale is being conducted.**

(3) **If a going out of business sale is conducted as part of a bankruptcy, receivership or other court-ordered action, a person:**

(a) **Need not file a notice of intent with the Secretary of State.**

(b) **Shall display the court order or judgment ordering the sale in a prominent place on the premises where the going out of business sale is being conducted.**

(4) **A person may not:**

(a) Conduct a going out of business sale for more than 90 days from the beginning date of the sale listed on the notice of intent.

(b) Continue to conduct a going out of business sale beyond the ending date listed on the notice of intent.

(5) A person who has conducted a going out of business sale may not conduct another going out of business sale for a period of one year after the ending date of the sale listed on the notice of intent.

SECTION 3. A person filing a notice of intent with the Secretary of State shall provide all of the following information in the notice of intent:

(1) The name, address and telephone number of the owner of the merchandise to be sold. If the owner is a corporation, trust, unincorporated association, partnership or other legal entity, the person signing the notice must be an officer of the entity and must identify the person's title.

(2) The name, address and telephone number of the person who will be in charge of and responsible for the conduct of the sale.

(3) The descriptive name, location and beginning and ending dates of the sale.

SECTION 4. A person may not conduct a going out of business sale if a person who has an ownership interest in the business or in the merchandise to be sold is subject to a court order resulting from a civil enforcement action under ORS 646.608 or sections 1 to 6 of this 2007 Act.

SECTION 5. (1) A person intending to conduct a going out of business sale may not transfer merchandise from an affiliated business or business location to the location of the sale.

(2) A person, after filing a notice of intent, may not buy or order merchandise, take merchandise on consignment or receive a transfer of merchandise from an affiliated business or business location for the purpose of selling the merchandise at the sale or sell such merchandise in a going out of business sale.

SECTION 6. (1) Sections 1 to 6 and 7 of this 2007 Act and ORS 646.608 (1)(fff) apply only to persons who engage in the retail sale of merchandise in the regular course of their business.

(2) Sections 1 to 6 and 7 of this 2007 Act and ORS 646.608 (1)(fff) do not apply to public officials acting within the scope of their duties as public officials.

SECTION 7. (1) As used in this section:

(a) "Appropriate court" has the meaning given that term in ORS 646.605.

(b) "Relevant market" means:

(A) A product market that consists of products or services that a consumer would regard as interchangeable or substitutable by reason of the products' or services' characteristics, prices and intended use; or

(B) A geographic market that consists of the area in which the persons concerned are involved in the supply of a product or service and in which the conditions of competition are sufficiently homogenous.

(c) "Sham sale" means a going out of business sale, as defined in section 1 of this 2007 Act, conducted with the intent to continue the same or a similar business in the same location or at a location within the same relevant market but that is a sale that is represented as being conducted due to a cessation of business.

(2) A person may bring an action in an appropriate court to enjoin another person in the same relevant market from conducting a sham sale if the person reasonably believes the other person is conducting a sham sale. The court may provide such equitable relief as it deems necessary or proper.

(3) In an action brought by a person under this section, the court may award reasonable attorney fees to the person.

(4) It is prima facie evidence that a person alleged to be conducting a sham sale has the intent to continue the same or a similar business if:

(a) The person regularly receives additional inventory during the sham sale or, immediately prior to the sham sale, receives additional inventory that is not regularly delivered;

(b) The sham sale exceeds 90 days; or

(c) The same or a similar business that consists of inventory remaining from the sham sale and that has the same principal ownership resumes business in the same relevant market within 12 months from the cessation of the business.

(5) It is an affirmative defense to an action brought under this section that, during an alleged sham sale, the person no longer needed to go out of business and immediately canceled the alleged sham sale.

SECTION 8. ORS 646.608 is amended to read:

646.608. (1) A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following:

(a) Passes off real estate, goods or services as those of another.

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

(c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

(d) Uses deceptive representations or designations of geographic origin in connection with real estate, goods or services.

(e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.

(f) Represents that real estate or goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.

(g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another.

(h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.

(i) Advertises real estate, goods or services with intent not to provide them as advertised, or with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.

(j) Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.

(k) Makes false or misleading representations concerning credit availability or the nature of the transaction or obligation incurred.

(L) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting real estate, goods or services to be used for model or demonstration purposes or in exchange for submitting names of potential customers.

(m) Performs service on or dismantles any goods or real estate when not authorized by the owner or apparent owner thereof.

(n) Solicits potential customers by telephone or door to door as a seller unless the person provides the information required under ORS 646.611.

(o) In a sale, rental or other disposition of real estate, goods or services, gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the customer in consideration of the customer giving to the person the names of prospective purchasers, lessees, or borrowers, or otherwise aiding the person in making a sale, lease, or loan to another person, if earning the rebate, discount or other value is contingent upon occurrence of an event subsequent to the time the customer enters into the transaction.

(p) Makes any false or misleading statement about a prize, contest or promotion used to publicize a product, business or service.

- (q) Promises to deliver real estate, goods or services within a certain period of time with intent not to deliver them as promised.
- (r) Organizes or induces or attempts to induce membership in a pyramid club.
- (s) Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services.
- (t) Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity.
- (u) Engages in any other unfair or deceptive conduct in trade or commerce.
- (v) Violates any of the provisions relating to auction sales, auctioneers or auction marts under ORS 698.640, whether in a commercial or noncommercial situation.
- (w) Manufactures mercury fever thermometers.
- (x) Sells or supplies mercury fever thermometers unless the thermometer is required by federal law, or is:
 - (A) Prescribed by a person licensed under ORS chapter 677; and
 - (B) Supplied with instructions on the careful handling of the thermometer to avoid breakage and on the proper cleanup of mercury should breakage occur.
- (y) Sells a thermostat that contains mercury unless the thermostat is labeled in a manner to inform the purchaser that mercury is present in the thermostat and that the thermostat may not be disposed of until the mercury is removed, reused, recycled or otherwise managed to ensure that the mercury does not become part of the solid waste stream or wastewater. For purposes of this paragraph, "thermostat" means a device commonly used to sense and, through electrical communication with heating, cooling or ventilation equipment, control room temperature.
- (z) Sells or offers for sale a motor vehicle manufactured after January 1, 2006, that contains mercury light switches.
 - (aa) Violates the provisions of ORS 803.375, 803.385 or 815.410 to 815.430.
 - (bb) Violates ORS 646.850 (1).
 - (cc) Violates any requirement of ORS 646.661 to 646.686.
 - (dd) Violates the provisions of ORS 128.801 to 128.898.
 - (ee) Violates ORS 646.883 or 646.885.
 - (ff) Violates any provision of ORS 646.195.
 - (gg) Violates ORS 646.569.
 - (hh) Violates the provisions of ORS 646.859.
 - (ii) Violates ORS 759.290.
 - (jj) Violates ORS 646.872.
 - (kk) Violates ORS 646.553 or 646.557 or any rule adopted pursuant thereto.
 - (LL) Violates ORS 646.563.
 - (mm) Violates ORS 759.690 or any rule adopted pursuant thereto.
 - (nn) Violates the provisions of ORS 759.705, 759.710 and 759.720 or any rule adopted pursuant thereto.
 - (oo) Violates ORS 646.892 or 646.894.
 - (pp) Violates any provision of ORS 646.249 to 646.259.
 - (qq) Violates ORS 646.384.
 - (rr) Violates ORS 646.871.
 - (ss) Violates ORS 822.046.
 - (tt) Violates ORS 128.001.
 - (uu) Violates ORS 646.649 (2) to (4).
 - (vv) Violates ORS 646.877 (2) to (4).
 - (ww) Violates ORS 87.686.
 - (xx) Violates ORS 646.651.
 - (yy) Violates ORS 646.879.
 - (zz) Violates ORS 646.402 or any rule adopted under ORS 646.402 or 646.404.
 - (aaa) Violates ORS 180.440 (1).

- (bbb) Commits the offense of acting as a vehicle dealer without a certificate under ORS 822.005.
- (ccc) Violates ORS 87.007 (2) or (3).
- (ddd) Violates ORS 92.405 (1), (2) or (3).
- (eee) Engages in an unlawful practice under ORS 646.648.
- (fff) Violates section 2, 4 or 5 of this 2007 Act.**

(2) A representation under subsection (1) of this section or ORS 646.607 may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

(3) In order to prevail in an action or suit under ORS 646.605 to 646.652, a prosecuting attorney need not prove competition between the parties or actual confusion or misunderstanding.

(4) An action or suit may not be brought under subsection (1)(u) of this section unless the Attorney General has first established a rule in accordance with the provisions of ORS chapter 183 declaring the conduct to be unfair or deceptive in trade or commerce.

(5) Notwithstanding any other provision of ORS 646.605 to 646.652, if an action or suit is brought under subsection (1)(aaa) of this section by a person other than a prosecuting attorney, relief is limited to an injunction and the prevailing party may be awarded reasonable attorney fees.

SECTION 9. Sections 1 to 6 and 7 of this 2007 Act and the amendments to ORS 646.608 by section 8 of this 2007 Act become operative on January 1, 2008.

SECTION 10. This 2007 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2007 Act takes effect on its passage.

Passed by Senate May 11, 2007

Received by Governor:

Repassed by Senate June 15, 2007

.....M.,....., 2007

Approved:

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Secretary of Senate

.....M.,....., 2007

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President of Senate

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Governor

Passed by House June 13, 2007

Filed in Office of Secretary of State:

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Speaker of House

.....M.,....., 2007

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Secretary of State