Legal Backgrounder
Vol. 38 No. 9 June 30, 2023

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Advocate for Freedom and Justice®
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Oregon High Court Ruling on Materiality in Consumer-Deception Cases Creates New Risks for Advertisers

by Jennifer Adams

The Oregon Supreme Court quietly issued a decision on deceptive trade practices recently that could have far-reaching implications across the consumer goods industries. In *State ex rel. Rosenblum v. Living Essentials, LLC*,[1] the court held that under certain false advertising-related prohibitions of the Oregon Unlawful Trade Practices Act (UTPA), plaintiffs need not establish the alleged misrepresentation was material to consumer purchasing decisions. The court also held that the UTPA provisions do not infringe on free-speech rights.

On first read of *Living Essentials*, the conclusion that two of the UTPA's prohibited practices, ORS 646.608(1)(b) and (1)(e), lack materiality requirements appears to be rather narrow, based on a careful and nuanced dissection of the statute. But the impact may be far broader. Foremost, advertisers must pay special attention to all advertising claims equally, as statements they previously thought were unlikely to inspire litigation may now be fair game for deception allegations. Second, numerous other states have identical statutes, so the Oregon Supreme Court's construction of those provisions can provide support for consumer-deception plaintiffs in other jurisdictions. Additionally, the court's remand of *Living Essentials* seemingly reopens other extremely critical UTPA issues, including the appropriate "falsity" standard under the statute.

Case History

The Oregon Supreme Court specifically addressed whether plaintiffs alleging violations of two UTPA-prohibited practices must prove that the alleged misrepresentations were "material to consumer purchasing decisions." These prohibitions are:

> 1. A person engages in unlawful practice if in the course of the person's business, vocation or occupation the person does any of the following:
>
> …
>
> (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.
>
> …
>
> (e) Represents that real estate, goods or services have sponsorship, approval, characteristic, ingredients, uses, benefits, quantities or qualities that the real estate, goods, or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation or connection that the person does not have.

[1] 371 Ore. 23, 2023 Ore. LEXIS 252 (May 4, 2023).

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The defendant, Living Essentials, is the company behind the 5-hour ENERGY dietary supplements. The company's portfolio of products includes "Original," "Extra Strength," and "Decaf" versions. Living Essentials represented that the non-caffeine ingredients, namely B-vitamins and amino acids, contributed to the products' efficacy—for example, "contains a powerful blend of B-vitamins for energy, and amino acids for focus." The company also engaged in an "Ask Your Doctor" campaign that made similar claims and made further allusions to "doctor recommended"-type claims.

As the UTPA requires, the Oregon Attorney General's office notified the defendants of alleged violations, including of (1)(b) and (1)(e), primarily that the efficacy claims for the non-caffeine ingredients were false and/or misleading. Under the statute, a company has ten days after notice from the state to respond with an "assurance of voluntary compliance" (AVC) that describes how the company will correct the alleged unlawful practice. If the AVC provides an answer to the satisfaction of the prosecuting attorney, the state can file the AVC with the court as judgment in favor of the state, though such a filing is not an admission of violation. However, if the state finds the AVC unsatisfactory, the prosecuting attorney can reject it and initiate a civil action. Here, the defendants submitted an AVC promising general compliance and specifically stating that it would refrain from making "material representations that were false or mislead consumers acting reasonably to their detriment." Living Essentials also offered to pay the state $250,000. The state rejected Living Essentials' AVC and filed suit in 2014.

After a bench trial, the court ruled in favor of defendants on all claims, including those alleged under (1)(b) and (1)(e).[2] For the (1)(b) claims, the trial court required the state to show that the conduct "caused confusion or misunderstanding that was material to consumer purchasing decisions." The recited elements for (1)(e) similarly referenced that the representations must have been "material to consumer purchasing decisions." The court weighed the competing evidence of the parties' experts and found the defendants' evidence—which included a consumer survey—that the allegedly deceptive statements were not a significant factor in purchasing to be more persuasive and concluded the state failed to meet its burden.

The state appealed, arguing in part that it need not prove materiality for a UTPA violation. The Oregon Court of Appeals rejected the state's arguments and affirmed the trial court on this issue and did not reach several important other assignments of error.[3] After acknowledging that the two UTPA provisions in question lack express materiality requirements, the court conducted a broader analysis of the law. The court concluded that a materiality requirement was an inherent part of the law's definition of "trade" and "commerce" ("directly or indirectly affect[ing] consumers"[4]) when those definitions are interpreted in the context of the UTPA's overall purpose of remedying unlawful trade practices that affect consumers. The court also reasoned that the UTPA mirrors the Uniform Deceptive Trade Practices Act (UDTPA), as well as the *Restatement (Second) of Torts* and the Lanham Act, all of which demand that misleading statements be material to consumers' purchasing decision for them to be violations. Finally, the court found that without a materiality requirement for each of its provisions, the UTPA would directly conflict with the Oregon Constitution's free-speech protections by prohibiting commercial speech that has no potential to mislead a reasonable consumer.

[2] 14CV09149. Multnomah County Circuit Court.

[3] *State ex rel. Rosenblum v. Living Essentials, LLC*, 313 Or. App. 176, 497 P.3d 730 (2021).

[4] ORS 646.605(8).

The Reversal

Despite what seemed to be a thoroughly researched and analyzed appeals court opinion, the Oregon Supreme Court disagreed with the court's conclusions and unanimously reversed.

First, the court echoed the Court of Appeals' conclusion that neither (1)(b) or (1)(e) contained an express materiality requirement. After analyzing the plain language meaning of each provision, the Supreme Court concluded that facially there was no logically implied materiality requirement in either statutory provision.

The court then analyzed the statutory context, agreeing with the lower court that the legislature intended the UTPA to regulate trade practices that *affect* consumers. But the justices disagreed that the legislature "considered only the practices that affect consumers to be those that would materially influence their purchasing decisions." Instead, they reasoned the legislature's judgment as to what practices are unlawful reflected that those practices are inherently "material." The court also explained that other sections of the UTPA do not mention materiality, noting that the appeals court found a jury instruction on a different subsection, (1)(f), to be correct over the defense's request it reference materiality.

Finally, the Supreme Court examined the UDTPA's drafting history and found no references to a materiality requirement. The court observed that Living Essentials provided no evidence that the UDTPA drafters were aware of or relied on the *Restatement (Second) of Torts* or the Lanham Act.

Having concluded neither (1)(b) nor (1)(e) included a materiality requirement, the court next concluded that the provisions did not violate the Oregon Constitution or the U.S. Constitution. Under the Oregon Constitution, the court agreed with the defendant that (1)(e) was a "category one law," because it expressly prohibits speech. Category one laws are unconstitutional unless they fall within a historical exception. Living Essentials argued no exception applied because (1)(e) "can be violated without any showing of materiality or that a misrepresentation was made with knowledge of its falsity or an intent to mislead, as is required for common-law fraud." The court disagreed, holding that (1)(e) falls into a historical exception for fraud laws. It reasoned that under controlling case law, exact matches are not required for historical exemptions, that those specific elements of common-law tort are not required to bring a law within the historical fraud exception, and that at the time of the Oregon Constitution's enactment, the historical understanding of fraud was more expansive than simply punishing culpable speech.

The court next turned to (1)(b), concluding that the provision does not directly prohibit speech and was thus a "category three law" not subject to facial challenge. In addition to challenging the two UTPA provisions as facially unconstitutional, Living Essentials had also challenged their constitutionality as applied to their 5-hour ENERGY statements. Because neither party presented well-developed arguments at the Supreme Court level, the court declined to consider the as-applied challenge and directed the defendant to address that claim to the Court of Appeals on remand.

Finally, the Supreme Court similarly concluded that neither UTPA provision violated the First Amendment of the U.S. Constitution. The court reasoned that, "Because ORS 646.608(1)(b) and (1)(e) concern misleading commercial speech, they are permissible" under the U.S. Supreme Court's *Central Hudson* test.

Broader Impact

The absence of a single few-word phrase on a product package or in an advertisement can potentially have far-reaching implications. That is especially true for those companies targeting the Oregon market after *Living Essentials*. The state high court's holding that *any* statement established to be misleading, no matter how arguably immaterial to the consumer, could violate Oregon's consumer-protection law will likely inspire more public and private UTPA enforcement.

The fallout from *Living Essentials* could spread to other states as well. Most states have consumer-protection laws similar to UTPA, some of which are based on the Uniform Deceptive Trade Practices Act. The Oregon Supreme Court's conclusion that the UDTPA sections that provided the models for (1)(b) and (1)(e) contain no materiality requirement could be persuasive to courts in other states construing laws similarly modeled after the UDTPA. Certainly, private plaintiffs, who in some states can enforce the consumer-protection law, will urge courts to embrace *Living Essentials* and its holding.

Marketers have generally approached advertising claims with different categories of risk depending on where those claims appear. For example, marketers have treated core, on-label claims with the most scrutiny, while one-off social-media posts may not be as heavily vetted or scrutinized. Even if not consciously acknowledged during the risk assessment, there is a general perception that certain advertising claims are of greater value than others. This value is typically tied to whether it is impactful or persuasive to a consumer—i.e., whether it is *material* to a purchasing decision. In light of *Living Essentials*, marketers and their lawyers may need to rethink that risk-assessment approach.

Perhaps *Living Essentials*' greatest impact is yet to be seen. On remand, the Oregon Court of Appeals will apply the state Supreme Court's holding when evaluating the state's claim against the 5-hour ENERGY statements. In the process of doing that, the appeals court will determine the correct legal standards for whether a claim is false and whether a claim is likely to confuse consumers without having to determine materiality. Those findings could add to the *Living Essentials* decision's impact both in and outside of Oregon.

