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The Honorable Rep. Janelle Bynum, Chair
The Honorable Rep. Karin Power, Vice Chair
The Honorable Rep. Sherrie Sprenger, Vice Chair
The Honorable Rep. Jeff Barker
The Honorable Rep. Akasha Lawrence Spence
The Honorable Rep. Rick Lewis
The Honorable Rep. Raquel Moore-Green
The Honorable Rep. Ron Noble
The Honorable Rep. Carla Piluso
The Honorable Rep. Tawna Sanchez
House Interim Committee on Judiciary
Oregon House of Representatives
900 Court St. NE, Salem Oregon 97301

Testimony of Justin Baxter
In Regard to Business and Consumer Liability
House Interim Committee on Judiciary, May 28, 2020

Dear Chair Bynum and Members of the Committee:

My name is Justin Baxter. I have been a consumer protection attorney in private practice since 1999. I am a founding board member of Oregon Consumer Justice (OCJ). OCJ is nonprofit organization created as part of a settlement with a Big Oil company that cheated Oregonians at the gas pump. OCJ's purpose is to further consumer protection in Oregon through education and advocacy. I have also served as the chair of the Oregon State Bar Consumer Law Section, and on the board of directors of the National Association of Consumer Advocates.

I would like to address four topics today:

1. Failure of insurance companies to pay meritorious claims
2. Garnishment of wages, bank accounts, and unemployment funds
3. Mortgages, loans, and rent after forbearances and deferments
4. The low likelihood of customers suing businesses after contracting COVID-19

Failure of Insurance Carriers to Pay Meritorious Claims

Small businesses and consumers alike pay insurance premiums to insure against the unforeseen and unforeseeable. While most consumer protection statutes and similar laws do not cover businesses, in many ways, small businesses can find common cause with consumers. Like individual consumers, small businesses typically have less bargaining power over larger entities – whether they be insurance companies, franchisors, or “big box” competitors. Small businesses are subject to vendors’ price gouging and going back on agreements. Small businesses are also tenants and mortgagees, beholden to larger, more powerful businesses.

What small businesses are experiencing right now – trying to get claims covered, managing budgets stretched thin, and struggling to stay afloat – is what Oregon consumers experience every day. Access to the courts and legal remedies levels the playing field and allows David to resist Goliath. Closing the courthouse doors emboldens the powerful. Equal access to justice will prevent consumers and small businesses alike from being denied meritorious insurance claims, and from being put on hold in the “We value your call” phone tree of corporate bureaucracy.

Garnishment of Wages, Bank Accounts, and Unemployment Funds

Consumers in Oregon living on the financial precipice are some of the most vulnerable to the economic fallout of this pandemic. They tend to have lower income and less savings, and they are more likely to experience job loss (which can result in loss of health insurance). Lost income or unexpected bills can cause a debt spiral of collections, negative credit, and court judgments – culminating in garnishments of wages and bank accounts. For families struggling to pay rent and put food on tables, these garnishments pose a real and immediate threat.

The Governor has temporarily halted evictions and garnishment of stimulus funds from the federal CARES Act. However, when the executive orders are lifted, consumers may find themselves further in debt, with less ability to pay. Consumer protection laws, like the Oregon Unlawful Debt Collection Practices Act (UDCPA), ORS 646.639 et seq., recognize that creditors and collectors can collect money owed, but must avoid misleading, harassing, or threatening behavior. Rather than immunizing creditors and collectors, now is the time to double down on protecting working people and families.

Mortgages, Loans, and Rent after Forbearances and Deferments

Banks, lenders and landlords have responded to the COVID-19 crisis admirably, in some cases voluntarily granting forbearances or extensions of monthly payments. However, a looming crisis is set to hit when those payments come due.

For example, many mortgage lenders have offered to defer mortgage payments for up to four months; however, at the end of the deferment, the borrower must either pay the full arrearage current, renegotiate the loan, or pay the missed payments at the end of the loan – at the discretion of the lender. For a homeowner that could not make his or her house payment in March, the demand to pay four months’ worth of house payments in July is catastrophic, and could result in delinquency, default, and foreclosure. The Oregon Unlawful Trade Practices Act (UTPA), ORS 646.605 et seq., was extended to cover lenders in 2009, and protects consumers from unlawful and unconscionable business practices, and “level the playing field” for businesses that operate within the bounds of the law.

The Low Likelihood of Customers Suing Businesses after Contracting COVID-19

There is apparently some discussion of immunizing businesses from liability for customers who contract COVID-19 after patronizing a business. This is as inadvisable as it is unnecessary. As a practical matter, the proof necessary to establish a causal connection between a customer’s contact with an infected employee, and actually contracting COVID-19 presents a virtually insurmountable legal hurdle. Because COVID-19 carrier can be asymptomatic for many days or weeks, it would be

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nearly impossible to show that the only source of transmission was a particular business. Because of the difficulty proving that the business was responsible for infecting the customer, it would be difficult for the customer to hire an attorney or prevail in court.

On the other hand, immunizing all businesses for any and all unsafe conditions only ensures a race to the bottom at the expense of public health and safety. Additionally, if a consumer can prove definitively that he or she contracted COVID-19 from a particular business, then there should be a remedy at law for that person. The current state of the law balances the interests of businesses and their customers.

Conclusion

The State of Oregon and various regulatory agencies are going to experience significant budget cuts this year and for years to come. Consumer protection laws can help fill that gap by allowing injured people to seek their own remedy through these laws. Holding businesses accountable in this way levels the playing field for law-abiding businesses.

I believe in the power of the free market to regulate some businesses. If a business is a habitual bad actor, word of mouth spreads, and people vote with their pocketbooks. However, in the 21st Century, this principle can fail consumers. Mortgages and other debt are collateralized and sold, then farmed out to servicers that the consumer may have no relationship with. Consumers do not have a choice whether to have credit or other personal information harvested and sold by credit bureaus and big data aggregators.

The COVID-19 pandemic has laid bare what was already clear: Consumers need more protections, not fewer. Rather than immunize bad actors, the Legislature should protect good businesses and consumers. I welcome questions from the members of Committee.

Sincerely,

A handwritten signature in black ink that reads "Justin M. Baxter". The signature is written in a cursive, flowing style.

Justin M. Baxter