



**DEPARTMENT OF JUSTICE
CIVIL ENFORCEMENT DIVISION**

MEMORANDUM

DATE: March 6, 2013

TO: Honorable Jeff Barker, Chair
House Judiciary Committee

FROM: Aaron Knott, Legislative Director

SUBJECT: HB 2775 – Changes UTPA willful standard to knowing standard

DOJ OPPOSES THIS BILL

BACKGROUND ON THE UNLAWFUL TRADE PRACTICES ACT

- The Unlawful Trade Practices Act (UTPA) was passed in 1971 and amended in 1977. It was based on a model consumer protection law. Additional changes have been made since to expand the “laundry list” of conduct covered by the UTPA.
- The UTPA protects both consumers and honest businesses by promoting a level playing field and a fair marketplace.
 - The Attorney General has investigated, negotiated settlements and litigated violations of the UTPA in many different industries. Targets of enforcement actions run the gamut from telecommunications providers to lenders, debt relief services to major drug and food manufacturers, and motor vehicle dealers to internet and telemarketing sales. The Attorney General also uses the UTPA to attack scams targeting older Oregonians, those new to this country, and other vulnerable populations.
 - These types of investigations help law-abiding businesses stay competitive in a free and fair marketplace. Additionally, some enforcement actions directly benefit businesses. For example, the Attorney General has prosecuted companies for sending local businesses simulated invoices for unordered or undelivered office goods and supplies, often following a deceptive telemarketing solicitation.

“WILLFUL” IS DEFINED IN THE UTPA

- “Willful” is defined in the UTPA as occurring “when the person committing the violation knew or should have known that the conduct of the person was a violation.”

- Oregon courts have definitively held that as “willful” is defined by the UTPA, it is a negligence standard.
- When the Attorney General takes enforcement action under the UTPA, she only needs to prove that the unlawful practices were committed in order to obtain injunctive relief, restitution and attorney fees. However, in order to obtain civil penalties, the Attorney General must show that the person who violated the UTPA acted “willfully.”
- When a private plaintiff brings a claim under the UTPA, (s)he needs to prove that (s)he had an “ascertainable loss of money or property...as a result of willful use or employment” of an unlawful trade practice in order to prevail.

HOW HB 2775 WILL HARM CONSUMERS

- HB 2775 deletes the definition of “willful” that provides that the standard for relief under the UTPA is a negligence standard. This changes the fundamental standard of when a court can award civil penalties to the State of Oregon if a person violates (1) the UTPA, (2) injunctions that a court previously ordered for violations of the UTPA or (3) the terms of an Assurance of Voluntary Compliance (a settlement agreement that was entered into with the Attorney General to settle alleged violations of the UTPA).
- HB 2775 changes the standard for a private plaintiff to bring a cause of action under the UTPA or Unlawful Debt Collection Practices Act from a negligence standard (“knew or should have known”) to actual knowledge.
- By shifting the burden of proof from a negligence standard to a knowing standard, it will be significantly more difficult for the Attorney General and consumers to enforce the UTPA.
- Only two states require a knowing standard for the Attorney General to obtain civil penalties under that state’s consumer protection law. This bill would put Oregon in the distinct minority to place such a high burden on enforcing the state’s consumer protection law.
- The Unlawful Trade Practices Act has served Oregon well for the past 42 years. There is no compelling reason to amend it as contemplated by HB 2775.

DOJ CONTACT

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