Oregon State Bar CLE Seminars

An Introduction to Common Consumer Law Issues

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Wednesday, August 16, 2023
Noon–1 p.m.

1 Practical Skills credit (ID 101966)

AN INTRODUCTION TO COMMON CONSUMER LAW ISSUES

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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

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SCHEDULE

Noon An Introduction to Common Consumer Law Issues

- ✦ What is consumer law?
- ✦ Common landlord/tenant law, debt defense, and financial fraud issues in Oregon • How to issue-spot and advocate for Oregon consumers
- ✦ Where and how to learn more about consumer law

1:00 Adjourn

FACULTY

Kevin Mehrens, *Law Office of Kevin A Mehrens, Portland.* Mr. Mehrens has been a practicing attorney since 2007, specializing in representing residential tenants in both eviction defense and affirmative claims against their landlords.

Christopher Mertens, *Mertens Law LLC, Portland.* Mr. Mertens is a consumer financial rights attorney who helps consumers irrespective of economic status. He asserts clients' rights against debt collectors, loan servicers, credit reporting agencies, and businesses that cheat consumers. He helps clients from Washington to California and focuses on representing Oregon consumers.

Consumer Law: An Introduction

By

Christopher Mertens & Kevin Mehrens

Agenda

- **What Even is Consumer Law?**
  - Who are the attorneys?
  - Who are our clients?
- **Frequent Issues in Consumer Law**
  - Debt Defense
  - Affirmative Claims—State and Federal Alphabet Soup!
- **Frequent Issues in Landlord/Tenant Law**
  - Eviction Defense
  - ORS 90 Individual Claims
    - Habitability
    - Security Deposit Accounting

What is a Consumer Law Case?

- Oregon consumer getting messed with:
  - Getting sued for consumer debt
    - Credit cards
    - Medical debt
    - Student loans
    - Auto loan deficiencies
    - Home loans/mortgages
  - Getting ripped off for a good or service
- Both defenses to being sued and affirmative claims

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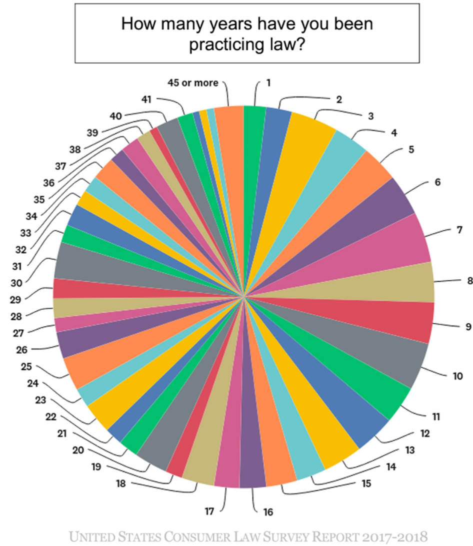
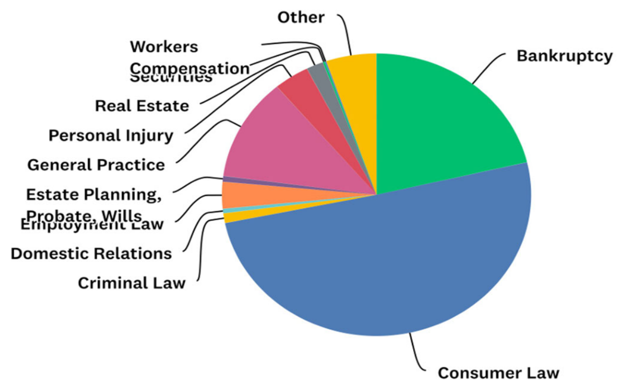
Consumer Lawyers: They're Just Like You!

- Private Practice
  - Large Firms
  - Solo/Small Firms
- Non-Profit
  - Oregon Consumer Justice
  - Legal Aid Services of Oregon
  - Oregon Law Center
- Public Sector
  - Oregon DOJ
  - Fair Trade Commission



Consumer Lawyers: We Do Other Stuff Too

Practice Areas Representing the Largest Percentage of Practice Time



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What the Heck Even is a Consumer?

Consumer: "any natural person obligated or allegedly obligated to pay any *debt*." 15 USC § 1692a(3) (emphasis added); AND "a natural person who purchases or acquires property, services or credit for *personal, family or household purposes.*" ORS 646.639(1)(b) (emphasis added).

Debt: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for *personal, family, or household purposes*…."15 USC § 1692a(5) (emphasis added).

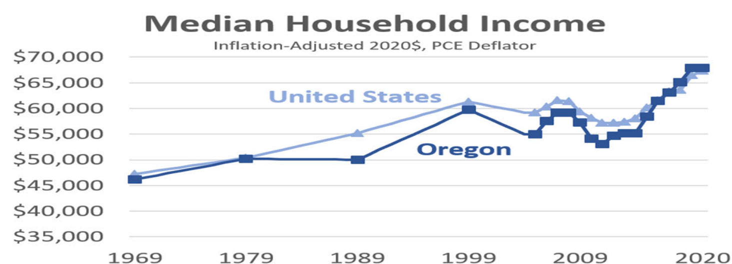
Yeah, But Who Are Our Clients?

- Low Income Families
- Historically Marginalized Communities
  - People of Color
  - Recent Immigrants
- Elderly

Low income families are contacted by debt collectors significantly more often

TABLE 3: DISTRIBUTION OF THE NUMBER OF DEBTS CONSUMERS WERE CONTACTED ABOUT, BY ANNUAL HOUSEHOLD INCOME (PERCENT)

Annual household income	None	One debt	Two or more debts
Less than $20,000	48	14	38
$20,000-$39,999	58	8	33
$40,000-$69,999	70	10	20
$70,000 or more	84	5	11



Minorities are significantly more likely to be targeted by debt collectors

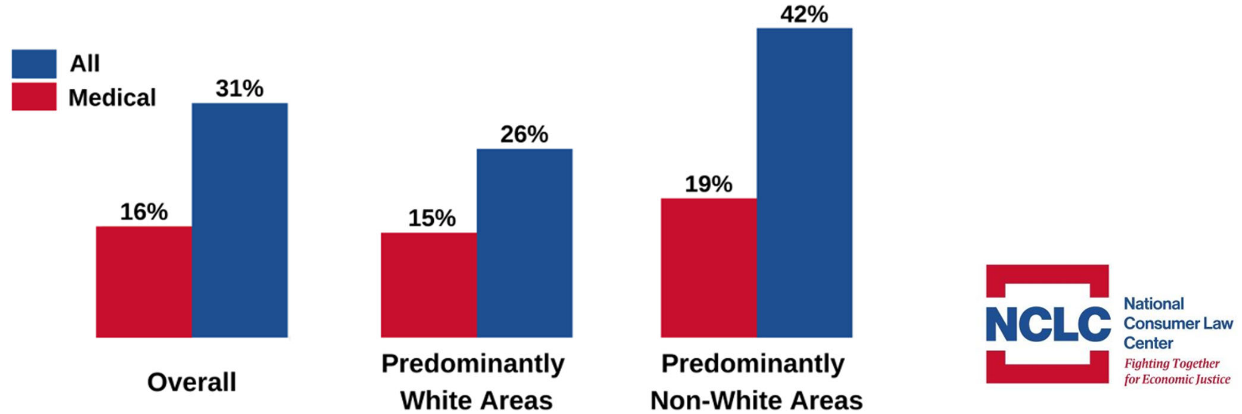
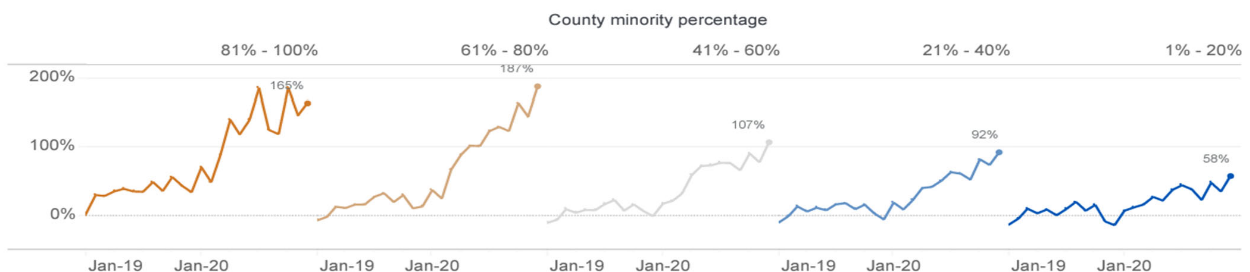
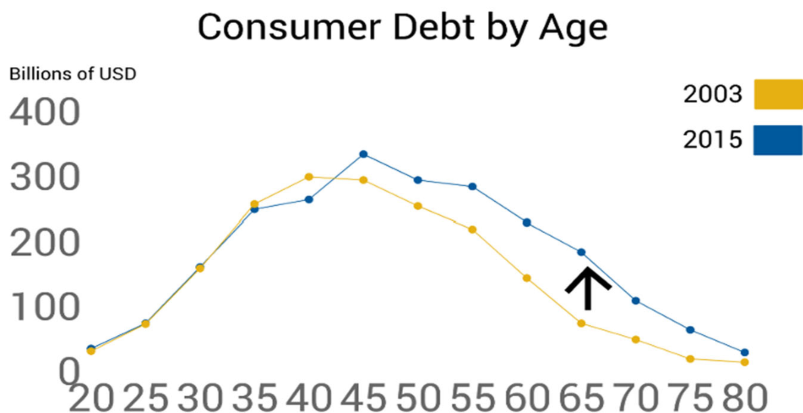


FIGURE 2: COMPLAINT VOLUME PERCENTAGE INCREASE BY MINORITY SHARE, INDEXED TO 2018 COMPLAINT AVERAGE



County groups (% minority)	Number of counties	2020 complaints	Total Population	Complaints per 100k population
81% - 100%	54	25,502	9,715,906	262.5
61% - 80%	178	153,318	55,617,136	275.7
41% - 60%	401	163,863	84,547,548	193.8
21% - 40%	748	122,826	97,566,911	125.9
1% - 20%	1,761	48,593	77,250,294	62.9
US Total	**3,142**	**514,102**	**324,697,795**	**158.3**

The elderly are increasingly carrying significant consumer debts



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Debt Defense – You Can Help!

- Check for client circumstances – Interview the client!
- Check the complaint
- Check for defenses
- Check for errors
- Check for over-charges
- Check for inaccurate credit reporting
- Check for Counter Claims or Affirmative Claims
- Litigate! Great area for new lawyers to get experience.

Debt Defense – You Can Help!

- Check for:
- Client circumstances – Interview the client!
- Complaint – details matter, errors matter
- Possible Defenses
- Over-charges
- Inaccurate Credit Reporting
- Affirmative Claims
- Litigate! Great area for new lawyers to get experience.

LISTEN TO YOUR CLIENT

- Listen to your client's story and GOALS
  - Can't pay and I need help. (most common?)
  - Shouldn't have to pay – not mine, long ago, surprise
  - I can settle this and need help.
- Make a timeline
- Get documents
- Confirm addresses
- Get Partner History – Bad Ex/family member problems
- Get credit reports (sometimes).

Check the Complaint

- Type of consumer debt – credit card, medical, student loan?
- Who's the plaintiff?
- Any errors in the pleading?
- Any defenses on the face of the pleading?
- How much is the claim?
- Attorney fees, Interest, Fees, other charges? Do they have a right to them? Check the contract and/or assignment!

CHECK FOR DEFENSES

- Wrong Defendant?
- Wrong Debt?
- Wrong calculation?
- Wrong Itemization from a debt buyer (OUDCPA)
- Wrong documents?
- Wrong fees or interest OVERcharged?
- No evidence? *Fasching*, *Gimple*
- Wrong Time? Statute of Limitations. *Sanders*

CHECK FOR OVERCHARGES

- Fees or interest not entitled to under contract or statute
- Improper calculation
- Attorney Fees
  - Need a basis
  - Might be prohibited.
- Are there overcharges in medical billing?
  - Charge-sheets for publicly funded hospitals.

Check for Affirmative Claims

- COUNTERCLAIM OR SEPARATE LAWSUIT?
  - Depends on who claim against, whether plaintiff is a debt collector, debt buyer, or original creditor.

Most Common Affirmative Claims:

- FDCPA – Fair Debt Collections Practices Act -DC Only
- OUDCPA – Oregon Unlawful Debt Collections Practices Act – check client fee exposure. *Porter*
- UTPA – Unlawful Trade Practices Act – applies to ***some*** activities related to debt collection.
- FCRA – dispute required via specifc means.

Procedure – Tips & Tricks

- Litigate the Case! Discovery and Motions Practice.
- Use UTCR and SLR and ORCP – READ THEM. USE THEM.
- Use ORCP 69 B for resolution or investigation.
- Learn Fee Waiver Procedures and help your clients and yourself.
- Mandatory Arbitration – practice round?
- Go to trial / trial de novo.
- Fee Applications – Special story telling skills. Important!

Get Experience and Get Paid!

- OR Fee Statutes – Litigate and win! MUST PLEAD right to attorney fees in pleading.
  - Void contract – ORS 20.083
  - Reciprocal contract – ORS 20.096
  - Small contracts under $10,000 – ORS 20.082
  - Discharged in bankruptcy – 20.094
  - Other statutory right
    - OUDCPA or FDCPA or UTPA.
- ORCP 68 C (2) must allege in (a) Pleading or (b) initial motion.
  - you have to show up to get paid!

Affirmative Claim Statutes

- OR Consumer Statutes
  - UTPA – Unlawful Trade Practices Act
  - OUDCPA
  - Elder Abuse Statutes – treble damages
  - Mortgage Lender Law
- Federal Consumer Statutes – so many
  - FDCPA, FCRA, EFTA, ECOA, TCPA.

Unlawful Trade Practices Act

- Huge Statutory Regulation of Oregon businesses.
- Shared Enforcement Responsibility -
  - Public (AG) and Private (attorneys)
- Broad and Specific violations
- 1 year SOL
- Lots of recent case law, mostly pro-consumer.
  - *Living Essentials, Clark, Daniel Gordon*

Unlawful Trade Practices Act

- *Consumer Lawyers are only Private Attorney Generals for Oregon Consumers.*
- ORS 646.608 – sets out violations for Private Action
- Private Right of Action under ORS 646.638
  - Greater of actual damages or $200.
  - Punitive Damages available if intentional
  - Fees and Costs to wining plaintiff
    - (client protected)
  - No Emotional Distress (?)

Unlawful Trade Practices Act

- ***Types of violations***
  - (b) causes likelihood of confusion about source, sponsorship, approval, or certification of real estate, good, or service.
  - (e) Misrepresentation about character or quality of real estate, good, or service.
  - (s) false or misleading rep re: price
  - (t) Fails to disclose material defect
  - (u) not a catchall - OAR is required
- see mortgage servicing OAR.

Other Consumer Claim Statutes

- Alphabet Soup!
- OR Consumer Statutes
  - UTPA – Unfair Trade Practices Act
  - OUDPCPA
  - Elder Abuse Statutes – treble damages
  - Mortgage Lender Law
- Federal Consumer Statutes – so many
  - FDCPA, FCRA, EFTA, ECOA, TCPA.

OUDCPA

- Oregon Unlawful Debt Collection Practices Act (OUDCPA).
- ORS 646.639.

Damages: ORS 646.641(1): Any person injured as a result of **willful** use or employment by another person of an unlawful collection practice may bring an action in an appropriate court to enjoin the practice or to recover actual damages **or** $200, whichever is greater. The court or the jury may award **punitive damages**, and the court may provide such **equitable relief** as it deems necessary or proper.

- Actual damages include "emotional distress" damages.
- Problems: (1) Prevailing party attorney fees and (2) *Porter v. Hill.*

OUDCPA

subsections/violations - ORS 646.639

- (2)(r) Files a legal action knew or reasonably should have known was barred by **statute of limitations**
- (2)(s) Knowingly collects any amount not expressly authorized by the agreement creating the debt or permitted by law.
- (2)(t) Debt buyer – collects without providing requested documents in (4)(b)
- (2)(u) collects without complying with financial screening requirements in ORS 646A.677
- (4)(b) brings action without admissible evidence of documents related to debt
  - Lots of information and possible leverage here.
  - See also ORS 646A.670. May prevent entry of judgment for Debt Collector or Debt Buyer.

FDCPA

- Fair Debt Collection Practices Act (FDCPA). 15 U.S.C. § 1692, *et seq*.
- Only "debt collectors" (unlike OUDCPA)
- Applies to collection companies, assignees, and debt collector attorney.
- Up to $1,000 in statutory damages and any actual damages, including emotional distress damages. 15 U.S.C. § 1692k(a).
- No punitive damages.
- One-way attorney fees for prevailing consumer unless "brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3).
- One-year SOL (no discovery rule anymore). 15 U.S.C. § 1692k(d).

FCRA

- Fair Credit Reporting Act (FCRA). 15 U.S.C. § 1681, *et seq*.
- Background report/screening error causing denial of application. 15 U.S.C. § 1681e(b).
- Failure to reinvestigate. 15 U.S.C. § 1681n, o.

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
15 U.S.C. § 1681n, o	(1) Failure of a furnisher or CRA to properly reinvestigate (2) After a consumer (3) Sends notice of a dispute to a CRA	Actual or statutory damages, punitive damages	Prevailing plaintiff	Two years

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Forcible Entry and Unlawful Detainer (FED)

- Notice of Termination to Tenant
- Lawsuit
- First Appearance
  - Settlement Agreement / Dismissal
  - Set for trial
- Tenant Right of Redemption; HB 2001 (2023)
- Trial
- Judgement
- Writ of Execution

FED's Are Strictly Construed by the Courts

- This means landlords have to correctly dot every i and cross every t
- Even small, seemingly insignificant defects will result in dismissal of the FED case and the tenant being declared the prevailing party
- "An FED action is a special statutory proceeding, summary in its nature; it is in derogation of the common law and must be strictly construed." *Teresi v. Gina Belmonte Corp.*, 31 Or. App. 1231, 1235 (1977).

Notice of Termination

- Non-payment of Rent **ORS 90.394**
- Material Violation of the Rental Agreement **ORS 90.392**
  - Tenant Right to Cure (14/30 Notice)
  - Repeat violation within six months
- 24-Hour Termination Notice **ORS 90.396**
- No-cause Termination **ORS 90.427**

Defective Notice as a Defense to FED

- "Proper notice is a prerequisite to maintaining an FED action." *Leffler v. Wilson*, 94 Or. App. 411, n. 1 (1989); See, *Federal Land of Spokane v. Schelske*, 87 Or. App. 346, 348 (1987).

- Does the termination notice comply with law—must be specific and exact in its terms
  - Date and time for termination?
  - Time periods correctly calculated?

"Returning to the facts of this case, plaintiff did not issue a valid notice of nonpayment to defendants. The notice stated that defendants owed $1,700 in unpaid rent * * * and that the rental agreement would be terminated if that amount was not received by December 27, 2019, at 11:59 p.m. The trial court determined that defendants only owed $1,175.00. Because the notice did not comply with the requirements of ORS 90.394(3), it was invalid, and the trial court therefore should have granted defendants' motion to dismiss the FED action for lack of a valid notice." *Hickey v. Scott*, 370 Or. 97, 115 (2022).

First Appearance

- Set seven days from the date of filing
- Offers an opportunity to reach a settlement with the landlord
- Landlords are generally either represented by counsel or by an agent familiar with the FED process

RATES OF LEGAL REPRESENTATION

	Multnomah	Oregon
Landlord has a Lawyer	62% (333)	41% (560)
Tenant has a Lawyer	5% (25)	6% (88)

Counterclaims in FED

- **ORS 105.132** “No person named as a defendant in an action brought under ORS 105.105 to 105.168 may assert a counterclaim unless the right to do so is otherwise provided by statute.”

- **ORS 90.370** “In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount * * * that the tenant may recover under the rental agreement or this chapter….”

Counterclaims in FED

- A counterclaim against a landlord in an FED must be authorized by some statute
- FED proceedings are summary in nature and limited in scope so the normal rules of civil procedure don't necessarily apply
- "[I]n any action brought by a seller or lessor against a purchaser or lessee of real estate, goods or services, such purchaser or lessee may assert any counterclaim the purchaser or lessee has arising out of a violation of [the UTPA]." ORS 646.638(6). See also, *Hoffer v. Szumski*, 129 Or. App. 7 (1994)

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Statute of Limitations

- **ORS 12.125** “An action arising under a rental agreement or ORS chapter 90 shall be commenced within one year.”

But

- “[W]e think that the phrase "action arising under a rental agreement or [the ORLTA]" is most naturally read as applying when the action itself is authorized by, or brought in accordance with, one of those two sources. At least on its face, the provision does not support defendant's sweeping interpretation, which would have all landlord/tenant disputes subsumed under ORS 12.125.” *Waldner v. Stephens*, 345 Or. 526, 540 (2008).

Habitability Claims ORS 90.320, 90.360

- **ORS 90.320(a)** “A landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition.”
- The duty to “maintain” the dwelling unit is persistent and ongoing throughout the lifetime of the tenancy.
- *Davis v. Campbell*, 327 Or 584, 589 (1998) (“Under the plain terms of the statute, a landlord fails to fulfill that affirmative obligation if, at any time during the tenancy, the dwelling unit substantially lacks safety from the hazards of fire...”) (emphasis added); *Napolski v. Champney*, 295 Or 408, 415 (1983) (“the act affirmatively obligates residential landlords to maintain rental properties in habitable condition….”) (emphasis added).

Habitability Claim Remedy—Diminution

- **ORS 90.360(2)** "the tenant may recover damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or ORS 90.320."
- "We * * * hold that a proper measure of damages for breach of the warranty of habitability * * * is the difference between the fair market rental value of the premises as measured by the rent reserved under the lease and the fair market rental value during the period of the breach." *Lane v. Kelley*, 57 Or. App. 197, 201 (1982).

What is a Habitability Violation?

- ORS 90.320(1) laundry list of uninhabitable conditions
- ORS 90.320(1)(e) catchall for common areas: "[a] dwelling unit shall be considered uninhabitable if it substantially lacks: all areas under control of the landlord kept in every part safe for normal and reasonably foreseeable uses…."
- The degree of diminution is a question of fact for the jury to decide.

Landlord Defenses to Habitability Claims

In the context of a habitability complaint under ORS 90.320 of the ORLTA, only the defenses limiting recovery of damages for a habitability violation specifically provided for in the ORLTA are appropriate "under the **strict liability** scheme of the ORLTA." *Thomas v. Dillon*, 319 Or App 429, 440 (2022) (holding that "any limitation on the recovery of damages" must be provided in the ORLTA, and affirming the trial court's order striking the landlord's common law affirmative defense of comparative fault) (emphasis added).

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Security Deposit Accounting ORS 90.300

- Landlord must provide accounting statement within 31 days from the end of the tenancy—ORS 90.300(12)
- Landlord can only deduct for unpaid amounts under the lease and damages not including wear and tear—ORS 90.300(7)
- Damages—Twice the amount withheld without a timely accounting or withheld in bad faith—ORS 90.300(16)
  - It is "tenant's discretion in deciding whether to assert a statutory right to recover double damages. Once the tenant decides to exercise that choice, and if the other statutory prerequisites are satisfied, the trial court must award the double damages that the statute requires." *Waldvogel v. Jones*, 196 Or. App. 446 (2004)

Attorney Fees—ORS 90.255

"In any action on a rental agreement or arising under this chapter, reasonable attorney fees at trial and on appeal may be awarded to the **prevailing party** together with costs and necessary disbursements, **notwithstanding any agreement to the contrary**."

503 P.3d 1233 (2022)
369 Or. 214

ARROWOOD INDEMNITY COMPANY, Respondent on Review,
v.
Douglas Dean FASCHING, Petitioner on Review.

(CC 17CV37770) (SC S067964).

Supreme Court of Oregon.

Argued and submitted May 6, 2021.
February 10, 2022.

On review from the Court of Appeals.[*]

Jonathan M. Radmacher, McEwen Gisvold LLP, Portland, argued the cause and filed the briefs for petitioner on review.

Kelly F. Huedepohl, Gordon Rees Scully Mansukhani, LLP, Portland, argued the cause and filed the brief for respondent on review.

Nadia H. Dahab, Sugerman Law Office, Portland, filed the brief for amicus curiae Oregon Trial Lawyers Association. Also on the brief was Phil Goldsmith, Law Office of Phil Goldsmith, Portland.

Before Walters, Chief Justice, and Balmer, Flynn, Duncan, Nelson, and Garrett, Justices, and Nakamoto, Senior Judge, Justice pro tempore.[**]

1235 *1235 DUNCAN, J.

This case concerns Oregon Evidence Code (OEC) 803(6), the "business records" exception to the hearsay rule.[1] In the trial court, the parties filed cross-motions for summary judgment, each of which focused on whether documents plaintiff had received from a third party were admissible. Plaintiff argued that the documents qualified for the business records exception. Defendant disagreed, arguing that, in order for the documents to qualify for the exception, plaintiff had to present evidence, through a qualified witness, about the record-making practices of the businesses that had created the documents, and that plaintiff had failed to do so. The trial court agreed with plaintiff, ruling that, "as long as the documents [were] received, incorporated, and relied upon" by plaintiff, they were "admissible as business records." Following that ruling, the trial court granted plaintiff's motion for summary judgment, denied defendant's motion for summary judgment, and entered a judgment in plaintiff's favor. Defendant appealed the trial court's judgment, and the Court of Appeals affirmed. *Arrowood Indemnity Co. v. Fasching*, 304 Or. App 749, 469 P.3d 271 (2020).

On defendant's petition, we allowed review to address what evidence a party must present to establish that documents created by a third party qualify for the business records exception. For the reasons explained below, we conclude that the party proffering the documents must present evidence of the third party's record-making practices sufficient to establish, as required by the text of OEC 803(6), that the documents were made close in time to the acts they describe, by—or from information transmitted by—a person with knowledge, as part of a regularly conducted business activity, and pursuant to a regular record-making practice. Because plaintiff failed to present such evidence, the trial court erred in ruling that the documents at issue qualified for the exception. Because that error affected the trial court's rulings on the parties' cross-motions for summary judgment, which the Court of Appeals affirmed, we reverse the decision of the Court of Appeals and the judgment of the trial court, and we remand the case to the trial court for further proceedings.

I. BACKGROUND

Plaintiff initiated this civil action by filing a complaint asserting a breach of contract claim against defendant. In the complaint, plaintiff alleged that defendant had entered into a student loan contract with Citibank. Plaintiff further alleged that

it had insured the loan and that, after defendant defaulted on the loan, it had paid a claim to Citibank. Based on its payment of the claim, plaintiff alleged that it was entitled to a judgment against defendant for the amount due under the contract.

Plaintiff later filed a motion for summary judgment and a supporting affidavit containing some different facts than plaintiff had alleged in its complaint—specifically, that *1236 defendant had obtained three student loans from Citibank, that Citibank had transferred the loans to Discover, and that Discover had filed the insurance claim that plaintiff had paid. Based on those facts, plaintiff asserted that it stood "in the shoes of" Discover.

To support its motion for summary judgment, plaintiff submitted documents it had received from Discover. The documents included a bill of sale and "loan transmittal summary" detailing loans transferred from Citibank to Discover. They also included, for each of three loans, (1) a copy of a loan application, (2) a copy of a disclosure form, (3) a summary of the history of disbursements, payments, and fees, and (4) a copy of a document transferring ownership of the loan from Discover to plaintiff.[2]

The documents contain hearsay, that is, out-of-court statements offered to prove the truth of the matters asserted. As a general rule, hearsay is inadmissible. OEC 802. But plaintiff asserted that the documents were admissible under OEC 803(6), which establishes an exception to that general rule for certain business records.[3]

To lay a foundation for the documents, plaintiff relied on an affidavit by one of its employees, McGough. In the affidavit, McGough averred:

> "All documents attached hereto are either produced and maintained directly by Plaintiff or are documents from [Discover's] proof of claim which are adopted by the Plaintiff and relied upon in the ordinary course of Plaintiff['s] business. These records were made at or near the time of the occurrence or transaction, recorded by a person with knowledge, and as the Plaintiff's qualified custodian of records I affirm that the attachments are true and correct copies of documents maintained by and relied upon by Plaintiff in the ordinary course of its regular business functions."

McGough averred that the documents plaintiff had received from Discover showed that defendant had obtained loans in 1999, 2000, and 2001, and that his last payment on the loans was made in 2013. The documents themselves state that defendant made payments beginning in 2003 and that Citibank sold the loans to Discover in 2011.

McGough did not aver that she had knowledge of the record-making or record-keeping practices of either Citibank or Discover. And nothing in the affidavit addresses whether the documents were made and kept in the regular course of either Citibank's or Discover's business or whether it was the regular practice of either Citibank or Discover to make and keep such documents.

The summaries of the loan histories appear to be computer-generated reports. They cover activities from 1999 to 2013, a period that, according to the documents, includes years when Citibank owned the loans and years when Discover owned them. The summaries do not indicate when, by whom, or how the information they contain was initially reported and recorded. The summaries state that they were generated in 2013, but they do not state who generated them.

Defendant filed a cross-motion for summary judgment. He asserted that plaintiff's motion for summary judgment was dependent on the documents plaintiff had attached to its motion and that McGough's affidavit failed to lay the foundation required for the business records exception. He further asserted that, without the documents, plaintiff could not make out a *prima facie* case, and, therefore, the trial court had to deny plaintiff's motion for summary judgment and dismiss plaintiff's claims.[4]

*1237 After a hearing on the parties' motions, the trial court ruled that the documents plaintiff had received from Discover were admissible, stating that, "as long as the documents [were] received, incorporated, and relied upon by the assignee, they're still admissible as business records." Following that ruling, the trial court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment.

Defendant appealed, and the Court of Appeals affirmed, ruling that documents created by one business and received by another business can qualify for the business records exception even if the proponent of the documents does not present evidence of the record-making practices of the business that created the documents. *Arrowood Indemnity Co.*, 304 Or. App. at 760-61, 469 P.3d 271. The Court of Appeals acknowledged that,

> "[w]here, as here, business records are offered through the testimony of one business's custodian of records and they include copies of another business's records, *the other business's records are not entitled to the same presumption of reliability* as those prepared directly by the business whose records are presented by its records custodian in court. *That is because the proponent of the records is often unable to procure testimony regarding the third party's business process and is, therefore, not able to independently establish the reliability of that process.*"

Id. at 757, 469 P.3d 271 (emphases added). Nevertheless, the Court of Appeals concluded,

> "like `hearsay within hearsay,' which is not excluded if `each part of the combined statements' fits within a proper hearsay exception, OEC 805, third-party business records contained within other business records satisfying OEC 803(6) *may themselves be admitted if they are shown to possess comparable indicia of reliability or trustworthiness.*"

Id. (emphasis added). Thus, the Court of Appeals announced a rule that allows third-party records to qualify for the business records exception even if the proponent of the records cannot establish that the records were made and kept in the manner described in OEC 803(6).

On defendant's petition, we allowed review to determine the eligibility requirements for the business records exception, in particular, the eligibility requirements for documents created by one business but proffered by another business.

On review, defendant argues that records can qualify for the business records exception only if the proponent of the records presents testimony from a witness who has knowledge of the record-making practices of the business that originally created the record. In defendant's view, the trial court erred in admitting the records at issue because McGough lacked sufficient knowledge to lay a proper foundation to qualify the records for the exception. Defendant further argues that, as a result of the trial court's erroneous ruling that the records qualified for the exception, the trial court erred in granting plaintiff's motion for summary judgment and denying defendant's cross-motion for summary judgment.

In response, plaintiff argues that records created by one business can qualify for the business records exception if they are proffered by another business that has "adopted and relied upon those records in the regular course of its own business, and where the records demonstrate sufficient indicia of trustworthiness." Relying on that interpretation of the exception, plaintiff argues that the trial court correctly admitted the documents attached to McGough's affidavit and, therefore, it correctly granted plaintiff's motion for summary judgment and denied defendant's cross-motion for summary judgment.

II. ANALYSIS

1238 This case requires us to construe OEC 803(6), a provision of the Oregon Evidence *1238 Code. The Oregon legislature enacted the code in 1981. Or. Laws 1981, ch. 892. The code's provisions are statutes; consequently, when construing them, our task is to ascertain the legislature's intent. ORS 174.020(1)(a) ("In the construction of a statute, a court shall pursue the intention of the legislature if possible."); *Crimson Trace Corp. v. Davis Wright Tremaine LLP,* 355 Or. 476, 485, 326 P.3d 1181 (2014) (so stating regarding the rules of evidence). To do so, we utilize "our traditional analytical framework, which focuses on the statute's text, context, and any helpful legislative history." *Crimson Trace Corp.,* 355 Or. at 485, 326 P.3d 1181; *see also* *State v. Gaines,* 346 Or. 160, 171-73, 206 P.3d 1042 (2009) (establishing framework).

In Part A of this section, we explain that the text and context of OEC 803(6) compel the conclusion that, to establish that a record is eligible for the business records exception, the proponent of the record must present evidence regarding the record-making practices of the business that created the record. In Part B, we respond to the arguments made by plaintiff and the dissent. In Part C, we apply our conclusion regarding the eligibility requirements for the business records exception to the facts of this case and conclude that plaintiff failed to present the required evidence regarding the record-making practices of the businesses that created the documents at issue and, therefore, the trial court erred in concluding that those documents qualified for the exception. Because that conclusion affected the trial court's rulings on the parties' motions for summary judgment, we remand the case to the trial court for further proceedings.

A. *Statutory Construction of OEC 803(6)*

We begin with an overview of the Oregon Evidence Code provisions governing hearsay. Under the evidence code, hearsay is generally inadmissible. OEC 802. OEC 801(3) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." OEC 802 establishes the "hearsay rule." It provides, "Hearsay is not admissible except as provided in [OEC 801] to [OEC 806] or as otherwise provided by law." The hearsay rule "reflects a preference for testimony that is given in court, under oath, and subject to cross-examination." *State v. Edmonds,* 364 Or. 410, 412, 435 P.3d 752 (2019). As we have explained,

> "[t]he objection to admissibility, based on the rule against hearsay, furthers an important legal policy of preventing the trier of fact from considering the possible truthfulness of out-of-court statements, unless the statements have sufficient guarantees of trustworthiness. The purpose of the hearsay rule is to guard against the risks of misperception, misrecollection, misstatement, and insincerity, which are associated with statements of persons made out of court. Safeguards in the trial procedure, such as the immediate cross-examination of the witness and the opportunity of the trier of fact to observe the demeanor of the witness who swears or affirms under the penalty of perjury to tell the truth, are designed to reduce those risks."

State v. Carlson, 311 Or. 201, 212, 808 P.2d 1002 (1991). As this court has long recognized, hearsay evidence is presumptively excluded because of its untrustworthiness. *See, e.g., Sheedy v. Stall,* 255 Or. 594, 596, 468 P.2d 529 (1970).

The evidence code contains several exceptions to the general prohibition against hearsay. OEC 803 (establishing exceptions that apply regardless of whether the declarant is available to testify); OEC 804 (establishing exceptions that apply only if the declarant is unavailable to testify); *see also* OEC 801(4) (excluding certain types of statements from the definition of "hearsay"). The party seeking the admission of hearsay bears the burden of proving that the hearsay satisfies the requirements of a hearsay exception. *See, e.g., State v. Jensen,* 313 Or. 587, 591 n 5, 837 P.2d 525 (1992) (noting that a party seeking to admit evidence under OEC 803(2) must establish that the requirements of that exception have been met); *State v. Rodriguez-Castillo,* 345 Or. 39, 46, 188 P.3d 268 (2008) (explaining that hearsay statements are admissible under OEC 805 only if the proponent can "show that each out-of-court *1239 statement either came within an exception to the hearsay rule or did not constitute hearsay").

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1. *Text of OEC 803(6)*

This case concerns OEC 803, which establishes several specific hearsay exceptions, OEC 803(2)-(27), and one residual exception, OEC 803(28). In the trial court, plaintiff asserted—and the trial court ruled—that the records at issue qualified for the business records exception, which is a specific exception defined by OEC 803(6). Plaintiff did not argue that the records qualified for the residual exception.

OEC 803 provides, in part:

> "The following are not excluded by [the hearsay rule, OEC 802], even though the declarant is available as a witness:
>
> "* * * * *
>
> "(6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness. The term `business' as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

Thus, the text of OEC 803(6) sets out several characteristics that a record must have to qualify for the business records exception. The record must (1) describe "acts, events, conditions, opinions, or diagnoses," (2) have been "made at or near the time" of those acts, events, conditions, opinions, or diagnoses, (3) have been made "by, or from information transmitted by, a person with knowledge," (4) have been "kept in the course of a regularly conducted business activity," and (5) have been made because it "was the regular practice of that business activity to make" such records.

A party seeking to utilize the exception must prove that the record it is proffering has each of those characteristics, and the party must do so through "the testimony of the custodian or other qualified witness." And, even if the party does that, the record will not qualify for the exception if "the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness."

The characteristics set out in OEC 803(6) that relate to when, by whom, why, and how a record is created provide assurances of accuracy. Each characteristic provides a different type of assurance. The requirement that the record be created close in time to the acts, events, conditions, opinions, or diagnoses that it describes increases the likelihood that record is based on a clear memory. The requirement that the record be made by, or from information transmitted by, a person with knowledge, ensures that the record is based on first-hand observations. The requirement that the record be kept in the course of a regularly conducted business activity increases the likelihood that the record is accurate because, when a person is engaged in such an activity, the person has a heightened interest in being attentive and careful because the person's position and the business's regular operations depend on the person's accuracy. And, finally, the requirement that the record be the result of a regular record-making practice increases the likelihood that the record is accurate because such practices are designed to create reliable records and their routine use creates habits of precision.

The text of OEC 803(6) reflects the legislature's determination that, to be eligible for the business records exception, a record must have several characteristics that, together, provide adequate assurances of the accuracy of the information in the record. As the commentary to OEC 803(6) states, the idea underlying the business records exception is that certain records possess "unusual reliability" that has been ascribed to the "duty of the record keeper to make an accurate record," the "actual reliance of the business" *1240 on the records, and "the regular entries and systematic checking which produce habits of precision." Legislative Commentary to OEC 803(6), *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 803.06[2], 820 (7th ed. 2020).

To be eligible for the exception, a record must have all the characteristics set out in OEC 803(6). Consequently, if, for example, a declarant is not acting in the regular course of business, the declarant's statement is not eligible for the exception, even if the statement is recorded in a document created as a regular practice. As the commentary to OEC 803(6) states, "[i]f the supplier of the information does not act in the regular course of business * * *, an essential link is broken: the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail." Legislative Commentary to OEC 803(6), *reprinted in* Kirkpatrick, *Oregon Evidence* § 803.06[2] at 820-21. There may be other characteristics, or combinations of characteristics, than those set out in OEC 803(6) that could support a conclusion that a record is reliable, but only those records with all the characteristics set out in OEC 803(6) are eligible for the business records exception as the legislature has defined it.

Thus, OEC 803(6) does not apply to all records created, used, or relied on by a business. It applies only to records that are the product of certain record-making practices. Consequently, a party seeking to utilize the exception must present evidence regarding those practices. Indeed, as Mueller and Kirkpatrick explain in their treatise on the Federal Rules of Evidence, the need for that evidence is why the analogous federal business records exception requires foundation testimony by the custodian of the record or another qualified witness:

> "Every [hearsay] exception requires a factual showing to bring it into play, but the business records exception is unusual in expressly including [the requirement for such foundation testimony]. *The reason for doing so is that the elements of the exception are elaborate and require what amounts to an `insider' to describe the recordmaking process.*"

Christopher B. Mueller & Laird C. Kirkpatrick, 4 *Federal Evidence* § 8:78, 725 (4th ed. 2013).[5]

In sum, the plain text of OEC 803(6) shows that a party seeking to utilize the business records exception to the hearsay rule must present evidence sufficient to establish that the record has the characteristics set out in OEC 803(6) itself, each of which provides a particular assurance of accuracy. Although the legislature could have provided that hearsay is admissible if it is reliable, it did not. Instead, it established exceptions—including the business records exception—that, by their own terms, require specific indicia of reliability. The legislature did not leave it to courts to come up with their own indicia of reliability.

The characteristics that the legislature chose to require as indicia of reliability *1241 in OEC 803(6) relate to the creation of the record. Thus, a party seeking to utilize the business records exception must present evidence about the record-making

practices of the business that created the record. Because the elements of the exception are elaborate, the party seeking the exception must present "what amounts to an `insider' to describe the recordmaking process." Mueller & Kirkpatrick, 4 *Federal Evidence* § 8:78 at 725.

2. *Context of OEC 803(6)*

The context of OEC 803(6)—including other provisions of OEC 803 and case law construing prior versions of the state statutory business records exception—confirms that, in order for a record to qualify for the business records exception under OEC 803(6), the proponent of the record must show that the record has the characteristics set out in OEC 803(6) itself, and, to do so, the party must present testimony about how the record was made.

a. Other provisions of OEC 803

As mentioned, OEC 803 includes several specific exceptions and one residual exception, OEC 803(28). When a party seeks to use an exception for a record that does not satisfy the requirements of any of the specific exceptions, the party may use the residual exception if the record satisfies the requirements of that exception, which provides:

> "The following are not excluded by [the hearsay rule, OEC 802], even though the declarant is available as a witness:
>
> "* * * * *
>
> "(28)(a) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:
>
> "(A) The statement is relevant;
>
> "(B) The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and
>
> "(C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.
>
> "(b) A statement may not be admitted under this subsection unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that such statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it."

The existence of OEC 803(28) shows that the legislature recognized that there may be occasions when a hearsay statement should be excepted from the general prohibition against hearsay even though it does not satisfy the requirements of any of the specific hearsay exceptions. It also shows that the legislature chose to establish requirements for excepting such statements. The legislature did not simply leave it to trial courts to determine what hearsay statements are sufficiently reliable to be excepted. A statement must satisfy the requirements of one of the specific exceptions or the residual exception. The specific exceptions are not to be stretched to apply to statements that do not satisfy their requirements; the residual exception can be used for those statements, provided they satisfy its requirements.

Notably, the residual exception in OEC 803(28) requires more than reliability. As the legislative commentary to it states, OEC 803(28) "allows evidence to be admitted which could not be admitted under any other hearsay exception, *if* a court finds that it has *guaranties of trustworthiness* equivalent to or exceeding the guaranties found in the other exceptions, *and* that it is *highly probative and necessary.*" Legislative Commentary to OEC 803(28), *reprinted in* Kirkpatrick, *Oregon Evidence* § 803.28[2] at 887 (emphases added). The legislature intended OEC 803(28) to apply in "exceptional cases." *Id.* at 888. It is to "be used very rarely, and only in situations where application of the hearsay rule and its other exceptions would result in injustice." *Id.* It is "not a broad grant of authority to trial judges to admit hearsay statements." *Id.*

1242 *1242 Thus, what OEC 803 as a whole shows is that the legislature did not intend to allow trial courts to except hearsay from the prohibition against hearsay based on their own criteria. If a record does not satisfy the requirements for any of the specific exceptions, then it can be excepted from the hearsay prohibition only if it satisfies the requirements of the residual exception. Consequently, in a case like this, a court can admit a record pursuant to OEC 803(6) only if the proponent of the record proves that the record was made in the manner described in OEC 803(6). If it was not, the record may be admissible under the residual exception, but only if the proponent proves that the record satisfies the requirements of that exception, that is, only if the proponent proves that the record is reliable, highly probative, and necessary.[6]

b. Case law regarding the business records exception

This court's case law provides further support for our conclusion that, in order for a record to qualify for the business records exception under OEC 803(6), the record must have the characteristics set out in OEC 803(6) itself. Although this court has not construed OEC 803(6) in many cases, the business records exception was "an established feature of Oregon law" when the evidence code was enacted in 1981, *id.* at 820, and in cases involving the substantially similar predecessor statute to OEC 803(6), enacted in 1941, this court had held that the business records exception did not apply to records that lacked one or more of the characteristics set out in the exception itself.[7] For example, this court had held that statements did not qualify for the exception when they were not made close in time to the events they described,[8] and when they were not made in the regular course of business—*e.g.,* when they were not made by a person acting in the course of a regularly conducted business activity,[9] or when they were not made as a regular practice of the business, including when a record was a summary of a business's books made for the purpose of enforcing a lien.[10] In all those cases, this court focused on whether the records had the characteristics set out in the exception itself, not on whether the records could be regarded as reliable for other reasons.

Allan v. Oceanside Lumber Co., 214 Or. 27, 328 P.2d 327 (1958), is particularly instructive. In *Allan,* the plaintiff proffered a document entitled "Abstract of Clinical Record" to prove that he had suffered a bone *1243 fracture. The document was a form created by the Federal Security Agency — Public Health Service, it carried the seal of the Unites States Public Health Service, and it was signed by a person identified as a "Medical Officer Deputy." As its title indicated, the document appeared to summarize information from the plaintiff's health record. Among other things, the document included an "Examination Summary" that stated, "Fracture contusion of coccyx. Fracture of 4th coccygeal segment." Over the defendant's objection, the trial court admitted the document.

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On appeal, this court held that the document did not qualify for the business records exception. It noted that the document had been prepared one year after the examination and diagnosis it described and that it

> "contains no explanation as to how the `abstract' was compiled from the `clinical record' or who made it. Likewise, it does not indicate what information is contained in the `clinical record' or where the latter is kept."

Id. at 47, 328 P.2d 327. Because the document had not been prepared "at or near the time of" the examination and diagnosis and because the plaintiff had failed to present evidence of the "mode of preparation" of the document, this court held that the conditions for the business records exception had not been met. *Id.* at 48, 328 P.2d 327.

Two aspects of *Allan* are important to this case. First, when determining whether the document was admissible, this court framed the issue as whether the plaintiff had established that the document had the characteristics set out in the exception itself, not on whether the document—a form that was created by, and carried the seal of, a federal agency and had been signed by a medical officer—could be considered reliable for other reasons. Second, this court concluded that the document —which, on its face was a summary of other information, like the loan summaries in this case—did not qualify for the business records exception in the absence of information about how it was prepared. Thus, *Allan* shows that this court has held that eligibility for the business records exception is contingent upon a showing that the proffered record has the characteristics set out in the exception, a showing that necessarily requires evidence of the record-making practices of the business that created the record.

3. *Summary of analysis of text and context of OEC 803(6)*

To summarize, the plain text of OEC 803(6) provides that hearsay is excepted from the general hearsay prohibition if it has certain, listed characteristics that relate to the creation of the record. Consequently, a party seeking to utilize the exception to introduce hearsay must present evidence regarding the record-making practices of the business that created the hearsay. That conclusion is reinforced by the statutory context of OEC 803(6): When OEC 803 is viewed as a whole, it is clear that hearsay must satisfy either the requirements of a specific exception or the requirements of the residual exception, and this court's cases interpreting the substantially similar predecessor business records exception treated the characteristics set out in the exception itself as requirements.

B. *Responses to Plaintiff and the Dissent*

Plaintiff and the dissent make several arguments for a different construction of OEC 803(6). But, as we explain below, those arguments are unpersuasive. First and foremost, they are incompatible with the text and context of OEC 803(6). Second, plaintiff's argument that a hearsay statement qualifies for the business records exception if it is made pursuant to a "duty to report" is based on a misreading of case law; such a duty may be relevant to whether a declarant was engaged in a "regularly conducted business activity," but it is not sufficient to satisfy the other express requirements of OEC 803(6). Third, plaintiff's argument that enforcement of the express requirements of OEC 803(6) is too onerous is based on policy concerns, which are properly addressed to the legislature. Fourth and finally, plaintiff and the dissent rely on cases from other jurisdictions, but, as we explain below, those cases are not persuasive.

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*1244 1. *Plaintiff's proposed rule is incompatible with the text and context of OEC 803(6).*

Plaintiff argues that the documents it received from Discover qualify for the business records exception, but plaintiff does not argue that the documents have the characteristics set out in OEC 803(6). Instead, plaintiff urges this court to announce, as a new rule, that "[t]hird-party records are admissible under OEC 803(6) where the party propounding the records adopted and relied upon those records in the regular course of its own business, and where the records demonstrate sufficient indicia of trustworthiness." According to plaintiff, under its proposed rule, "[w]hether sufficient indicia of trustworthiness exist to admit third-party business records will generally be a matter committed to the discretion of the trial court." Plaintiff offers a list of factors that a trial court should consider when exercising that discretion:

> "To determine whether third-party records are sufficiently trustworthy, the trial court should consider whether the records contain subjective or objective information, whether the records evince regular entries of readily ascertainable information, such as records of payments, deposits, or measurements, whether the third party was under a legal obligation to make accurate records, whether the third party was under an obligation to report accurate information to the propounding party or other entities in the chain of custody for the records, whether the records are of a type commonly and widely relied on by one or more industries, whether the records appear on their face to be complete, whether the records appear on their face to contain any inaccuracies or inconsistencies, whether the party opposing admission offers evidence that the records are inaccurate or incomplete, and whether any other information about the records or the circumstances surrounding their authentication suggests the records are not trustworthy."

Under plaintiff's rule, a party would not have to present evidence of how the records were created. Therefore, a party seeking the admission of records created by a third party would not have to present evidence regarding the record-making practices of the third party.

The most obvious and most important problem with plaintiff's proposed rule is that it is inconsistent with the text of OEC 803(6). As discussed above, the legislature expressly identified the characteristics that a record must have to qualify for the business records exception. Plaintiff's argument assumes that this court can replace those characteristics with others. We cannot. When construing a statute, our task is to ascertain the legislature's intent. ORS 174.020. The text of a statute is the best evidence of that intent, and we are not to omit what the legislature has inserted or insert what it has omitted. ORS 174.010. Plaintiff would have us do both. Plaintiff's interpretation of OEC 803(6) essentially deletes the express requirements of OEC 803(6) and replaces them with requirements of "reliance" and "sufficient indicia of trustworthiness." As we understand it, plaintiff's interpretation would permit the admission of records under OEC 803(6) even if, for example,

they were not made at or near the time of the acts described. That interpretation is simply incompatible with the text of OEC 803(6).

Plaintiff's rule would create an end run around the requirements of OEC 803(6). Under plaintiff's rule, a record that could not be admitted if it was still in the possession of the business that created it could be admitted if it was transferred to a second business that relied on it. So, in this case, if the documents at issue were still in the possession of Discover, but Discover could not establish, for example, that they were made at or near the time of the acts described, the documents would not qualify for the business records exception. But, under plaintiff's rule, if Discover passed the records along to another business that relied on them, that business would not have to show that the records met the requirements of the rule. That result would be inconsistent with the text and context of OEC 803(6). We agree with defendant that "there is no rule of evidence that allows Plaintiff to `adopt' records of its insured and thereby sanitize them from basic rules of evidence that its insured or assignor would *1245 have had to comply with, had it brought its own claim."[11]

Although plaintiff does not make a text-based argument, the dissent does. According to the dissent, if a record is transferred from one business to another, the record can become the record of the receiving business and, therefore, the proponent of the record need only present evidence of the receiving business's record-making practices. 369 Or. at 254-55, 503 P.3d at 1255-56 (Garrett, J., dissenting). Essentially, the dissent's view is that a record "made" by one business can be "made" again by another business if that business incorporated the record into its own files and relied on it. According to the dissent, if a record was created by one business, and was later transferred to second business that "integrated" the record into its own records, then the relevant record-making practices are those of the second business. *Id.* (Garrett, J., dissenting).

To explain that contention, the dissent uses an example in which Company A records information in a document and then Company B receives that document and integrates it into a file. In the dissent's view the entire "file" is a "record" for the purposes of OEC 803(6), so Company B can satisfy the requirements of the rule by presenting evidence about how it created its file.

The dissent's view is based on a misunderstanding of what constitutes a "record" for the purposes of OEC 803(6). The plain text and context of OEC 803(6) make clear that the "record" is the statement that the proponent is offering for the truth of the matter asserted. OEC 803(6) is an exception to the hearsay rule; it concerns hearsay statements. Thus, when trying to determine what the "record" is for the purposes of the business records exception, the question to ask is simply, "What statements are being offered for the truth of the matters asserted?" If, as here, a party proffers documents describing loan activities to prove that the activities occurred, the descriptions of the loan activities are the hearsay statements at issue; they are the "records" that must have been made in the manner required by OEC 803(6). In short, the business that made the statements that are being offered for *1246 their truth is the business whose record-making practices must be shown.[12]

As discussed above, OEC 803(6) requires, among other things, that a record be made "at or near the time" of the act that it describes. It is the close temporal proximity between the act and the making of the record that matters because it is that closeness that helps ensure that the record is based on an accurate recollection. If a record was not made at or near the time of the act it describes, transferring the record does not cure that deficiency. If, as in *Allan,* a record is created a year after the act it describes, it does not qualify for the exception because the delay reduces the reliability of the record. Transferring that record to a second business that puts it in a file close in time to the transfer does not undo the effect of the initial delay. Likewise, if a record was not initially made "by, or from information transmitted by, a person with knowledge," "kept in the course of a regularly conducted business activity," or made because it "was the regular practice of that business activity to make" such records, transferring it to another business cannot change those facts.

To recap, plaintiff's proposed rule—that records qualify for the business records exception if the proponent shows reliance and sufficient indicia of trustworthiness—is inconsistent with the text and context of OEC 803(6). Plaintiff does not engage in our required methodology for statutory interpretation; it does not even attempt a text-based analysis. The dissent does, but its attempt is unavailing. The dissent suggests that, if a record created by one business is received and put in the file of another business, the record can qualify for the business records exception if the proponent of the record presents evidence of the receiving business's practices. But the characteristics set out in OEC 803(6) relate to the initial creation of the document offered for the truth of its assertions, not to the later receiving and filing of the document.

2. *Plaintiff's "duty to report" argument is based on a misunderstanding of case law.*

In support of its argument that records can qualify for the business records exception under OEC 803(6) even if they do not have the characteristics set out in the rule, plaintiff cites cases in which courts have discussed whether the declarant of a hearsay statement was acting pursuant to a "duty to *1247 report." Relying on those cases, plaintiff urges this court to hold that a record qualifies for the exception if the declarant was acting pursuant to such a duty. But, as we explain below, none of those cases establish that a "duty to report" is sufficient to qualify a record for the exception. A "duty to report" may be relevant to whether the declarant was engaged in a "regularly conducted business activity," but it is not sufficient to establish the remaining, express requirements of OEC 803(6).

Plaintiff cites *Johnson v. Lutz,* 253 N.Y. 124, 170 N.E. 517 (1930), an early business records exception case in which the New York Court of Appeals affirmed a trial court's exclusion of a police report that contained statements made to a police officer by persons at the scene of a traffic accident. The court explained that the New York legislature had enacted the state's statutory business records exception

> "to permit a writing or record, made in the regular course of business, to be received in evidence, without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information."

Id. at 128, 170 N.E. at 518.[13] The court further explained that the exception permits the introduction of records "made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as part of their duty." *Id.* But the exception "was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto." *Id.* Therefore, the court concluded, the New York legislature "never intended" its statutory exception to apply to records like the police report at issue in the case, which contained statements from persons who were not acting pursuant to a business duty. *Id.* at 129, 170 N.E. at 519.

This court relied on *Johnson* in *Snyder v. Portland Traction Company,* 182 Or. 344, 185 P.2d 563 (1947), which also involved a police report of a traffic accident. Citing *Johnson,* this court held that the report did not qualify for Oregon's then-existing statutory business records exception because the report was based on statements made to a police officer by persons at the scene of the accident who were not acting in the "`regular course of any business, profession, occupation, or calling.'" *Id.* at 351, 185 P.2d 563 (quoting *Johnson,* 253 N.Y. at 127, 170 N.E. at 518).

Relying on *Johnson* and *Snyder,* plaintiff argues that a statement can qualify for the business records exception if it is made pursuant to a "duty to report." Plaintiff's misunderstands *Johnson* and *Snyder.* In both those cases, the courts held that records did not qualify for the business records exception because the declarants were not acting in the regular course of business, in that they did not have a "duty to report." But the requirement that a record be made in the regular course of business is only one of the eligibility requirements of the exception, and *Johnson* and *Snyder* do not hold otherwise. In keeping with that understanding, this court's cases decided since *Johnson* and *Snyder* treat all the characteristics set out in the exception as requirements for the exception; they do not focus solely on whether the declarant had a "duty to report." *See* 369 Or. at 229-32, 503 P.3d at 1242-44 (describing cases).

*1248 3. *Plaintiff disagrees with the legislature's policy choices.*

The arguments made by plaintiff and the dissent appear to be rooted in a disagreement with the legislature's policy choices regarding the scope of the business records exception. Plaintiff and the dissent both argue that compliance with the requirements of the exception is too onerous. And plaintiff argues that there should be a special exception for bank records. We address those arguments in turn.

First, satisfying the requirements of OEC 803(6) is not too onerous, especially given that the exception allows a party to use hearsay—instead of in-court testimony by a witness who is under oath and subject to cross-examination—to prove a disputed fact. All that the legislature has chosen to require, and all that we are holding, is that a party seeking to utilize OEC

803(6) must put on evidence regarding the record-making practices of the business that created the record sufficient to establish that the record has the characteristics set out in the rule itself. To do so, a party can call a witness from the business that created the record.[14] Or, a party can call another witness who can testify about the practices of the business that created the record.[15] Thus, a party can call the current custodian of a record if, for example, the custodian became familiar with the record-making practices of the business that created the record in the course of acquiring the record or deciding to bring a legal action based on it. Certainly, when a business regularly acquires loan accounts from third parties, the business could, as part of its acquisition process, obtain affidavits about the third parties' record-making practices, especially if the business anticipates bringing legal actions based on the accounts.

To be clear, we are not holding that a party must present witnesses with personal knowledge of the information in the record. The purpose of the business records exception is to eliminate the need to do so. *See* Johnson, 253 N.Y. at 128, 170 N.E. at 518 (explaining that the exception "permits the introduction of shopbooks without the necessity of calling all clerks who may have sold different items of account"). But, in lieu of such testimony, the exception, as codified in OEC 803(6), requires that records have certain characteristics regarding when, by whom, why, and how they are made and kept, and the exception requires that a custodian or other qualified person testify about those characteristics. Such testimony necessarily must include information about the practices of the business that initially made and kept the record. As the commentary to OEC 803(6) explains, the proponent of evidence is not required

> "to produce, or even identify, the specific individual upon whose firsthand knowledge the record is based. A sufficient foundation is laid if the proponent shows that it was the regular practice of the activity to base such a record upon a transmission from a person with knowledge. Thus, in the case of contents of a shipment of goods, it is sufficient to produce a report from the company's computer programmer or a person having knowledge of the particular record system."

1249 Legislative Commentary to OEC 803(6), *reprinted in* Kirkpatrick, *Oregon Evidence* *1249 § 803.06[2] at 822; *see also* Mueller & Kirkpatrick, 4 *Federal Evidence* § 8:78 at 727-28 ("The regular custodian of the records can lay the necessary foundation [for admission under FRE 803(6)] by describing the record-making process, and so can one who supervised the making of the record. Others too can provide the necessary information: What is important is that the witness be familiar with the pertinent record-making practices of the business, and with the manner in which records of the particular sort being offered are made and kept, and these points may be shown by anyone with the appropriate knowledge." (Footnotes omitted.)).

The dissent expresses concern that, if records were transferred a long time ago, the business that currently holds them may not know whether the records have the characteristics required by OEC 803(6). 369 Or. at 255-56, 503 P.3d at 1256-57 (Garrett, J., dissenting). For example, the business that holds the records may not know whether the records were created at or near the time of the act that they describe or whether they were made by, or from information transmitted by, a person with knowledge. We acknowledge that possibility, but it is not a reason to disregard the express requirements of OEC 803(6). Different businesses exercise different degrees of care, both when making records and when relying on them. Some businesses are diligent, and others are negligent. Just because a business has chosen to rely on hearsay does not mean that the legislature would want a court to do so. Businesses may rely on hearsay in their daily affairs, but courts do not.

Even assuming that, in some circumstances, it may not be possible for a party to satisfy the requirements of OEC 803(6), that possibility does not justify disregarding those requirements. As discussed above, the legislature created a residual hearsay exception that allows for the admission of hearsay that does not satisfy the requirements of a specific exception, if the hearsay is reliable, highly probative, and necessary. So, if a business cannot lay the required foundation for the business records exception, it can seek to use the residual exception, provided that it can satisfy the requirements of that exception. But if it cannot satisfy the requirements of either of those exceptions, then—in keeping with the legislature's intent—the record cannot be admitted.

Finally, and most importantly, the concern that the express requirements of OEC 803(6) are too difficult to satisfy is a policy concern that should be presented to the legislature. As mentioned, plaintiff proposes a variety of factors for trial courts to consider when determining whether a record is sufficiently reliable to be eligible for the business records exception. But those are not the factors the legislature has chosen, and whether they provide adequate assurances of reliability is a question for the legislature.

We note that, in 2000, Congress amended FRE 803(6) to allow business records proponents to avoid, "under certain circumstances[,] *** the expense and inconvenience of producing time-consuming foundation witnesses." FRE 803(6), advisory committee's note to 2000 amendment. That amendment permits a proponent to substitute, in place of a qualified witness's foundation testimony, a certification that meets certain requirements. FRE 803(6) (as amended in 2000). But, since 1981, the Oregon legislature has not altered the Oregon business records exception to adopt that amendment, nor any other that would change the required foundation testimony for the exception.

In addition to arguing that the requirements of OEC 803(6) are too onerous, plaintiff suggests that there should be a special rule for bank records. Both defendant and *amicus curiae* Oregon Trial Lawyers Association argue against such a special rule and dispute plaintiff's assertion that bank records are particularly reliable; they point out that banks have been found to have committed mistakes and engaged in deceptive practices in connection with student loans. Regardless of whether bank records are particularly reliable, the simple response to plaintiff's request for a special rule for bank records is that the legislature did not, and we cannot, create one as part of OEC 803(6). It may be that most banking records have the characteristics required by the OEC 803(6) because banks are careful in their record making; if *1250 so, it should not be too onerous for banks to present evidence regarding their processes.

4. *Plaintiff's reliance on other jurisdictions' cases is misplaced.*

Finally, plaintiff and the dissent rely on cases from other jurisdictions, including cases from federal circuit courts interpreting FRE 803(6), the federal business records exception whose language the Oregon legislature borrowed when enacting OEC 803(6). Those cases are not persuasive for several reasons.

First, our task is to interpret the intent of the Oregon legislature, which enacted OEC 803(6) in 1981. Most of the federal circuit cases cited by plaintiff the dissent were decided after the enactment of OEC 803(6) and, therefore, could not have affected the legislature's intent in enacting OEC 803(6). *See* *OR-OSHA v. CBI Services, Inc.,* 356 Or. 577, 593, 341 P.3d 701 (2014) (noting that "court decisions that existed at the time that the legislature enacted a statute—and that, as a result, it could have been aware of—may be consulted in determining what the legislature intended in enacting the law as part of the context for the legislature's decision," but that "[c]ase law published after enactment— of which the legislature could not have been aware—is another matter").[16]

Second, numerous federal circuit cases decide prior to the enactment of OEC 803(6) support our conclusion. When the Oregon legislature enacted OEC 803(6), federal circuit courts had held that the characteristics set out in the federal statutory business records exception were eligibility requirements.[17] *E.g., Ross v. American Export Isbrandtsen Lines, Inc.,* 453 F.2d 1199, 1201 n. 2 (2d Cir 1972) ("It of course is fundamental that, in order to claim admissibility of an otherwise hearsay statement * * * under the Federal Business Records Act, a foundation must be laid establishing the indispensable requirements of the statute."); *see also* *United States v. Grossman,* 614 F.2d 295, 297 (1st Cir. 1980) (upholding admission of record under FRE 803(6) after considering whether each of the rule's enumerated requirements were satisfied based on the testimony of a witness with knowledge of how the record was prepared). They had excluded the admission of evidence under the business records exception where the party seeking to utilize the exception had failed to present evidence of the business practices of the business that made the records. *E.g., N. L. R. B. v. First Termite Control Co., Inc.,* 646 F.2d 424, 427, 427 n. 5 (9th Cir. 1981) (emphasizing the need for a witness who could testify about how the company that created the record had "made and kept" its records, and noting that the legislative history "clearly established" the drafters' intent *1251 "that the introducing witness have knowledge of the *making, keeping and maintaining* of the documents" (emphasis added)); *J. Howard Smith, Inc. v. S.S. Maranon,* 501 F.2d 1275, 1278 (2d Cir. 1974), *cert. den.,* 420 U.S. 975, 95 S.Ct. 1399, 43 L.Ed.2d 655 (1975) (holding that records created by a third-party firm were not admissible where the proponent's witness was not associated with the firm and "had no personal knowledge of how the firm created or kept the records"); *United States v. Rosenstein,* 474 F.2d 705, 710 (2d Cir. 1973) (stating that, although a proponent's witness need not have personally kept the records being proffered, the witness must be "sufficiently familiar with the business practice" of the business that made the records and must testify that the "records were made as part of that practice").

Moreover, in *United States v. Davis,* 571 F.2d 1354 (5th Cir. 1978), the Fifth Circuit had rejected a claim similar to the one that plaintiff and the dissent make here: that a record qualified for the business records exception because, although the proponent had received it from a third party, the proponent regularly requested, retained, and relied on such records.

In *Davis,* a criminal case, the government proffered two forms that an agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF) had sent out to gather information regarding whether a gun that the defendant had received had been shipped or transported in interstate commerce. One form was filled out by another ATF agent based on information that did not originate within the Bureau; the other was completed by an employee of the gun manufacturer, Colt Industries. The government sought to use the completed forms to prove that the gun had been manufactured in one state and sold in another. As the Fifth Circuit later recounted:

> "The [trial] court acknowledged that the information entered on the two ATF forms did not originate within the Bureau. ATF merely preserved the information as reported on the forms. Thus, it was questionable whether the documents were actually a part of the records of the Bureau's business and admissible under the rule 803(6) exception. *The court was impressed, however, that it was part of ATF's regular business activity to make the sort of inquiries made here and to maintain the results of those inquiries in its investigative files. Also impressive to the court was ATF's reliance upon that information in the conduct of its affairs.*"

Id. at 1357 (emphasis added). Based on those considerations, the trial court ruled that the forms were admissible under FRE 803(6).

On appeal, the Fifth Circuit reversed, holding that the forms did not qualify for the business records exception. *Id.* at 1358. The court treated the characteristics set out in FRE 803(6) as "condition[s] essential to admissibility" under the exception. *Id.* at 1359. As the court explained, the foundation that the government had laid for the form received from Colt was deficient because it was

> "silent as to how Colt recorded the information concerning the manufacture and distribution of firearms or whether, in the language of rule 803(6), it was the `regular practice of [Colt] to make [such] record[s]'; whether the records were `kept in the course of a regularly conducted business activity'; and whether they were `made at or near the time by, or from information transmitted by, a person with knowledge.'"

Id. (quoting FRE 803(6) (brackets in *Davis*)). Thus, *Davis*—like the other pre-1981 federal circuit cases cited above, *see* 369 Or. at 244-45, 503 P.3d at 1250-51—held, as we do, that a party seeking to utilize the business records exception must present evidence of the record-making practices of the business that created the record.

In addition to cases decided before the enactment of OEC 803(6), plaintiff and the dissent also cite later federal circuit court cases. Those cases could not have affected the Oregon legislature's enactment of OEC 803(6). Their persuasive value depends on, among other things, whether they involve the same type of analysis that we are required to employ, and they do not. The analysis in those cases differs in two important ways from the analysis that our case law requires us to conduct.

First, the federal circuit courts employ a different standard of review than we do. They review trial court rulings regarding 1252 hearsay exceptions like FRE 803(6) *1252 for abuse of discretion. ***See, e.g.,*** ***Air Land Forwarders, Inc. v. U.S.,*** 172 F.3d 1338, 1341 (Fed Cir. 1999) (reviewing a district court's admission of evidence under FRE 803(6) for abuse of discretion); *United States v. Dreer,* 740 F.2d 18, 19 (11th Cir. 1984) (same). But we review them for errors of law. *State v. Cook,* 340 Or. 530, 537, 135 P.3d 260 (2006) (citing *State v. Cunningham,* 337 Or. 528, 538-39, 99 P.3d 271 (2004)). It appears that, because of the standard of review that the federal circuit courts use, the courts in the cases cited by plaintiff and the dissent regard the admissibility of hearsay as a discretionary issue and, therefore, do not regard the characteristics set out in FRE 803(6) as eligibility requirements.[18]

Second, and relatedly, the federal circuit cases cited by plaintiff and the dissent do not engage with the text of FRE 803(6). [19] We do not approach statutory interpretation like the federal courts did in the cases cited by plaintiff and the dissent. Instead, we focus on the text of the statute, in context, which is "the best evidence of the legislature's intent." *PGE v. Bureau of Labor and Industries,* 317 Or. 606, 610, 859 P.2d 1143 (1993); *accord* *Gaines,* 346 Or. at 171, 206 P.3d 1042 (recognizing that "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes" (internal quotation marks omitted)).

Because the federal cases cited by plaintiff and the dissent do not engage in the analysis we are required to employ, they are not persuasive. In those cases, the courts created their own tests for the business records exception. Notably, different courts have created different tests.[20] The different tests reflect different policy choices, which highlights that, if we were to 1253 do what plaintiff and the dissent urge, we would be making our own policy choices. But, again, that is not *1253 our role. If

the legislature wanted to adopt a policy of excepting records from the hearsay rule if they were created by one business and transferred to another business that relied on them, the legislature could have done so, but it did not.[21]

5. *Plaintiff's argument about the standard of review is incorrect.*

Before addressing whether plaintiff's foundation for the documents it received from Discover satisfied the requirements of OEC 803(6), we pause to address plaintiff's contention that we should review the trial court's ruling regarding admissibility of the documents for abuse of discretion. That contention is inconsistent with this court's case law.

Plaintiff bases its assertion on *Mayor v. Dowsett,* 240 Or. 196, 229, 400 P.2d 234 (1965), which involved an earlier version of the business records exception and has been superseded by *Cunningham.* In *Cunningham,* *1254 this court explained that, when an evidentiary ruling can have only one legally correct answer, such as a ruling regarding whether requirements for a hearsay exception have been met, the ruling is reviewed for errors of law. 337 Or. at 536-39, 99 P.3d 271. *Cunningham* involved the admissibility of hearsay statements under the excited utterance exception, OEC 803(2). Like the business records exception, the excited utterance exception has multiple requirements,[22] and, as this court explained in *Cunningham,* whether those requirements have been satisfied is ultimately a question of law:

> "[T]here is only one legally correct answer to the question whether a statement is admissible as an excited utterance. The trial court finds the facts that underlie the application of OEC 803(2), and those findings will not be disturbed if evidence in the record supports them. However, the ultimate legal issue—whether the requirements of OEC 803(2) have been met and the hearsay statement is therefore admissible as an excited utterance—is a question of law as to which there is only one legally correct outcome. Like this court's holding in [*State v.*] *Titus,* [328 Or. 475, 982 P.2d 1133 (1999)], that evidence is either relevant or it is not, we conclude that a statement is either an excited utterance under OEC 803(2) or it is not. It follows that an appellate court reviews the trial court's legal conclusion that a statement is or is not an excited utterance to determine whether that ruling was an error of law."

Id. at 538, 99 P.3d 271; *see also* Cook, 340 Or. at 537, 135 P.3d 260 (holding that a trial court's ruling regarding whether a hearsay statement qualifies for an exception to the hearsay rule is reviewed for errors of law). As with the excited utterance exception, a record is either a business record under OEC 803(6) or it is not. If two trial courts found the same facts, they could not reach different legal conclusions about whether the statement would be admissible under the business records exception.[23]

In this case, it is particularly clear that we must review the trial court's legal ruling for errors of law because the ruling relates to what the statutory requirements for the business records exception are. Here, the trial court ruled that plaintiff was not required to present evidence regarding the record-making practices of the business that created the records at issue. That is, the trial court ruled that plaintiff was not required to prove, among other things, that the records were based on personal knowledge, made at or near the time of the acts they described, or pursuant to a regular practice. That ruling is akin to a ruling that a party seeking to utilize the excited utterance exception is not required to prove that there was a startling event. It is a question of statutory construction, which is a question of law.

C. *Application*

In this case, plaintiff did not present evidence about the record-keeping practices of Citibank or Discover sufficient to establish that the records have the characteristics required by OEC 803(6). For example, plaintiff did not present evidence about who generated the summaries of the loan histories, nor any evidence about when, by whom, why, and how the information in the summaries was reported and recorded; it did not establish that the information was reported and recorded close in time to the activities to which it relates, or that the information was made and kept pursuant to a regular practice.

Because plaintiff failed to lay the foundation required by OEC 803(6) for the documents it received from Discover, the trial court erred in ruling that those documents qualified for the business records exception. And, because plaintiff's motion for summary *1255 judgment relied on those documents, the trial court erred in granting plaintiff's motion.

That leads to the question of whether, as defendant argues, the trial court erred in denying his motion for summary judgment. Defendant contends that, because plaintiff failed to lay the foundation required by OEC 803(6) for the documents plaintiff received from Discover, it offered no admissible evidence supporting its claim. According to defendant, the trial court therefore should have denied plaintiff's motion for summary judgment and granted defendant's motion.

Defendant's contention, however, sweeps too broadly. Although plaintiff failed to lay a proper foundation to qualify the documents plaintiff received from Discover for admission under the business records exception, both McGough's affidavit and plaintiff's arguments to the trial court asserted alternative grounds for admitting at least some of the documents even if the business records exception did not apply. According to McGough's affidavit, the accompanying documents were "*either* produced and maintained directly by Plaintiff *or* [were] documents from [Discover's] proof of claim which [were] adopted by the Plaintiff and relied upon in the ordinary course of Plaintiff's business." (Emphases added.) And, at the hearing on the parties' cross-motions for summary judgment, plaintiff argued that the loan applications were admissible as party admissions, and the list of checks that plaintiff paid to Discover were admissible as records of plaintiff.

Because the trial court concluded that all the documents attached to McGough's affidavit were "admissible as business records," the trial court did not rule on any alternative grounds for admitting the documents. Therefore, we remand this case to the trial court to determine whether any of the documents are admissible and then reconsider the parties' motions for summary judgment.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

Garrett, J., dissented and filed an opinion, in which Balmer, J., joined.

GARRETT, J., dissenting.

I agree with much of what the majority says about the origins, purpose, and operation of OEC 803(6). That hearsay exception allows the admission of business records when certain criteria are met; to the extent that the analyses put forward by plaintiff and the Court of Appeals would allow the admission of documents that do not meet those criteria, the majority correctly rejects them.

However, I do not agree that the trial court committed legal error by admitting the business records in this case. The majority treats those records as belonging to a "third party"—a mistaken characterization that leads the majority to conclude that the records are inadmissible because plaintiff failed to "present evidence of the third party's record-making practices." 369 Or. at 216, 503 P.3d at 1235. But plaintiff presented the documents as its *own* records, and they satisfy the requirements in OEC 803(6):

> "[1] A memorandum, report, record, or data compilation, in any form, [2] of acts, events, conditions, opinions, or diagnoses, [3] made at or near the time [4] by, or from information transmitted by, a person with knowledge, [5] if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness."

Plaintiff's records qualified under the rule because: (1) the documents constitute a "record, or data compilation, in any form"; (2) they evidence an "act" or "event," namely the creation of a liability owed by defendant, first to a third party not involved in this action and now, as a result of transactions not challenged here, to plaintiff; (3) the record was "made at or near the time" the liability came into existence (*i.e.,* when plaintiff paid the insurance claim to Citibank and thus became entitled to bring 1256 this action against defendant); (4) plaintiff submitted evidence, in the form of the McGough affidavit, that *1256 the record was made by "a person with knowledge"; and (5) McGough further averred that she was plaintiff's "qualified custodian of records" and able to "affirm" that the documents were incorporated, maintained, adopted, and relied upon as a part of plaintiff's regular business practices. Nothing else was required.

In concluding otherwise, the majority characterizes the records at issue as a combination of Citibank's records and Discover's records that require information about those entities' record-making practices. 369 Or. at 252, 503 P.3d at 1254-55. The majority's analysis fails to appreciate that a document originally created by Company A might later, in the ordinary

course of routine business transactions, become part of a distinct record created and maintained by Company B; at that point, the same information may simultaneously be a "record" of both businesses.

Nothing in the text of OEC 803(6) requires a court to ignore that reality—and most courts around the country, interpreting substantively identical rules, do not ignore it. Neither should we. The text can be understood to encompass information that originated from another entity when that information has been fully integrated into the proponent's own records that have the characteristics required by the rule. Suppose a business keeps a file that includes hundreds of single-page documents from various sources, to which entries are added and subtracted over time in the regular course of business. The majority's analysis presumes that, if the business wants to offer that file into evidence, then a separate OEC 803(6) analysis must occur for each page that originated elsewhere. But, as a matter of text and common sense, the "record" can consist of the file as a whole—a reading that is consistent with the rule's statement that the record can be "in any form" and its reference to a "data compilation" as a type of record.

In the digital age, when data can be effortlessly transferred from one electronic document into another, a single business record could comprise thousands of pages, containing data received from other sources in a variety of forms—each bit of data perhaps its own record belonging to another entity before being received and integrated into a new record belonging to the proponent business. If the proponent business demonstrates that the information is now its own record, nothing in the rule requires the trial court to treat the information as belonging to a "third party." The only evidentiary foundation required concerns the record-keeping practices of the proponent business.

The majority takes a different view, arguing that what constitutes the "record" is determined by "the statement that the proponent is offering for the truth of the matter asserted." 369 Or. at 235, 503 P.3d at 1245. Thus, for example, if plaintiff was attempting to use a document originating from Discover to show that Discover made a loan to defendant, then the document from Discover is the "record." But that explanation begs the question. The "matter" being asserted does not have to be understood as the loan from Discover to defendant many years ago; it can also be understood as the creation of a liability owed to plaintiff many years later. *That* is the "act" or "event" for purposes of OEC 803(6) that plaintiff is seeking to prove, and the various pieces of the paper trail demonstrating that liability can be understood as component parts of a larger "record" or "data compilation" that plaintiff created in the ordinary course of its business "at or near the time" that that liability came about.

Given the practically limitless ways in which business records might be maintained, formatted, organized, and presented to a trial court, the majority's approach could significantly complicate the admission of business records by presumptively excluding any part of a record that was originally created by a third party, no matter how thoroughly it has been integrated into the proponent's own records. In this case, it may not have been difficult for plaintiff to obtain the third-party information that the majority announces was necessary. In other cases, however, obtaining that information may be difficult, expensive, or impossible. A "third party" may have ceased existing years earlier; individuals with personal knowledge of its record-keeping processes may be unavailable. Courts have always interpreted the business records exception broadly, with an eye toward the practical *1257 realities of modern commerce.[1] The majority's narrow approach is ill-suited for those realities, a problem that will likely worsen as technology advances in ways this court cannot foresee. And that approach will result in additional costs in business and consumer transactions, costs that will of course be passed on to consumers.

It is thus unsurprising that the prevailing approach around the country is different than the majority's. The federal rule is substantively identical to OEC 803(6), and nearly all federal courts allow admission of integrated records without requiring the proponent to present information about a "third party's" business practices. Federal courts have continued to interpret that rule's requirements broadly, including in the context of integrated records.[2] The First Circuit, for example, allows the admission of "intimately integrated" business records if the evidence "demonstrate[s] the reliability and trustworthiness of the information." *U.S. Bank Trust v. Jones,* 925 F.3d 534, 537, 539 (1st Cir. 2019) (brackets in original).[3] Viewing the rule's requirements broadly, the First Circuit has "affirmed the admission of business records containing third-party entries * * * where the entries were `intimately integrated' into the business records." *Id.* at 537 (citing *FTC v. Direct Marketing Concepts, Inc.,* 624 F.3d 1, 16 n 15 (1st Cir. 2010)). It has also admitted records when "the party that produced the business records `relied on the third-party document and documents such as those in his business.'" *Id.* (quoting *U.S. v. Doe,* 960 F.2d 221, 223 (1st Cir. 1992) (brackets omitted)). Conversely, that court has excluded integrated records when the business that produced the records "lacked a self-interest in assuring the accuracy of the third-party information." *Id.* at 538 (citing *U.S. v. Vigneau,* 187 F.3d 70, 77 & n 6 (1st Cir. 1999)).

1258 *1258 Other jurisdictions have taken a similarly broad approach. The Ninth Circuit allows a proponent to introduce business records that include records that originated elsewhere when the records were received directly, maintained in the proponent's files, and relied upon, and when the proponent business "had a substantial interest in the accuracy of the [records]." *MRT Construction v. Hardrives, Inc.,* 158 F.3d 478, 483 (9th Cir. 1998). The Second and Tenth Circuits also follow this trend, allowing integrated business records to be admitted: "Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity." *U.S. v. Jakobetz,* 955 F.2d 786, 801 (2d Cir. 1992) (citing *United States v. Carranco,* 551 F.2d 1197, 1200 (10th Cir. 1977)); *see also* *Air Land Forwarders, Inc. v. U.S.,* 172 F.3d 1338, 1343 (Fed Cir. 1999) (admitting integrated business records without requiring testimony about the original creator's record-keeping practices when the proponent relied on the accuracy of the record and other circumstances indicated that the document was trustworthy); *United States v. Parker,* 749 F.2d 628, 633 (11th Cir. 1984) (concluding that the business records exception was still available to a business who "had neither prepared the [record] nor had firsthand knowledge of [its] preparation"). In addition to those federal courts, many other state courts allow admission of integrated records under similar or identical rules.[4]

The majority contends that all of those cases are distinguishable because they either have not grappled with the text of the rule or (in the case of the federal courts) apply an abuse-of-discretion standard of review. 369 Or. at 247, 503 P.3d at 1251-52. I would not infer that the many courts interpreting the rule differently have ignored its text. Rather, their decisions reflect a recognition that "record" has a broader meaning than what the majority adopts, and that documents originating from somewhere else may nonetheless come to be the business records of the proponent.

The majority also argues that an integrated-records approach is contrary to the purpose of the rule because it would not provide the assurances of accuracy that OEC 803(6) contemplates. The majority emphasizes the requirement that a record be made "at or near the time by, or from information transmitted by, a person with knowledge" of the event. 369 Or. at 236, 503 P.3d at 1245-46. I understand the concern to be that, if a record is transferred from Company A to Company B, then Company B should be required to submit the same information about Company A's record-making practices that Company A would be required to provide if it were the proponent. However, if Company B is offering what is now *its own* record, then, textually, the proper focus is on the circumstances of creating and maintaining B's record, not A's. Company B would need to demonstrate that its process for creating and maintaining the record satisfies the requirements of the rule. The records custodian from Company B can present that information, including the circumstances under which the information was received from Company A.

The majority may be correct that, in that situation, less will be known about how A generated some underlying information than if A itself were the proponent. But that is a matter going to the weight of the evidence that is properly dealt with on cross-examination, not a basis for deeming *B's record* inadmissible. *See* *N. L. R. B. v. First Termite Control Co., Inc.,* 646 F.2d 424, 427 (9th Cir. 1981) (emphasizing that the qualified witness must be subject to meaningful cross-examination for the factfinder to evaluate the accuracy of the record). In addition, the trial court retains the authority to exclude records that 1259 otherwise meet the criteria for the exception if "the source of information or the *1259 method [or] circumstances of preparation indicate lack of trustworthiness." OEC 803(6). Here, defendant did not argue to the trial court that there is a particular reason to doubt the trustworthiness of plaintiff's documents, nor does he make that argument now.[5]

In short, the trial court did not err in admitting plaintiff's records. Because the majority concludes otherwise, I respectfully dissent.

Balmer, J., joins in this dissenting opinion.

[*] On appeal from Multnomah County Circuit Court, Bruce C. Hamlin, Judge pro tempore. 304 Or App 749, 469 P3d 271 (2020).

[**] DeHoog, J., did not participate in the consideration or decision of this case.

[1] The full text of OEC 803(6) is set out below at 369 Or at 223.

[2] Plaintiff also submitted copies of checks it had issued to Discover to pay Discover's claim. Defendant has acknowledged that the copies of the checks were properly authenticated business records, and those copies are not at issue on review.

[3] As noted below, plaintiff also asserted that some of the documents attached to McGough's affidavit were admissible on alternative grounds, but, because the court ruled that all the documents were admissible as business records, it did not rule on any alternative grounds for admitting those documents. *See* 369 Or. at 252, 503 P.3d at 1254-55.

[4] OEC 803(6) sets out several characteristics that a record must have to qualify for the exception. In addition, it provides that, even if a record has those characteristics, it will not qualify for the exception if "the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness." In this case, in addition to asserting that plaintiff had failed to present a witness qualified to testify that the documents had the required characteristics, defendant argued that McGough's statements in the affidavit and the accompanying records "demonstrate a lack of trustworthiness" that weighed against admission of the documents because McGough had averred that the documents attached to the affidavit included a promissory note, but no promissory note was attached.

[5] OEC 803(6) was modeled on the then-existing federal statutory business records exception, FRE 803(6), which applied the exception to the following:

"A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

FRE 803(6) (1980). At the time that the legislature enacted OEC 803(6), the federal rule was identical to OEC 803(6) except for the last clause: Whereas the federal rule affirmatively places the burden for proving lack of trustworthiness on the opponent of the evidence, the Oregon rule does not identify who has the burden to show that a record that meets the express requirements of the exception is nevertheless untrustworthy. *See* OEC 803(6) (excepting business records from the hearsay rule "unless the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness"). As noted below, Congress later approved an amendment to the federal rule that permits a proponent to substitute, in place of a qualified witness's in-court testimony, a certification that meets certain requirements. *See* 369 Or. at 242, 503 P.3d at 1249. Otherwise, the federal rule has remained substantively unchanged since its 1975 codification.

[6] As mentioned above, in this case, plaintiff did not invoke the residual exception.

[7] Oregon Laws 1941, chapter 414, which adopted the Uniform Business Records as Evidence Act, provided, in part:

"A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Id. § 2. That exception was later codified as *former* ORS 41.690 (1953), *repealed by* Or. Laws 1981, ch. 892, § 98.

[8] *See, e.g., Hansen v. Bussman,* 274 Or. 757, 786, 549 P.2d 1265 (1976) (holding that a letter dated June 8, 1971, did not qualify for the exception because it was not made "at or near the time" of events referred to in the letter that had occurred in 1970); *Allan v. Oceanside Lumber Co.,* 214 Or. 27, 48, 328 P.2d 327 (1958) (holding same as to a record of examination and diagnosis that had occurred one year before the record was created).

[9] *See, e.g., Snyder v. Portland Traction Company,* 182 Or. 344, 351, 185 P.2d 563 (1947) (holding that a police report based on bystanders' statements was "pure hearsay" and did not qualify for the business records exception because the bystanders were not acting in the regular course of business); *Miller v. Lillard,* 228 Or. 202, 212, 364 P.2d 766 (1961) (holding same as to a livestock officer's report that was based on others' statements).

[10] *Buckler Co. v. Am. Met. Chem. Corp.,* 214 Or. 639, 645, 332 P.2d 614 (1958) (holding same as to an accountant's summary of the plaintiff's books that was "a memorandum prepared long after the event for the purpose of enforcing a lien"); *see also, e.g., Scanlon v. Hartman,* 282 Or. 505, 511, 579 P.2d 851 (1978) (explaining that, because records that a business does not make regularly are not made in "the regular course of business," they are "generally considered inadmissible as business records," and holding that a letter from a doctor to the plaintiff's attorney did not qualify for the exception because it was not made pursuant to a regular practice).

[11] As mentioned, the Court of Appeals analogized the documents at issue in this case to "hearsay within hearsay," stating that,

"like `hearsay within hearsay,' which is not excluded if `each part of the combined statements' fits within a proper hearsay exception, OEC 805, third-party business records contained within other business records satisfying OEC 803(6) may themselves be admitted if they are shown to possess comparable indicia of reliability or trustworthiness."

Arrowood Indemnity Co., 304 Or. App. at 757, 469 P.3d 271. The Court of Appeals was correct to conclude that layered business records can qualify for the business records exception, but it was incorrect to conclude that all that a party needs to show regarding the inner layer is that it has "comparable indicia of reliability or trustworthiness." *Id.* The general rule for layered hearsay applies to layered business records: "Hearsay included within hearsay is not excluded under [the hearsay rule, OEC 802] if *each part* of the combined statements *conforms with an exception set forth in [OEC 803] or [OEC 804].*" OEC 805 (emphases added). The layered hearsay rule requires a showing that each layer satisfies the requirements of one of the statutory exceptions to the hearsay rule; it does not allow for a showing of "comparable indicia of reliability or trustworthiness."

As Mueller and Kirkpatrick explain regarding FRE 803(6), "[i]f the source of information is an outsider to the business, the exception alone is not enough and the record can be admitted only if what the source said is itself within an exception." Mueller & Kirkpatrick, 4 *Federal Evidence* § 8:82 at 759. Therefore, "[w]here the records of one business integrate records from another, or include information gleaned from records of another, often the result is admissible if both sets of records satisfy the exception." *Id.* at 760. "In these cases, foundation testimony should show that not only the records of the first business (the source) but also the records of the second (the last entry) fit the exception." *Id.* at 760-61.

But, as Mueller and Kirkpatrick note,

"some courts make do with a single knowledgeable witness, and the decisions leave the impression that courts are satisfied by the fact that the second business sees fit to use the information or records of the first business as a kind of independent guarantor that the incorporated data or records are trustworthy, and not as real evidence that they satisfy the exception independently."

Id. at 761. Plaintiff and the dissent rely on decisions by those courts, but, as we explain below, those decisions do not involve the type of analysis that our case law requires us to perform. 369 Or. at 248-49; 249 n. 21, 503 P.3d at 1252-53, 1253 n. 21). Moreover, as we have explained, the text and context of OEC 803(6) show that the legislature did not intend for the admission of hearsay simply because a business relied on it.

[12] The dissent suggests that a "record" can be a file that contains hundreds of documents from various sources. 369 Or. at 254, 503 P.3d at 1255-56 (Garrett, J., dissenting). It bases that suggestion, in part, on the fact that OEC 803(6) can apply to a "data compilation." *Id.* (Garrett, J., dissenting). But that fact is not inconsistent with our understanding of what constitutes a record. For the purposes of OEC 803(6), a "record" is a statement that describes "acts, events, conditions, opinions, or diagnoses." Records may contain multiple facts or bits of data. They may be in the form of entries in a paper ledger or a computer database. The point is that they are statements that are being offered for the truth of the matters asserted, and, to be eligible for the business records exception, the proponent must prove that they were made in the manner required by OEC 803(6). When multiple statements are made pursuant to the same practice, like ledger or database entries, the proponent can lay a foundation for each entry simply by describing that practice.

So, in the case of a computer database, information may be entered into a computer at different times, by different persons, and may be later printed out in a report. Just as it does for shopkeepers who keep paper ledgers, the business records exception relieves businesses from having to call each person who made a database entry recording an event. But that relief is conditioned on testimony about the data entry and report-making practices of the business.

Consequently, when a party seeks to utilize the business records exception, it should first identify the statements it wants admitted to prove the truth of the matters asserted and should then establish that those statements were made in the manner required by OEC 803(6).

The dissent suggests that the records here are not being used to prove the truth of the matter asserted (that is, that they are not being used to prove the history of the loans between defendant and Citibank and Discover), but instead are being used to show that defendant is liable to plaintiff. 369 Or. at 255, 503 P.3d at 1256 (Garrett, J., dissenting) ("The `matter' being asserted does not have to be understood as the loan from Discover to defendant many years ago; it can also be understood as the creation of a liability owed to plaintiff many years later."). That view ignores the basic fact that because, as plaintiff itself asserts, it "stands in the shoes of" Discover, the only way that defendant can be liable to plaintiff is if defendant was liable to Discover and its predecessor, and proof of that liability depends on the truth of the matters asserted in the records at issue.

[13] New York codified its business records exception in 1928:

"[Civil Practice Act] § 374-a. *Admissibility of certain written records.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business[] to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility."

1928 N.Y. Laws, ch. 532, § 1.

[14] *See, e.g., State v. Cain,* 260 Or App 626, 630, 320 P.3d 600 (2014) (state called the payroll coordinator of the defendant's employer to lay a foundation for admission, under OEC 803(6), of information that the employer had provided to the Employment Department); *Douglas Creditors Ass'n v. Padelford,* 181 Or. 345, 348, 182 P.2d 390 (1947) (creditor association, in seeking to collect a debt it acquired from a doctor's office, called the doctor to lay a foundation for a document created in his office that showed an out-standing balance due).

[15] *See, e.g., U.S. v. Franco,* 874 F.2d 1136, 1140 (7th Cir 1989) (drug enforcement agent laid foundation for the records of a money exchange business, where the agent had familiarity with the business's record-making practices); *United States v. Hathaway,* 798 F.2d 902, 906 (6th Cir 1986) (concluding that "there is no reason why a proper foundation for application of [FRE] 803(6) cannot be laid, in part or in whole, by the testimony of a government agent or other person outside the organization whose records are sought to be admitted," and upholding admission of records seized from a firm where an FBI agent had laid the foundation for admission under FRE 803(6)).

[16] The only pre-1981 federal circuit case cited by the dissent, *United States v. Carranco,* 551 F.2d 1197 (10th Cir 1977), is consistent with our conclusion. It involved the admissibility of a freight bill. The bill was created by the shipper as a record of items shipped, and the carrier's truck driver used the bill when reviewing the shipment to confirm that the items on the bill were present and made notations on the bill. Thus, the bill became a record of what had been received, and it was a record based on personal knowledge of the person who reviewed the shipment and annotated the bill at that time. Accordingly, the proponent of admission of the bill presented evidence regarding the practices of the carrier. Specifically, the truck driver testified that such bills were regularly used by the carrier "as the means of determining whether or not a shipment they received from another carrier had too many items or too few" and that "notations were made if discrepancies appeared." *Id.* at 1200. The court held that that testimony was sufficient to establish the bill's admissibility, under FRE 803(6), as a hearsay record of the items the carrier had received. *Id.*

[17] The Federal Rules of Evidence were adopted in 1975, but the predecessor statute to the Federal Rules of Evidence included an analogous business records exception:

"[A]ny writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

28 USC § 1732(a) (repealed 1975).

[18] Even if this court applied the abuse-of-discretion standard to admissibility determinations under OEC 803(6), it would still reach the issue of whether the trial court had committed legal error in construing the scope of its discretion under that rule. *See Oakmont, LLC v. Dept. of Rev.,* 359 Or. 779, 789, 377 P.3d 523 (2016) (noting that, "[i]n reviewing a ruling for abuse of discretion, it can be important to distinguish the factual and legal issues that underlie * * * a trial court's exercise of discretion," and that, "when a trial court's exercise of discretion rests on an incorrect legal premise, an appellate court will review that legal premise independently" (citing *State v. Rogers,* 330 Or. 282, 312, 4 P.3d 1261 (2000)); *accord State v. Hightower,* 361 Or. 412, 421, 393 P.3d 224 (2017) (recognizing that "legal determinations that are predicates for the exercise of discretion are reviewed for errors of law").

Federal courts reviewing rulings for abuse of discretion have articulated a similar requirement. *See, e.g., Yokoyama v. Midland Nat. Life Ins. Co.,* 594 F.3d 1087, 1091 (9th Cir. 2010) ("[N]o federal court has ever held that a district court's error as to a matter of law is not an abuse of discretion ***."); *Bradley v. Sugarbaker,* 891 F.3d 29, 33 (1st Cir. 2018) ("We review the district court's interpretation of the Federal Rules of Evidence *de novo,* but its application of those Rules for abuse of discretion."). Despite that articulated standard, however, some federal courts have applied a less rigorous textual analysis and reached a different result when reviewing a trial court's admission of evidence under the analogous federal business records exception. *See, e.g., Air Land Forwarders, Inc.,* 172 F.3d at 1341 (recognizing that a trial court abuses its discretion if its decision is "based on an erroneous construction of the law," but upholding admission of evidence under FRE 803(6) without considering whether the proponent had satisfied the exception's enumerated requirements).

[19] *E.g., U.S. Bank Trust v. Jones,* 925 F.3d 534 (1st Cir. 2019); *Air Land Forwarders, Inc.,* 172 F.3d 1338; *MRT Construction v. Hardrives, Inc.,* 158 F.3d 478 (9th Cir. 1998); *U.S. v. Jakobetz,* 955 F.2d 786 (2d Cir. 1992); *United States v. Parker,* 749 F.2d 628 (11th Cir. 1984). Indeed, in *Air Land Forwarders, Inc.,* the dissent pointed out that the majority's theory of admissibility, which did not require a qualified witness who could be subjected to meaningful cross-examination as to the manner in which the records were made and kept, was "squarely at odds with the text of [FRE] 803(6)" and in conflict with the court's recent case law. 172 F.3d at 1346, 1348 (Bryson, J., dissenting) (citing *Kolmes v. World Fibers Corp.,* 107 F.3d 1534, 1542 (Fed Cir. 1997)).

[20] Where federal decisions, including those cited by plaintiff and the dissent, have not grounded their analyses in the text of the analogous federal rule, courts have ended up creating different tests. Some courts have held that a record created by one business qualifies for the business records exception if the record was integrated into the records of another business and relied on by that business in its daily operations. *E.g., Jakobetz,* 955 F.2d at 801 (permitting admission of third-party records under FRE 803(6) where "witnesses testify that the records are integrated into a company's records and relied upon in its day to day operations" (internal quotation marks omitted)). Others have required additional, general indicia of reliability. *E.g., Air Land Forwarders, Inc.,* 172 F.3d at 1343 (requiring reliance, incorporation of the record, and "other circumstances indicating the trustworthiness of the [record]"). And still others have enumerated more specific requirements, including that the acquiring business that has integrated and relied on the record also has a substantial interest in its accuracy. *E.g., MRT Construction,* 158 F.3d at 483 (permitting admission of third-party records received by a business "when those records are kept in the regular course of that business, relied upon by that business, and where that business has a substantial interest in the accuracy of the records"). Others seem to take a particularly flexible approach. *E.g., U.S. Bank Trust,* 925 F.3d at 537-38 (noting that the First Circuit has upheld admission of third-party records where the records have been "intimately integrated" into the records of the acquiring business *or* where the acquiring business has relied on the records, and noting that the "key question" is simply "whether the records in question are reliable enough to be admissible" (internal quotation marks omitted)). *See also Bank of New York Mellon v. Shone,* 2020 ME 122, ¶ 1, 239 A.3d 671, 674 (2020) (holding admissible "integrated" third-party records under Maine's business record exception, which is "identical" to the federal exception, when "the proponent of the evidence establishes that the receiving business has integrated the

record into its own records, has verified or otherwise established the accuracy of the contents of the record, and has relied on the record in the conduct of its operations").

[21] In addition to the federal circuit court cases, plaintiff cites state court cases. In response, we note that many states have construed their statutory business records exceptions the same way that we construe OEC 803(6). *See, e.g., CACH, LLC v. Askew,* 358 S.W.3d 58, 65 (Mo. 2012) (holding that records originally created by banks were inadmissible through the testimony of the plaintiff's records custodian, who lacked personal knowledge of the banks' record-keeping practices); *Commonwealth Financial Systems v. Smith,* 15 A.3d 492, 499-500 (Pa. Super Ct. 2011) (holding that the employee of a debt purchaser could not lay a foundation for account statements acquired from a third party where the employee lacked personal knowledge of the "preparation and maintenance" of the account statements, and noting that "the Pennsylvania Supreme Court has not seen fit to adopt the rule of incorporation"); *Palisades Collection LLC v. Kalal,* 324 Wis. 2d 180, 192-94, 781 N.W.2d 503, 509-10 (2010) (holding that a representative from an entity that was collecting a debt lacked personal knowledge of the record-keeping process of Chase Bank and was therefore not a "qualified witness" under Wisconsin's business records exception). Many cases plaintiff cites simply hold, consistent with our decision in this case, that a "qualified witness" need not have personally assembled the record, or need not be from the business that created the record, *provided that the witness establishes that the other foundational requirements of the exception are met. E.g., State v. Parker,* 231 Ariz. 391, 401-02, 296 P.3d 54, 64-65 (2013) (noting that a sponsoring witness with knowledge of how documents were made and kept was not required to have personally assembled the proffered record); *State v. Fitzwater,* 122 Hawai'i 354, 367-68, 227 P.3d 520, 533-34 (2010) (holding that third-party records "are admissible as business records of the incorporating entity provided that it relies on the records, there are other indicia of reliability, *and the requirements of [the Hawaii business records exception] are otherwise satisfied*" (emphasis added)); *Alloway v. RT Capital, Inc.,* 2008 WY 123, ¶¶ 15-17, 193 P.3d 713, 718 (2008) (similar); *Great Seneca Financial v. Felty,* 170 Ohio App. 3d 737, 742, 869 N.E.2d 30, 33-34 (2006) (permitting admission of third-party records where a witness from the proponent's business established that the "essential elements" of the Ohio business records exception were met).

Other state court cases that plaintiff cites do not persuasively analyze the wording of the state's business records exception, *e.g., Dodeka, L.L.C. v. Campos,* 377 S.W.3d 726, 732 (Tex. App. 2012), or involve business records exceptions that are worded very differently than OEC 803(6), *e.g., Beal Bank, SSB v. Eurich,* 444 Mass. 813, 815, 831 N.E.2d 909, 911 (2005) (applying the Massachusetts business records exception, which does not require testimony from a custodian or other qualified witness, or that the proffered record was made by, or from a person with knowledge).

[22] For a statement to qualify for the excited utterance exception, "(1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of the excitement caused by the event or condition; and (3) the statement must relate to the startling event or condition." *Cunningham,* 337 Or. at 535, 99 P.3d 271.

[23] As noted above, a record that has that five enumerated characteristics set forth in OEC 803(6) will qualify for the exception "unless the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness." The standard of review that would apply to that determination of trustworthiness is not at issue in this case.

[1] Judge Learned Hand explained the rationale of an early version of the business records exception:

"The routine of modern affairs, mercantile, financial[,] and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his creditor does a large enough business. That there should not be checks and assurances of veracity we do not suggest; it is indeed possible to expose adversaries to genuine danger, but to continue a system of rules, originally designed to relieve small shopkeepers from their incompetence as witnesses, into present day transactions is to cook the egg by burning down the house."

Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F.2d 934, 937 (2d Cir. 1927).

[2] The majority cites Mueller and Kirkpatrick's *Federal Evidence* in support of a stricter approach. 369 Or. at 234 n. 11, 503 P.3d at 1245 n. 11. However, Mueller and Kirkpatrick in fact explain that the federal courts have interpreted integrated records to fall within the exception when an organization relies on them in its normal course of business. Because many people are involved in transmitting data, often by entries in records rather than word of mouth, business records demonstrate reliability when "the [external] source and recorder act in regular course, and everyone in the chain of transmission does likewise." Christopher B. Mueller & Laird C. Kirkpatrick, 4 *Federal Evidence* § 8:82, 758 (4th ed. 2013). "[T]he message of Rule 803(6) is that the fact of layered hearsay does not matter." *Id.*

Mueller and Kirkpatrick go on to emphasize that, when presented with integrated records, federal courts generally do *not* require a witness from each organization to authenticate the records:

"Some courts make do with a single knowledgeable witness, and the decisions leave the impression that courts are satisfied by the fact that the second business sees fit to use the information or records of the first business as a kind of independent guarantor that the incorporated data or records are trustworthy, and not as real evidence that they satisfy the exception independently."

Id. at 761.

[3] That court's reasoning was based on similar legislative history to the Oregon Evidence Code: "[W]e are mindful that the reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. FRE 803 advisory committee's note to 1972 proposed rules. The rule seeks to capture these factors and to extend their impact by applying them to a regularly conducted activity. *Id.*" *U.S. Bank Trust,* 925 F.3d at 538 (internal quotation marks omitted).

[4] While not every state has addressed the question, of those that have, at least 24 have articulated a test similar to the federal one. While not all of those courts have a textually identical rule, over half of them do have rules that are substantively identical—that is, the rule includes a temporal personal knowledge requirement, a regularly conducted activity requirement, and a regular practice requirement. *E.g.,* Ohio Evid R 803(6); Ariz R Evid 803(6). The Court of Appeals' opinion further describes how those states have approached integrated records. *Arrowood Indemnity Co. v. Fasching,* 304 Or. App. 749, 760 n. 4, 469 P.3d 271 (2020).

[5] *Amicus curiae* Oregon Trial Lawyers Association outlines what it describes as "the realities of modern debt collection," focusing on the "predatory conduct and exploitation of consumers [that] persists throughout the unsecured debt-collection industry." It is certainly true that the country has seen predatory and abusive conduct in consumer and mortgage lending and in collection efforts related to that debt. Legislatures, including Oregon's, also have increased statutory protections against "debt buyers," *see* Or. Laws 2017, ch. 625, § 2 (amending ORS 646.639 to impose requirements before a "debt buyer" can bring an action against a debtor), and courts have adopted new rules to ensure fairness in service and later proceedings in consumer debt cases, *see* UTCR 5.180 (setting out prefiling notification and document requirements for consumer debt collection actions). But those well-documented abuses are not a basis for reading OEC 803(6) to impose an artificial categorical bar on records that originate from third parties. Rather, in a given case, it might be appropriate to consider industry or company practices as part of the inquiry into whether records that meet the threshold criteria for admissibility should *nonetheless* be excluded because "the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness." OEC 803(6). Again, nothing in this record permits such a conclusion. And defendant makes no claim that either the unpaid law school debt plaintiff seeks to collect or plaintiff's conduct in this litigation constitutes "predatory conduct" or "exploitation."

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508 P.3d 561 (2022)
318 Or. App. 672

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2, a Delaware Statutory Trust, Plaintiff-Appellant,
v.
Courtney N. GIMPLE, aka Courtney N. Butler, Defendant-Respondent.

A169887.

Court of Appeals of Oregon.

Argued and submitted December 1, 2020.
April 6, 2022.

Appeal from the Clackamas County Circuit Court, Douglas V. Van Dyk, Judge.

James Schultz, Florida, argued the cause for appellant. On the briefs were Ashley N. Wydro, Dayle M. Van Hoose, and Sessions, Fishman, Nathan & Israel LLC, and Julie A. Smith and Cosgrave Vergeer Kester LLP.

Nadia H. Dahab, Portland, argued the cause for respondent. Also on the brief were Innovation Law Lab and Christopher J. Mertens and Mertens Law LLC.

Before Mooney, Presiding Judge, and Egan, Judge, and Pagán, Judge.[*]

562 *562 EGAN, J.

Plaintiff, the National Collegiate Student Loan Trust 2006-2, appeals a general judgment in favor of defendant after the trial court granted defendant's cross-motion for summary judgment on plaintiff's claims for breach of contract and *quantum meruit.* Plaintiff assigns four errors. We affirm without discussion plaintiff's third assignment. We write only to address plaintiff's second assignment, in which plaintiff contends that the trial court erred in excluding two pieces of evidence that plaintiff asserts should have been admitted as business records under OEC 803(6). We conclude that the trial court did not err as to plaintiff's second assignment. Given that resolution, plaintiff's first and fourth assignments also fail. Accordingly, we affirm.

Generally, when reviewing the trial court's ruling on cross-motions for summary judgment, "we examine whether there are any disputed issues of material fact and whether either party was entitled to judgment as a matter of law." *Providence Health Plan v. Allen,* 299 Or. App. 128, 135, 449 P.3d 504 (2019), *rev. den.,* 366 Or. 257, 458 P.3d 1125 (2020). Here, that determination turns on the admissibility of certain hearsay statements. "We review the court's legal conclusions regarding the admissibility of a hearsay statement under an exception to the hearsay rule for legal error." *Morgan v. Valley Property and Casualty Ins. Co.,* 289 Or. App. 454, 455, 410 P.3d 327 (2017), *adh'd to on recons.,* 290 Or. App. 595, 415 P.3d 1165 (2018).

563 In 2006, defendant applied for and obtained a loan from JPMorgan Chase Bank, N.A. Bank One (Bank One). In November *563 2007, defendant filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court. Defendant's debt was discharged in March 2018. The parties contest whether the loan at issue here was discharged as a part of defendant's bankruptcy.

Approximately 10 years after defendant filed for bankruptcy—in February 2018— plaintiff filed a complaint against defendant in Clackamas County Circuit Court for breach of contract and *quantum meruit.* Plaintiff claimed that, pursuant to "an assignment agreement," it owned defendant's Bank One loan and that defendant had failed to make monthly payments under the terms of the loan agreement. Defendant responded to plaintiff's complaint with several affirmative defenses. As relevant here, defendant claimed that plaintiff had "failed to allege facts" sufficient "to show [that plaintiff was the] party in interest entitled to enforce the contract."

Subsequently, after the parties sought admissions and both parties responded to those admissions, plaintiff filed a motion for summary judgment arguing that there was no genuine issue as to any material facts, because defendant "admitted to borrowing, without timely repaying, the funds in question." However, in making that motion, plaintiff acknowledged that defendant had not "admitted * * * that Plaintiff is the correct party to whom she owes repayment of the loan." In support of its motion, plaintiff submitted an affidavit of Jacqueline Jefferis, who explained in her affidavit that she was an employee of Transworld Systems Inc., the Subservicer for plaintiff regarding the educational loan at issue. There were several exhibits attached to the affidavit. To establish that plaintiff was the party that owned defendant's loan, plaintiff attached Exhibit B—the "loan request/credit agreement"— and Exhibit C—the "deposit and sale agreement."[1]

Exhibit B stated that the original lender was Bank One and that defendant "promise[d] to pay to [the lender's] order, upon the terms and conditions of [the] credit agreement."

Exhibit C put forth the terms of the sale between Bank One and plaintiff. As a part of that exhibit, plaintiff attached a document titled "Pool Supplement." That supplement, which described the transaction between Bank One and plaintiff stated:

> "In consideration of the Minimum Purchase Price, [Bank One] hereby transfers, sells, sets over and assigns to The National Collegiate Funding, LLC * * * each student loan set forth on the attached [transferred Bank One loans]. * * * [The National Collegiate Funding, LLC] in turn will sell the Transferred Bank One loans to The National Collegiate Student Loan Trust 2006-4."

Defendant then filed a cross-motion for summary judgment pursuant to ORCP 47 B. Defendant maintained that plaintiff failed to allege facts sufficient to prove that it was the party in interest entitled to enforce the contract. In doing so, defendant asserted that the documents that might support that plaintiff is the party in interest, specifically Exhibit B and Exhibit C, were "inadmissible hearsay not qualifying as business records" because they were "without competent foundation." The court held a hearing on those motions.

Plaintiff, in response to defendant's evidentiary argument, asserted that Exhibit B and Exhibit C were business records, admissible as exceptions to the rule against hearsay under OEC 803(6). To establish those exhibits as business records, plaintiff attached a personal affidavit from an employee —Jacqueline Jefferis—of Transworld Systems Incorporated (TSI). In the affidavit, Jefferis stated that TSI is the subservicer for plaintiff's loan. As the subservicer, TSI was the "designated custodian of records for Defendant's education loan. Additionally, TSI maintains the dedicated system of record for electronic transactions pertaining to the Defendant's educational loan, including, but not necessarily limited to, payments, credits, interest accrual and any other transactions *564 that could impact the Defendant's educational loan." Jefferis's affidavit additionally stated:

> "5. I am familiar with the process by which TSI receives prior account records, including origination records from the time the loan was requested and/or disbursed to the Defendant and/or the student's school on their behalf.
>
> "6. As custodian of records[,] it is TSI's regularly-conducted business practice to incorporate prior loan records and/or documentation into TSI's business records.
>
> "7. I am further competent and authorized to testify regarding this educational loan through personal knowledge of the business records maintained by TSI as custodian of records, including electronic data provided to TSI related to the Defendant's educational loan, and the business records attached to this Affidavit.
>
> "8. This lawsuit concerns an unpaid loan owed by Defendant * * * to Plaintiff. Specifically, Defendant entered into an educational loan agreement at Defendant's special instance and request. A loan was extended for Defendant to use pursuant to the terms of the loan agreements. Defendant has failed, refused, and/or neglected to pay the balance pursuant to the agreed terms.
>
> "9. Educational loan records are created, compiled and recorded as part of regularly conducted business activity at or near the time of the event and from information transmitted from a person with personal knowledge of said event and a business duty to report it, or from information transmitted by a person with personal knowledge of the accounts or events described within the business record. Such records are

> created, kept, maintained, and relied upon in the course of ordinary and regularly conducted business activity.
>
> "10. I have reviewed the educational loan records * * *. No payment has been received on this account. * * *. Attached hereto and incorporated as Exhibit `B' is a true copy of the underlying Credit Agreement/Promissory Note and Note Disclosure Statement. In the event the Defendant(s) faxed the executed Credit Agreement/Promissory Note, per its terms they agreed their facsimile/electronic signature is deemed to be an original.
>
> "11. The Defendant opened an educational loan with [Bank One] * * *. The Defendant's educational loan was then transferred, sold and assigned to National Collegiate Funding LLC, who in turn transferred, sold and assigned the Defendant's educational loan to Plaintiff, * * * for valuable consideration, in the course of the securitization process. The Defendant's educational loan was in good standing and not in default * * *. Attached hereto and incorporated as Exhibit "C" is a true and correct copy of the Agreement(s) described herein. Said Exhibit contains a redacted copy of the Schedule of transferred loans referenced within the Pool Supplement."

After the court considered the parties' arguments about the affidavit and exhibits, the trial court admitted the affidavit of Jefferis, but rejected plaintiff's argument that Exhibit B and Exhibit C were admissible. The court reasoned that Jefferis was able to "attest to what she's able to attest to." In essence, the court reasoned that, because Jefferis worked for TSI "to perform the duties of subservices," she has knowledge of how TSI "maintains the dedicated system of record for [its] electronic transactions." Specifically, the court explained, she can attest to her "firsthand knowledge" of "[p]ayments, credits, [and] interest accruals." The court stated that what Jefferis did not have firsthand knowledge of was whether the "loan was extended for defendant to use pursuant to the terms of the loan agreements." Thus, her affidavit could not be used to "introduce the contract, because she has no firsthand knowledge of the contract." In sum, the court concluded that Jefferis could not "authenticate" the exhibits, because TSI was not a "party or signor" to the original contract, nor did TSI have firsthand knowledge of the contract.

With those exhibits excluded, the trial court concluded that plaintiff did not provide sufficient facts to support its claim that plaintiff owned the loan. Accordingly, the court granted defendant's cross-motion for summary judgment and denied plaintiff's motion *565 for summary judgment. This timely appeal followed.

On appeal, plaintiff argues that the trial court erred in concluding that Exhibit B and Exhibit C were not admissible as business records under OEC 803(6). Defendant responds that the court properly concluded that Exhibit B and Exhibit C were inadmissible hearsay, because Jefferis could not authenticate the records as required by OEC 803(6).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it qualifies under a hearsay exception or is excluded from the category of hearsay. *See* OEC 801(3) (defining hearsay); OEC 802 (stating that hearsay is not admissible except as provided in OEC 801 to 806); OEC 803 and OEC 804 (setting forth exceptions to the hearsay rule); OEC 801(4) (setting forth exclusions to category of hearsay). The party seeking the admission of hearsay bears the burden of proving that the statements satisfy the requirements of a hearsay exception. *Arrowood Indemnity Co. v. Fasching,* 369 Or. 214, 224, 503 P.3d 1233 (2022) (*Arrowood*).

As relevant in this case, the "business records exception" to the hearsay rule allows admission of:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness."

OEC 803(6). Such records are admissible, despite being hearsay, because of their "`unusual reliability,' that has been ascribed to the `duty of the record keeper to make an accurate record,' the `actual reliance of the business' on the records, and `the regular entries and systematic checking which produce habits of precision.'" *Arrowood,* 369 Or. at 224-25, 503 P.3d 1233 (quoting Legislative Commentary to OEC 803(6), *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 803.06[2], 820 (7th ed. 2020)).

Recently, the Supreme Court in *Arrowood* discussed the requirements that must be met for a business record to be admissible under OEC 803(6). In *Arrowood,* the plaintiff relied on an affidavit by one of its employees to create the necessary foundation to establish records of a loan made to the defendant as business records. That affidavit averred that

> "[a]ll documents attached hereto are either produced and maintained directly by Plaintiff or are documents from [Discover's] proof of claim which are adopted by the Plaintiff and relied upon in the ordinary course of Plaintiff['s] business. These records were made at or near the time of the occurrence or transaction, recorded by a person with knowledge, and as the Plaintiff's qualified custodian of records I affirm that the attachments are true and correct copies of documents maintained by and relied upon by Plaintiff in the ordinary course of its regular business functions."

369 Or. at 218, 503 P.3d 1233. The Supreme Court noted that the employee "did not aver that she had knowledge of the record-making or record-keeping practices" of any of the companies that provided the defendant with the loan. *Id.* Further, "nothing in the affidavit addresse[d] whether the documents were made and kept in the regular course of [the loaning companies'] business or whether it was the regular practice of either [of the loaning companies] to make and keep such documents." *Id.*

The Supreme Court, interpreting OEC 803(6) in compliance with the analytical framework of *PGE Co. v. Bureau of Labor and Industries,* 317 Or. 606, 610, 859 P.2d 1143 (1993), and *State v. Gaines,* 346 Or. 160, 171-73, 206 P.3d 1042 (2009), concluded that a party seeking admission of records as a business record under OEC 803(6) must meet the following requirements:

> "The record must (1) describe `acts, events, conditions, opinions, or diagnoses,' (2) have been `made at or near the time' of those *566 acts, events, conditions, opinions, or diagnoses, (3) have been made `by, or from information transmitted by, a person with knowledge,' (4) have been `kept in the course of a regularly conducted business activity,' and (5) have been made because it `was the regular practice of that business activity to make' such records."

566

Arrowood, 369 Or. at 223-24, 503 P.3d 1233 (quoting OEC 803(6)). To use the exception as stated in OEC 803(6), the party seeking admission must "prove that the record it is proffering has each of those characteristics, and the party must do so through `the testimony of the custodian or other qualified witness.'" *Id.* at 224, 503 P.3d 1233 (quoting OEC 803(6)). Additionally, "even if the party does that, the record will not qualify for the exception if `the source of information or the method [or] circumstances of preparation indicate lack of trustworthiness.'" *Id.* (quoting OEC 803(6)).

With the context of *Arrowood* in mind, we address the parties' arguments. Defendant argues that Jefferis's affidavit "does not * * * attest to any contemporaneous business duty to record and report to TSI by any actual party" to the transactions documented in the exhibits. Thus, defendant asserts that no "person with knowledge" had attested to whether Exhibit B and Exhibit C were "recorded and reported to TSI in the regular course of business." Plaintiff does not dispute that Jefferis lacks firsthand knowledge of Bank One's record making process. Rather, plaintiff's argument focuses on the role that Jefferis played as the custodian of records for TSI, the subservicer for plaintiff. As we under-stand the parties' arguments, the sole issue we must address is whether Jefferis was "a person with knowledge" to establish a foundation to admit Exhibit B and Exhibit C under OEC 803(6).

For a record to be admissible under OEC 803(6), a person with knowledge "regarding the record-making practices of the business that created the record" must supply testimony that "necessarily must include information about the practices of the business that initially made and kept the record." *Arrowood,* 369 Or. at 221, 241, 503 P.3d 1233. As the commentary to OEC 803(6) explains, the proponent of evidence is not required

> "`to produce, or even identify, the specific individual upon whose firsthand knowledge the record is based. A sufficient foundation is laid if the proponent shows that it was the regular practice of the activity to base such a record upon a transmission from a person with knowledge. Thus, in the case of contents of a shipment of goods, it is sufficient to produce a report from the company's computer programmer or a person having knowledge of the particular record system.'"

Id. (quoting Legislative Commentary to OEC 803(6), *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 803.06[2] at 822).

Here, as previously noted, plaintiff does not contest the trial court's conclusion that Jefferis had no personal knowledge of Bank One's record making process. Rather, plaintiff argues that Jefferis's role as the custodian of records for TSI is sufficient to establish that Exhibits B and C are admissible as business records under OEC 803(6).

Plaintiff's argument is foreclosed by the rule set forth by *Arrowood,* which requires that the testimony "include information about the practices of the business that initially made and kept the record." 369 Or. at 241, 503 P.3d 1233. Jefferis's affidavit provided evidence that Jefferis had personal knowledge of how "TSI receives prior account records, including origination records from the time the loan was requested and/or disbursed to the Defendant and/or the student's school on their behalf" and that Jefferis had "personal knowledge of the business records maintained by TSI as custodian of records, including electronic data provided to TSI related to the Defendant's educational loan, and the business records attached to this Affidavit." Nothing in those statements, or any other statements in the record, purport that Jefferis had knowledge of the record making process of Bank One. As *Arrowood* emphasizes, "[t]he requirement that the record be made by, or from information transmitted by, a person with knowledge, ensures that the record is based on first-hand observations." 369 Or. at 224, 503 P.3d 1233. Given the insufficient record to show *567 personal knowledge, plaintiff failed to demonstrate the requirements of the business record exception. Accordingly, the trial court did not err in excluding the evidence.

567

In plaintiff's first and fourth assignments of error, plaintiff argues, respectively, that the trial court erred in granting defendant's cross-motion for summary judgment on the basis that defendant's loan had been discharged in bankruptcy, 11 USC § 523(a)(8)(A), and in denying plaintiff's motion for summary judgment on the ground that plaintiff failed to establish ownership and entitlement to enforce defendant's loan. Both of those arguments rely on plaintiff establishing a right to enforce defendant's loan. *See Key West Retaining Systems, Inc. v. Holm II, Inc.,* 185 Or. App. 182, 188, 59 P.3d 1280 (2002), *rev. den.,* 335 Or. 402, 68 P.3d 231 (2003) (concluding that whether a contract exists is a question of law); *see also Enes v. Pomeroy,* 104 Or. 169, 176-77, 206 P. 860 (1922) (concluding that a party lacks standing to enforce a contract in which it has no established interest). Given our resolution of plaintiff's second assignment, the trial court did not err in determining that plaintiff had failed to prove a loan agreement between plaintiff and defendant, so we reject plaintiff's first and fourth assignments. The trial court properly granted summary judgment to defendant.

Affirmed.

[*] Egan, J., *vice* DeVore, S. J.; Pagán, J., *vice* DeHoog, J. pro tempore.

[1] For purposes of readability, and because it does not affect our analysis, we omit unnecessary capitalization.

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838 P.2d 45 (1992)
314 Or. 86

Charles O. PORTER, Petitioner on Review,
v.
Reginald Robert HILL, Respondent on Review.

CC 16-88-08912; CA A61074; SC S38572.

Supreme Court of Oregon, In Banc.

Argued and Submitted March 2, 1992.
Decided August 6, 1992.

46 *46 John F. Kilcullen, of Brown, Roseta, Long & McConville, Eugene, argued the cause for petitioner on review. With him on the petition was Richard A. Roseta.

Jeff Price, Portland, argued the cause and filed the response to the petition for respondent on review.

GRABER, Justice.

This civil case involves the Unlawful Debt Collection Practices Act (UDCPA), ORS 646.639, and the federal Truth In Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* Plaintiff, a lawyer, brought this action against his former client to collect fees for services rendered. Defendant counterclaimed, contending (among other things) that plaintiff had violated UDCPA and TILA. The trial court dismissed those counterclaims for failure to state a claim. ORCP 21 A(8). On appeal, the Court of Appeals reversed. *Porter v. Hill,* 108 Or.App. 418, 815 P.2d 1290 (1991). We reverse the decision of the Court of Appeals.

I. FACTS[1] AND PROCEDURAL BACKGROUND

47 Defendant engaged plaintiff to perform legal services. Plaintiff and defendant *47 entered into a written "Retainer and Fee Agreement," which provided in part:

> "Client will be responsible for filing fees, court costs, costs of special reports, investigation and/or depositions, and witness fees. Such costs are payable in advance, or upon billing by Attorney."

Plaintiff incurred costs of the kind described in the fee agreement. Plaintiff sent billing statements to defendant periodically, listing those costs (among other things). At the bottom of each billing statement, the following appeared:

> "A LATE PAYMENT CHARGE OF 1½% PER MONTH, BUT NOT LESS THAN $1.00, WILL BE ADDED TO THE BALANCE DUE ON REGULAR AND DEFERRED AMOUNTS MORE THAN 30 DAYS OVERDUE."

Plaintiff filed this action, claiming in the original complaint that defendant owed $26,623.25 for legal services, plus late payment charges. The $26,623.25 included hourly fees for representing defendant in a state criminal case and a federal civil rights action. Defendant answered and counterclaimed. Among other things, defendant asserted that plaintiff had agreed to represent him for free in the criminal case and on a contingent fee basis in the civil rights action. Separate counterclaims alleged that plaintiff had violated UDCPA and TILA, had engaged in unlawful trade practices, and had committed the tort of intentional infliction of severe emotional distress. After checking his records, plaintiff acknowledged that he had accepted the civil rights case on a contingent fee basis. Plaintiff amended the complaint to allege that defendant owed him $3,112.75 for legal services in the criminal case and for deposition costs. Defendant filed an amended answer, which contained the same counterclaims.

On plaintiff's motion, the trial court dismissed the UDCPA and TILA counterclaims with prejudice, and the case proceeded to trial. The jury found in favor of plaintiff on his claim and against defendant on his counterclaim for unlawful trade practices.[2] The trial court then entered judgment in favor of plaintiff. Defendant appealed, arguing that the trial court erred in dismissing his UDCPA and TILA counterclaims. As noted above, the Court of Appeals agreed with defendant.

II. UNIFORM DEBT COLLECTION PRACTICES ACT

With respect to UDCPA, defendant alleges in his counterclaim:

> "Plaintiff knows or should have known that the debt does not exist and that he has no actionable right with respect to the alleged debt."

Defendant argues that he states a claim under ORS 646.639, which provides in part:[3]

> "(1) As used in subsection (2) of this section:
>
> "(a) `Consumer' means a natural person who purchases or acquires property, services or credit for personal, family or household purposes.
>
> "(b) `Consumer transaction' means a transaction between a consumer and a person who sells, leases or provides property, services or credit to consumers.
>
> "(c) `Commercial creditor' means a person who in the ordinary course of business engages in consumer transactions.

"* * * * *

> "(g) `Debt collector' means any person who by any direct or indirect action, conduct or practice, enforces or attempts to enforce an obligation that is owed or due to any commercial creditor, or alleged to be owed or due to any commercial creditor, by a consumer as a result of a consumer transaction. "* * * * *
>
> "(2) It shall be an unlawful collection practice for a debt collector, while collecting or attempting to collect a debt to do any of the following: "* * * * * *48 "(k) Attempt to or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten to take any action which the debt collector in the regular course of business does not take."

Defendant is a "consumer," because he is a natural person who acquired services for personal, family, or household purposes. Plaintiff is a "commercial creditor," because he engages in transactions with "consumers," in which he provides services to them, in the ordinary course of business. In the present action, plaintiff is acting as a "debt collector," because he is attempting to enforce an obligation that is alleged to be owed to him as a "commercial creditor" by the "consumer" as the result of a "consumer transaction." The disputed question under UDCPA is whether ORS 646.639(2)(k) proscribed plaintiff's attempt to collect an allegedly nonexistent debt by filing a civil action.

Defendant argues that a debt that does not exist is a "right * * * [that] does not exist," within the meaning of ORS 646.639(2)(k). With respect to the word "remedy," defendant reasons that plaintiff, by filing the action, attempted to enforce a remedy (collecting a debt in a legal action) with knowledge or reason to know that that remedy does not exist in the absence of a debt.

Plaintiff counters that a debt is not a "right" within the meaning of ORS 646.639(2)(k). Plaintiff asserts that that paragraph does not address the existence or amount of a debt, but rather addresses only the method by which a debt is collected. Plaintiff further argues that filing a civil action is not the kind of "remedy" that ORS 646.639(2)(k) is meant to foreclose. We agree with plaintiff.

In interpreting ORS 646.639(2)(k), our task is to discern the intent of the legislature. ORS 174.020. We look first to the text and context of the statute to discern legislative intent. ORS 174.020; *State ex rel Juv. Dept. v. Ashley,* 312 Or. 169, 174-75, 818 P.2d 1270 (1991). The context includes other statutes relating to the same subject matter. *See* Davis v. Wasco IED, 286 Or. 261, 272, 593 P.2d 1152 (1979) (in determining the legislature's intent in enacting a statute, courts should read that statute in connection with others relating to the same subject matter); *Kankkonen v. Hendrickson,* 232 Or. 49, 67, 374 P.2d 393 (1962) (same). In this case, as will be demonstrated below, the text and context of ORS 646.639(2)(k) inform us as to the legislative intent and resolve any ambiguity.

Defendant reasons: A debt is a right to be repaid; ORS 646.639(2)(k) forbids a creditor from enforcing a right that does not exist; therefore, that paragraph must cover attempted enforcement of a nonexistent debt. The major flaw in that reasoning is

that the legislature has defined the word "debt" differently than defendant has. ORS 646.639(1)(e) defines "debt" to "mean[] any obligation *or alleged obligation* arising out of a consumer transaction." (Emphasis added.)

That definition is important in three respects. First, it does not use the word "right." Second, it expressly recognizes that a debt might or might not be owed. Third, ORS 646.639(2)(k) does not employ the defined word "debt" at all in explaining what practices it forbids.

ORS 646.639(2) provides that "[i]t shall be an unlawful collection practice for a debt collector, *while collecting or attempting to collect a debt,"* to do any of the practices listed in paragraphs (a) through (*o*). The specific practice described in paragraph (k) is "[a]ttempt[ing] to or threaten[ing] to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten[ing] to take any action which the debt collector in the regular course of business does not take." ORS 646.639(2)(k) makes sense grammatically only if an underlying debt, expressly defined to include an alleged debt, is assumed to exist.

The substance of the statute as a whole points in the same direction as does its grammar. The statute proceeds from the assumption that a debt does (or might) *49 exist and prohibits the debt collector from using unfair practices to collect it. Nothing in the statute evidences a legislative concern with the existence or amount of the underlying debt, as distinct from the use of abusive methods to pressure debtors to pay their debts. *All* paragraphs other than (k) of ORS 646.639(2) refer to specific *methods* of enforcing a debt; all portray coercive or abusive tactics. Examples include threatening or using physical force, ORS 646.639(2)(a), using profane or abusive language in communicating with the debtor, ORS 646.639(2)(d), and communicating with the debtor's employer about the debt, ORS 646.639(2)(f). ORS 646.639(2)(k) fits sensibly into that list only if it, too, is read to prohibit certain methods of collecting a debt, such as enforcing a right collateral to the debt in order to pressure the debtor to pay the debt.

The Court of Appeals has decided two cases that provide examples of when ORS 646.639(2)(k) applies. In *Isom v. P.G.E.,* 67 Or.App. 97, 106, 677 P.2d 59 (1983), the court held that the debtors stated a claim under ORS 646.639(2)(k), because the debt collector, a utility, had terminated the debtors' electrical service when it had reason to believe that the right to terminate was not available. In *Rowe v. Bank of the Cascades,* 68 Or.App. 490, 494-95, 683 P.2d 93 (1983), the court held that the debtors stated a claim under ORS 646.639(2)(k) where the debt collector, a bank, had frozen the debtors' checking account for the purpose of attempting to collect the debtors' debt to a different bank.

Had the legislature wanted ORS 646.639(2)(k) to include the practice of trying to collect a nonexistent debt, it would have referred to the debt. The legislature did include two paragraphs that concern the amount of the underlying debt. ORS 646.639(2)(m) and (n) provide:

> "It shall be an unlawful debt collection practice for a debt collector * * * to * * *:

"* * * * *

> "(m) Represent that an existing debt may be increased by the addition of attorney fees, investigation fees or any other fees or charges when such fees or charges may not legally be added to the existing debt.
>
> "(n) Collect or attempt to collect any interest or any other charges or fees in excess of the actual debt unless they are expressly authorized by the agreement creating the debt or expressly allowed by law."

Those paragraphs refer to methods of collecting a debt: adding unauthorized charges to the underlying debt in order to pressure the debtor to pay the underlying debt. But they also concern the amount of the debt itself. Paragraphs (m) and (n) demonstrate that, when the legislature intended to refer to the amount of a debt, it did so plainly by using the word "debt." We conclude that the term "right" in ORS 646.639(2)(k) does not mean "debt."

We next consider defendant's argument that an attempt to enforce a nonexistent debt by filing an action is an attempt knowingly to enforce a "remedy [that] does not exist," within the meaning of ORS 646.639(2)(k). It is apparent from examining other paragraphs of subsection (2) that filing civil actions is not ordinarily the sort of conduct that ORS 646.639(2)(k) proscribes.[4]

Most telling are the paragraphs that concern sidestepping the legal process or using the appearance of legal authority when no such legal authority exists. ORS 646.639(2) provides that it is an unlawful debt collection practice to:

"(b) Threaten arrest or criminal prosecution.

50 "(c) Threaten the seizure, attachment or sale of a debtor's property *when such action can only be taken pursuant to* *50 *court order without disclosing that prior court proceedings are required.* "* * * * *

"(L) Use any form of communication which *simulates legal or judicial process or which gives the appearance of being authorized, issued or approved by a governmental agency, governmental official or an attorney at law when it is not in fact so approved or authorized."* (Emphasis added.)

Those paragraphs prohibit pressuring a debtor into paying on *threat* of legal action, or misleading the debtor into believing that legal authority exists. In contrast, no paragraph suggests that *actually* filing a legal action is prohibited. That is because filing a legal action resolves issues surrounding the debt in a proper manner, not duplicitously or coercively.

Defendant's reading of the statute also would make it redundant of portions of the Unlawful Trade Practices Act, ORS 646.605 *et seq.* ORS 646.608 provides in part:

"(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: "* * * * *

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

"(s) Makes false or misleading representations of fact concerning the offering price of * * * services. "* * * * *

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

Those provisions cover the situation in which a lawyer files an action to collect fees when the lawyer knows or has reason to know that no fees in fact are owed.[5] Reading ORS 646.639 and ORS 646.608 together demonstrates that the legislative objective of ORS 646.639(2)(k) is narrower than the one for which defendant argues here.

We hold that filing a civil action to collect an alleged debt is not an act attempting to enforce a "right" or "remedy" proscribed by ORS 646.639(2)(k) merely because all or part of the alleged debt does not exist. The trial court did not err when it dismissed defendant's UDCPA counterclaim.

III. TRUTH IN LENDING ACT

Defendant's second counterclaim is under TILA. He alleges:

"45.

"Plaintiff's original Complaint and the proposed First Amended Complaint alleged that he has extended credit to Defendant with a finance charge. The alleged credit is for attorney services primarily provided for Defendant's personal, family or household use.

"46.

"Plaintiff extended such open-ended credit 25 times or more in the year preceding his transaction with Defendant on billings providing for `a late payment [*sic*] of 1½% per month, but not less than $1.00, will be added to the balance due on regular and deferred amounts more than 30 days overdue.'" Defendant also alleges that TILA governs plaintiff and that plaintiff did not make certain required disclosures.

The purpose of TILA, 15 U.S.C. § 1601 *et seq.,* is to ensure that creditors make meaningful disclosure of credit terms to debtors. 15 U.S.C. § 1601. Congress gave the Federal Reserve Board (FRB) authority to construe TILA's provisions and to promulgate regulations to carry out the legislative purpose. 15 U.S.C. § 1632(a). FRB regulations are not binding on courts,

but they are entitled to substantial deference, because the agency has broad interpretive powers. *See Bright v. Ball Memorial* *51 *Hospital Ass'n, Inc.*, 616 F.2d 328, 333 n. 1 (7th Cir.1980) (so stating).

Under the FRB regulations, TILA is applicable to a person

> "who regularly extends consumer credit that is *subject to a finance charge* or is payable by written agreement in more than 4 installments * * * and (B) to whom the obligation is initially payable * * *." 12 CFR 226.2(a)(17)(i)(A) (emphasis added; footnote omitted).
>
> "(12) *Consumer* credit means credit offered or extended to a consumer primarily for personal, family, or household purposes. "* * * * *

"(14) *Credit* means the right to defer payment of debt or to incur debt and defer its payment." *Id.* at 226.2(a) (emphasis in original).

Persons "regularly extend consumer credit" only when they have extended credit more than 25 times in either the preceding or the current calendar year. 12 CFR § 226.2(a)(17)(i) n 3.

12 CFR § 226.4 excludes "late payment charges" from the definition of finance charge:

> "Finance Charge
>
> "(a) Definition. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit * * *. "* * * * *
>
> "(c) Charges excluded from the finance charge. The following charges are not finance charges: "* * * * *
>
> "(2) Charges for actual unanticipated late payment, * * * or for delinquency, default, or a similar occurrence."

Plaintiff contends that he is not governed by TILA, because he did not "regularly extend consumer credit subject to a finance charge," but instead provided for a late payment charge on his billings. The official FRB staff commentary to 12 CFR 226.4 (12 CFR 226.4, Supp. I) sets forth standards to determine whether a charge is a late payment charge, rather than a finance charge:

> "1. Late payment charges. * * * In determining whether a charge is for actual unanticipated late payment, * * * factors to be considered include:
>
> "The terms of the account. For example, is the consumer required by the account terms to pay the account balance in full each month? If not, the charge may be a finance charge.
>
> "The practices of the creditor in handling the accounts. For example, regardless of the terms of the account, does the creditor allow consumers to pay the accounts over a period of time without demanding payment in full or taking other action to collect? If no effort is made to collect the full amount due, the charge may be a finance charge."

To summarize, the commentary lists two factors to determine whether a charge is a "late payment charge" to which the TILA disclosure requirements do *not* apply: whether the terms of the account require the consumer to pay the balance in full each month and whether, regardless of the terms, the creditor in fact acquiesces in the extension of credit by allowing the consumer to pay the account over time without demanding payment in full or taking other action to collect. Here, both factors show that the charge was a late payment charge.

Plaintiff's billing statements, which were incorporated by reference in the pleadings, and his original complaint refer to a "late payment charge," not to a finance charge. Although defendant's counterclaim alleges that plaintiff added a "finance charge" and although we assume the truth of all well-pleaded allegations, the characterization of the amount as a "finance charge" is a legal conclusion, not a fact.

The parties' written agreement required defendant to pay the balance in full "in advance, or upon billing by Attorney." Defendant does not allege that the parties amended that agreement. Defendant does not allege that plaintiff in fact ever

52 gave *52 him the option of paying over time subject to the 1½ percent charge;[6] indeed, instead of doing that, plaintiff demanded full payment each month and, when he was dissatisfied, brought this action to collect the full amount due. The debtor's mere failure to pay the account in full when due does not convert the charge into a finance charge. *See* *Bright v. Ball Memorial Hospital Ass'n, Inc., supra,* 616 F.2d at 334-37 (where agreement provided for late payment charge on unpaid balance, failure of customer to pay bill when due was "unanticipated," and late payment charge was not a finance charge); *Rogers Mortuary, Inc. v. White,* 92 N.M. 691, 594 P.2d 351, 353 (1979) (debtor's failure to pay in full, and debtor's attempt to interpret a funeral purchase agreement as allowing an extension of credit, did not make the late payment charge provided for in the agreement a finance charge).

The trial court did not err in dismissing defendant's TILA counterclaim.

IV. DISPOSITION

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

APPENDIX

ORS 646.639 provides:

> "(1) As used in subsection (2) of this section:
>
> "(a) `Consumer' means a natural person who purchases or acquires property, services or credit for personal, family or household purposes.
>
> "(b) `Consumer transaction' means a transaction between a consumer and a person who sells, leases or provides property, services or credit to consumers.
>
> "(c) `Commercial creditor' means a person who in the ordinary course of business engages in consumer transactions.
>
> "(d) `Credit' means the right granted by a creditor to a consumer to defer payment of a debt, to incur a debt and defer its payment, or to purchase or acquire property or services and defer payment therefor.
>
> "(e) `Debt' means any obligation or alleged obligation arising out of a consumer transaction.
>
> "(f) `Debtor' means a consumer who owes or allegedly owes an obligation arising out of a consumer transaction.
>
> "(g) `Debt collector' means any person who by any direct or indirect action, conduct or practice, enforces or attempts to enforce an obligation that is owed or due to any commercial creditor, or alleged to be owed or due to any commercial creditor, by a consumer as a result of a consumer transaction.
>
> "(h) `Person' means an individual, corporation, trust, partnership, incorporated or unincorporated association or any other legal entity.
>
> "(2) It shall be an unlawful collection practice for a debt collector, while collecting or attempting to collect a debt to do any of the following:
>
> "(a) Use or threaten the use of force or violence to cause physical harm to a debtor or to the debtor's family or property.
>
> "(b) Threaten arrest or criminal prosecution.
>
> "(c) Threaten the seizure, attachment or sale of a debtor's property when such action can only be taken pursuant to court order without disclosing that prior court proceedings are required.
>
> "(d) Use profane, obscene or abusive language in communicating with a debtor or the debtor's family.

"(e) Communicate with the debtor or any member of the debtor's family repeatedly or continuously or at times known to be inconvenient to that person with intent to harass or annoy the debtor or any member of the debtor's family.

"(f) Communicate or threaten to communicate with a debtor's employer concerning the nature or existence of the debt.

53 *53 **APPENDIX—Continued**

"(g) Communicate without the debtor's permission or threaten to communicate with the debtor at the debtor's place of employment if the place is other than the debtor's residence, except that the debt collector may:

"(A) Write to the debtor at the debtor's place of employment if no home address is reasonably available and if the envelope does not reveal that the communication is from a debt collector other than a provider of the goods, services or credit from which the debt arose.

"(B) Telephone a debtor's place of employment without informing any other person of the nature of the call or identifying the caller as a debt collector but only if the debt collector in good faith has made an unsuccessful attempt to telephone the debtor at the debtor's residence during the day or during the evening between the hours of 6:00 p.m. and 9:00 p.m. The debt collector may not contact the debtor at the debtor's place of employment more frequently than once each business week and may not telephone the debtor at the debtor's place of employment if the debtor notifies the debt collector not to telephone at the debtor's place of employment or if the debt collector knows or has reason to know that the debtor's employer prohibits the debtor from receiving such communications. For the purposes of this subparagraph, any language in any instrument creating the debt which purports to authorize telephone calls at the debtor's place of employment shall not be considered as giving permission to the debt collector to call the debtor at the debtor's place of employment.

"(h) Communicate with the debtor in writing without clearly identifying the name of the debt collector, the name of the person, if any, for whom the debt collector is attempting to collect the debt and the debt collector's business address, on all initial communications. In subsequent communications involving multiple accounts, the debt collector may eliminate the name of the person, if any, for whom the debt collector is attempting to collect the debt, and the term `various' may be substituted in its place.

"(i) Communicate with the debtor orally without disclosing to the debtor within 30 seconds the name of the individual making the contact and the true purpose thereof.

"(j) Cause any expense to the debtor in the form of long distance telephone calls, telegram fees or other charges incurred by a medium of communication, by concealing the true purpose of the debt collector's communication.

"(k) Attempt to or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten to take any action which the debt collector in the regular course of business does not take.

"(L) Use any form of communication which simulates legal or judicial process or which gives the appearance of being authorized, issued or approved by a governmental agency, governmental official or an attorney at law when it is not in fact so approved or authorized.

"(m) Represent that an existing debt may be increased by the addition of attorney fees, investigation fees or any other fees or charges when such fees or charges may not legally be added to the existing debt.

"(n) Collect or attempt to collect any interest or any other charges or fees in excess of the actual debt unless they are expressly authorized by the agreement creating the debt or expressly allowed by law.

"(*o*) Threaten to assign or sell the debtor's account with an attending misrepresentation or implication that the debtor would lose any defense to the debt or would be subjected to harsh, vindictive or abusive collection

tactics.

"(3) It shall be an unlawful collection practice for a debt collector, by use of any direct or indirect action, conduct or practice, to enforce or attempt to enforce an obligation made void and unenforceable *54 APPENDIX—Continued

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by the provisions of ORS 759.720(2) to (4)."

[1] Because we are reviewing the dismissal of claims for failure to state a claim, we assume the truth of all well-pleaded allegations. *Madani v. Kendall Ford, Inc.*, 312 Or. 198, 201, 818 P.2d 930 (1991).

[2] Defendant's counterclaim for intentional infliction of severe emotional distress was dismissed by the court before trial, and that ruling was not challenged on appeal.

[3] The full text of ORS 646.639 is set out in the appendix to this opinion.

[4] This is *not* a case in which, for example, the parties' agreement required them to submit to arbitration instead of filing a civil action, when it might be argued that the debt collector is attempting "to enforce a * * * remedy [of filing a civil action] with knowledge or reason to know that the * * * remedy does not exist." ORS 646.639(2)(k). In that situation, the form of the remedy, rather than the substance of what is to be remedied (the merits of the claim for the underlying debt), arguably is known not to exist.

[5] Those provisions formed the basis for defendant's counterclaim in this case for unlawful trade practices, as to which the jury found against him.

[6] Defendant's counterclaim relies on what plaintiff's billings said, not on what plaintiff did with respect to defendant's failure to pay those bills when due.

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462 P.3d 263 (2020)
366 Or. 355

PORTFOLIO RECOVERY ASSOCIATES, LLC, Respondent on Review,
v.
Jason SANDERS, Petitioner on Review.
Portfolio Recovery Associates, LLC, Petitioner on Review,
v.
Jason Sanders, Respondent on Review.

SC S066455 (Control) S066456.

Supreme Court of Oregon, En Banc.

Argued and submitted September 19, 2019.
April 23, 2020.

On review from the Court of Appeals.[*]

265 *265 Tomio Buck Narita, Simmonds & Narita LLP, San Francisco, California, argued the cause for the petitioner on review Portfolio Recovery Associates, LLC. Jeffrey A. Topor filed the briefs for petitioner on review Portfolio Recovery Associates and the brief for respondent on review Portfolio Recovery Associates. Also on the briefs was Julie A Smith, Cosgrave Vergeer Kester, LLP, Portland.

Bret A. Knewtson, Law Office of Bret A. Knewtson, Hillsboro, argued the cause and filed the brief for respondent on review Jason Sanders, and filed the briefs for petitioner on review Jason Sanders.

Nadia H. Dahab, Stoll Stoll Berne Lokting Shlachter PC, Portland, filed the brief on behalf of amicus curiae Oregon Trial Lawyers Association.

264 *264 FLYNN, J.

This case arises out of Portfolio Recovery's action to recover a credit card debt from Sanders under a common-law claim for an "account stated," which we have described as "`an agreement between persons who have had previous transactions of a monetary character fixing the amount due in respect to such transactions and promising payment[.]'" *Sunshine Dairy v. Jolly Joan*, 234 Or. 84, 85, 380 P.2d 637 (1963) (quoting *Steinmetz v. Grennon*, 106 Or. 625, 634, 212 P. 532 (1923)). The parties filed competing motions for summary judgment in the trial court—Portfolio contending that it was entitled to summary judgment on the merits of its account-stated claim and Sanders contending that he was entitled to summary judgment on his affirmative defense that the claim is governed by, and barred by, the statute of limitations of Virginia, a state with connections to the underlying credit card agreement. The Court of Appeals held that neither party was entitled to summary judgment, and both parties sought review.

The case presents two distinct issues: first, whether an account-stated claim is established as a matter of law when a credit card customer fails to object to the amount listed as the "new balance" on a credit card statement and, second, how Oregon's choice-of-law principles resolve a conflict between competing state statutes of limitations when the relevant substantive law of the two states is the same. We agree with the Court of Appeals that neither party is entitled to prevail on summary judgment.

I. BACKGROUND

In reviewing the parties' competing motions for summary judgment, we view the evidence for each motion "and all reasonable inferences that may be drawn from the evidence in the light most favorable" to the party opposing the motion to determine whether the moving party has demonstrated that "it is entitled to judgment as a matter of law." *TriMet v. Amalgamated Transit Union Local 757*, 362 Or. 484, 491, 412 P.3d 162 (2018). We describe the pertinent facts in light of that standard.

Portfolio brought the present action after acquiring the right to collect Sanders' credit card debt from Capital One Bank (USA), N.A., with which Sanders had entered into a credit card agreement. Pursuant to the terms of that agreement, Capital One sent Sanders monthly statements showing his balance, which included fees and interest charged on previous balances. In late 2009, Capital One suspended Sanders' use of the account because he had missed several monthly payments, but it continued to send monthly statements reflecting a balance that rose each month due to the addition of interest and fees.

In March 2010, the statement that Capital One sent to Sanders advised that his account was "now 7 payments past due"; that his "new balance," including accrued interest and late fees, was $1,494.85; and that he would be contacted soon "to discuss options for resolving [his] debt." The statement also advised that the amount listed as "due" was not necessarily the "payoff amount" for various reasons, including that charges might be added or that "the amount you owe may differ if you've entered into a separate payment arrangement." Sanders did not object to Capital One's statement of the balance due on the account, but he also made no payments toward that balance.

266 *266 After March 2010, Capital One continued to send Sanders statements, although no longer on a monthly basis. The record includes a statement from August 2011 listing a "new balance" of $1,918.60, which included interest charges for the year to date of just over $222. Eventually, Capital One assigned its rights in the debt to Portfolio in 2013. At that time, Capital One calculated the balance of Sanders' account as $2,039.21.

Although the credit card statements in the record were addressed to Sanders at locations in Washington and Utah, he lived in Oregon in 2014—when Portfolio filed the present action in Multnomah County Circuit Court. Portfolio's complaint asserted that it was the assignee of Capital One's claim against Sanders for "account stated."[1] It alleged that Sanders became obligated to pay $1,494.85 (the amount set out as the "new balance" in the March 2010 credit card statement) because, "[b]y failing to object or otherwise dispute" the credit card statement, Sanders "impliedly agreed to pay the stated balance[.]" When Portfolio moved for summary judgment, it argued that the "new balance" set out in the March 2010 credit card statement was a "final accounting" of Sanders' debt and that Sanders' admitted failure to object before the lawsuit was filed established —as a matter of law—that Sanders impliedly promised to pay that amount. On those facts, Portfolio contended, Sanders became liable under the common-law doctrine of "account stated."

Sanders responded with a pleading that combined his opposition to Portfolio's motion and his own cross-motion for summary judgment. In opposing Portfolio's motion, Sanders argued that the record permitted a reasonable inference that neither he nor Capital One intended to agree that the amount stated as "due" in the March 2010 statement was a final accounting of his debt to Capital One. Sanders also argued that Portfolio's account-stated claim was contrary to the terms of the express credit card contract,[2] including because the balance Portfolio sought to recover as an "account stated" was calculated by including fees that the express contract did not permit Capital One to charge.

In support of his own motion for summary judgment, Sanders argued that Portfolio's claim should be governed by Virginia law and that the claim was untimely under Virginia's three-year statute of limitations for contract claims. Va Code Ann § 8.01-246(4). Sanders pointed to evidence that Capital One is chartered under Virginia law and that its cardholder agreement provides, "[t]his Agreement will be interpreted using Virginia law," which Sanders contended gave Virginia the only relevant connection to the claim. Portfolio did not dispute that the account-stated claim would be barred under Virginia's statute of limitations. But it contended that Oregon law governs the claim and that the claim was timely filed under Oregon's six-year statute of limitations for claims sounding in contract, ORS 12.080.

The trial court ruled for Portfolio on both motions, and Sanders appealed. Although the Court of Appeals ultimately agreed with Sanders' argument that genuine issues of material fact preclude Portfolio from prevailing as a matter of law on the account-stated claim, the court first disagreed with Sanders' argument that Virginia law supplies the applicable statute of limitations. *Portfolio Recovery Associates v. Sanders,* 292 Or. App. 463, 468, 425 P.3d 455 (2018). With respect to the limitations issue, the court addressed the conflict by turning first to ORS 15.360, which generally "govern[s] the choice of law applicable to any contract, or part of a contract," if the parties have not made "an effective *267 choice of law."[3] *Id.* at 470, 425 P.3d 455; *see* ORS 15.305; ORS 15.360. That statute requires the court to begin by identifying "the states that have a relevant connection with the transaction or the parties" and then to evaluate "the relative strength and pertinence" of the "policies underlying any apparently conflicting laws" of the states having "a relevant connection." ORS 15.360.

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The Court of Appeals answered that inquiry by concluding that the summary judgment record did not reveal that either Virginia or Oregon had "a relevant connection with the transaction or the parties" because neither state had a connection

that was "of the type that evidences a *state* interest in having its law applied to Portfolio's claim." 292 Or. App. at 471, 425 P.3d 455 (emphasis in original). The court then defaulted to applying Oregon's statute of limitations because, it reasoned, "[w]here neither state has a connection to the transaction such that it has an interest in having its law applied, we will apply the law of Oregon as the forum state." *Id.* (citing *Erwin v. Thomas,* 264 Or. 454, 459-60, 506 P.2d 494 (1973), for the proposition that "[n]either state has a vital interest in the outcome of this litigation and there can be no conceivable material conflict of policies or interests if an Oregon court does what comes naturally and applies Oregon law"). Thus, the court affirmed the denial of Sanders' motion for summary judgment but reversed the grant of summary judgment to Portfolio. Both parties sought review, each contending that the Court of Appeals erred in ruling that the party is not entitled to summary judgment.

II. ANALYSIS

We allowed both petitions and have consolidated the cases. According to Sanders, the Court of Appeals erred by failing to recognize that Virginia—and only Virginia—has a "relevant connection" for purposes of the choice-of-law inquiry and, thus, supplies the governing statute of limitations.[4] According to Portfolio, the Court of Appeals erred by failing to recognize that the March 2010 statement was a "final accounting" of Sanders' debt, to which he impliedly agreed as a matter of law. As indicated above, we do not agree with either party, and we affirm the decision of the Court of Appeals, although we disagree with its construction of ORS 15.360. We begin by addressing Sanders' argument that he was entitled to summary judgment on his affirmative defense that Portfolio's claim is barred by Virginia's statute of limitations.

A. *Sanders' Motion for Summary Judgment on the Statute-of-Limitations Defense*

The parties' dispute over the applicable statute of limitations turns on a narrow legal question. There is no dispute that the only difference between applying Virginia law or Oregon law to resolve the case is that the claim would be time-barred under Virginia's law but would not be time-barred under Oregon law. There also is no dispute that Oregon law supplies the analytical framework for choosing between the conflicting statutes of limitations. The question on which the parties disagree is what that framework directs us to do with a conflict of the type presented in this case.

As described above, the Court of Appeals began its analysis with ORS 15.360, concluded that neither Virginia nor Oregon had "a relevant connection with the transaction or the parties," within the meaning of that statute, and then turned to our decision in *Erwin* to conclude that Oregon's statute of limitations applies to the claim. 292 Or. App. at 470-72, 425 P.3d 455. In their briefing of the issue to this court, however, both parties begin their analysis with a different statute, ORS 12.430, which directs Oregon courts to *268 choose between competing statutes of limitations by determining the state or states on whose law the claim is "substantively based."

1. *ORS 12.430*

As an initial matter, we agree with the parties that ORS 12.430 is the correct starting point when the parties' dispute requires the court to choose between conflicting statutes of limitations. ORS 12.430 provides:

> "(1) * * * if a claim is substantively based:
>
> "(a) Upon the law of one other state, the limitation period of that state applies; or
>
> "(b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies.
>
> "(2) The limitation period of this state applies to all other claims."[5]

We begin with two preliminary observations about the text: First, the statute distinguishes between the law on which a claim is "substantively based" and the law that specifies a "limitation period" for the claim and, second, the statute sets up essentially a default in favor of Oregon's statute of limitations, unless the claim is substantively based on the law of another state. ORS 12.430(2).

Sanders contends that Portfolio's account-stated claim is "substantively based" only on the law of Virginia and thus is governed by Virginia's limitation period, under ORS 12.430(1)(a). Portfolio contends that its claim is not "substantively based" on the law of any other state and thus is governed by Oregon's limitation period, under ORS 12.430(2). As with all issues of statutory construction, we seek to discern what the legislature intended by applying the methodology described in *State v. Gaines,* 346 Or. 160, 171-72, 206 P.3d 1042 (2009). Under that statutory construction methodology, we give primary consideration to the text and context of the pertinent statutes and consider the legislative history "`for what it's worth.'" *Id.* at 171, 206 P.3d 1042.

Here, the text of ORS 12.430 does not specify how a court is to determine whether a claim is "substantively based" on the law of a state other than Oregon, but the legislative history points to the answer. The text is taken verbatim from section 2 of the Uniform Conflict of Laws—Limitations Act (UCLLA), which the legislature adopted in 1987, at the request of the Oregon State Bar. Or. Laws 1987, ch. 536; Minutes, House Judiciary Committee, June 8, 1987 (testimony of Diana Godwin, Oregon State Bar).

As the Commentary to the UCLLA explains, the section that became ORS 12.430 "provides that the enacting state, as forum, will apply its own conflicts law, whatever it may be, to select the substantive law that governs the litigated claim."[6] Exhibit F, Senate Judiciary Committee, SB 297, Apr. 1, 1987 (commentary to the UCLLA accompanying report by Joe Willis). That commentary was before the House and Senate Judiciary Committees as an exhibit when they recommended passage of the UCLLA bill without amendment or opposition. Minutes, House Judiciary Committee, June 8, 1987, June 10, 1987. We are, thus, persuaded that the intention of the 1987 Oregon legislature was consistent with the intention of the drafters of the uniform law—that courts would use Oregon's conflicts law "to select the substantive law that governs the litigated claim." *See, e.g., Elk Creek Management Co. v. Gilbert,* 353 Or. 565, 579-80, 303 P.3d 929 (2013) (concluding that Oregon legislature's intention *269 when adopting "nearly verbatim" a section of the Uniform Residential Landlord and Tenant Act "was consistent with the intent of the drafters of the" uniform law, as reflected in the commentary).

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2. *Whether the claim is substantively based on the law of another state*

Although the parties agree with our conclusion that we should apply Oregon conflicts law to determine whether Portfolio's account-stated claim is "substantively based" on the law of Virginia or Oregon, they disagree on where that law leads us. According to Sanders, the Court of Appeals correctly determined that ORS 15.360 supplies the applicable framework for determining whether the account-stated claim is substantively based on the law of Virginia. Under ORS 15.360, "the rights and duties of the parties with regard to an issue in a contract are governed by the law, in light of the multistate elements of the contract, that is the most appropriate for a resolution of that issue," and the "most appropriate law" is determined by following three steps: "(1) Identifying the states that have a relevant connection with the transaction or the parties"; "(2) Identifying the policies underlying any apparently conflicting laws of these states that are relevant to the issue"; and "(3) Evaluating the relative strength and pertinence of these policies[.]" ORS 15.360. As explained above, however, Sanders argues that the Court of Appeals erred in failing to recognize that Virginia has a "relevant connection" within the meaning of ORS 15.360.

According to Portfolio, however, ORS 15.360 supplies no mechanism for choosing Virginia law as the "most appropriate" to resolve the substance of the account-stated claim because ORS 15.360 describes how to choose between "apparently conflicting laws." Portfolio emphasizes that Sanders, in opposing the account-stated claim, asserts that "Virginia law is the same" as Oregon's with respect to the "essential allegations of an account stated claim." That assertion, Portfolio argues, amounts to a concession that there are no "apparently conflicting laws" with respect to the substance of the account-stated claim and, thus, no basis under ORS 15.360 on which to compare underlying policies. Portfolio urges us, instead, to apply common-law choice-of-law principles. It agrees with the Court of Appeals that *Erwin* controls and requires that "the law of the forum should apply" under the circumstances of this case. *See* 264 Or. at 457-58, 506 P.2d 494.

We agree with Portfolio that ORS 15.360 does not supply a mechanism for Oregon courts to choose the law of another state when there is no apparent conflict with the applicable Oregon law. Under those circumstances, and if no other statute provides a path to choose the state on whose law the claim is substantively based, we conclude that the common-law principle described in *Erwin* fills the gap.

a. The common-law method for resolving conflicts of law

Before turning to Sanders' arguments regarding ORS 15.360, we explain the historical context out of which the choice-of-law statutes arose. At the time that the legislature adopted ORS 12.430, Oregon conflicts law was entirely a matter of common law. Oregon by then had adopted a method for resolving conflicts that looked to the "`most significant relationship' approach of Restatement (Second) Conflict of Laws." *Erwin,* 264 Or. at 456, 506 P.2d 494 (footnote omitted); *see Lilienthal v. Kaufman,* 239 Or. 1, 16, 395 P.2d 543 (1964) (adopting for conflicts issues in contract cases an analysis that took into account the competing state "connections with the transaction" and state interest that would "be served or thwarted, depending upon which law is applied"); *Casey v. Manson Constr. Co.,* 247 Or. 274, 287-88, 428 P.2d 898 (1967) (for conflicts issues in tort cases, adopting "the rule of `most significant relationship with the occurrence and with the parties' as set forth in the Tentative Draft of the Restatement [(Second) *Conflict of Laws*]"). That approach replaced "the traditional, arbitrary, and much criticized rule[s]" of *lex loci,* under which the place where certain legally-significant events occurred—such as the formation of a contract or the last act necessary to give rise to a tort claim—would mechanistically determine the *270 governing law. *See Erwin,* 264 Or. at 456, 506 P.2d 494.

Unfortunately, the "modern" approach to resolving conflicts was also widely criticized. *Id.* (explaining that this court in the late 1960's had adopted the "maligned and almost universally criticized `most significant relationship' approach of Restatement (Second) Conflict of Laws" (footnote omitted)). As the Oregon Law Commission explained to the 2001 Oregon Legislature, Oregon's resolution of conflicts disputes had produced "a confusing, rather erratic line of decisions," which prompted the Commission to recommend that the Legislature adopt a statutory framework for resolving conflicts issues in contract cases. Exhibit A, Senate Judiciary Committee, HB 2414, Apr. 24, 2001 ("Conflicts Law Applicable to Contracts Report" adopted by Oregon Law Commission). The Law Commission maintained in its report to the legislature that the proposed legislation was "a substantial improvement over the case law of which it [took] account but which it would largely replace." *Id.* The proposed law was adopted with only minor changes to the Law Commission's draft and is now codified at ORS chapter 15.300 to 15.380. *See* Exhibit C, House Committee on Judiciary, HB 2414, Mar. 28, 2001 ("Proposed Amendments to House Bill 2414"); Or. Laws 2001, ch. 164 (adopting *former* ORS chapter 81 (2001), *renumbered as* ORS chapter 15 (2011)).[7]

b. The statutory path to resolving conflicts of law, ORS 15.360

Neither party challenges the Court of Appeals' conclusion that Portfolio's account stated is a form of "contract," within the meaning of ORS chapter 15. 292 Or. App. at 469, 425 P.3d 455. And we agree that is a reasonable conclusion. As we will explain later in the opinion, this court has long described an "account stated" as an enforceable agreement that is based on consideration. *See, e.g., Truman, Hooker, & Co. v. Owen,* 17 Or. 523, 527, 21 P. 665 (1889) (an account stated "is said to be in the nature of a new promise but the consideration of the promise is the stating of the account"); *Bliss v. Southern Pacific Co.,* 212 Or. 634, 646, 321 P.2d 324 (1958) (explaining that there is an enforceable contract when competent persons "upon a sufficient consideration, voluntarily agree to do or not to do a particular thing which may be lawfully done or omitted"); *see also Edwards, Guardian, v. Hoevet,* 185 Or. 284, 295, 200 P.2d 955 (1948) (explaining that the "theory of stated accounts introduced into the law of contracts a sort of stratification concept in which a debtor-creditor relationship is a sedimentary deposit underlying and supporting the superstructure consisting of the subsequently formed account stated").

We also agree that, among the statutes governing choice of law issues for contracts claims, the Court of Appeals reasonably focused on ORS 15.360. That statute is essentially a "catch-all" provision that applies "[t]o the extent that an effective choice of law has not been made by the parties pursuant to ORS 15.350 or 15.355, or is not prescribed by ORS 15.320, 15.325, 15.330, 15.335 or 15.380" (provisions that make Oregon law always or presumptively the choice for certain categories of contract). Here, neither party contends that there has been an "effective choice" of the law to govern the account-stated claim, and it does not fall among the categories of contracts for which ORS chapter 15 prescribes the governing law. Thus, if the account-stated claim in this case is governed by statute at all, then it is governed by ORS 15.360.

However, we do not agree with Sanders that ORS 15.360 leads to a conclusion that Virginia's account-stated law is the "most appropriate for a resolution of" the substance of Portfolio's claim. Under ORS 15.360, "[t]he most appropriate law is determined by:

> "(1) Identifying the states that have a relevant connection with the transaction or the parties, such as the place of negotiation, making, performance or subject matter of the contract, or the domicile, habitual

residence or pertinent place of business of a party;

271 "(2) Identifying the policies underlying any apparently conflicting laws of *271 these states that are relevant to the issue; and

"(3) Evaluating the relative strength and pertinence of these policies in:

"(a) Meeting the needs and giving effect to the policies of the interstate and international systems; and

"(b) Facilitating the planning of transactions, protecting a party from undue imposition by another party, giving effect to justified expectations of the parties concerning which state's law applies to the issue and minimizing adverse effects on strong legal policies of other states."

ORS 15.360.

(1) States with a relevant connection

Sanders contends that, at step one of the statutory framework, the only "relevant connection" is a state's connection with the transaction or the contracting parties *at the time of the transaction.* According to Sanders, only Virginia has a relevant connection under that standard—because Capital One is chartered in Virginia and because its credit agreements (the source of the underlying debt in the account-stated claim) are regulated by Virginia law unless otherwise specified. *See* Va. Code Ann. § 6.2-312 (loans exempt from limit on contract rate of interest); Va. Code Ann. § 6.2-313 (specifying when banks can charge interest and what rate).

Before considering Sanders' argument, we pause to emphasize that, when the Court of Appeals concluded that neither Oregon nor Virginia has a "relevant connection with the transaction or the parties," it mistakenly focused on its conclusion that neither state has a connection of the "type that evidences a *state* interest in having its law applied." *Portfolio Recovery,* 292 Or. App. at 471, 425 P.3d 455 (emphasis in original). The court explained that "Virginia would have no substantial interest in having its statute prevent Portfolio's action because defendant was not a resident of Virginia." *Id.* We caution that the court's focus on "a state interest" to determine which states have a "relevant connection" is not rooted in the text of ORS 15.360. Rather, the "state interest" test cited by the Court of Appeals is taken from decisions of that court that predate adoption of Oregon's statutory framework for resolving conflicts of law. *See, e.g.,* 292 Or. App. at 471, 425 P.3d 455 (quoting *Manz v. Continental American Life Ins. Co.,* 117 Or. App. 78, 83, 843 P.2d 480 (1992), *adh'd to as modified on recons.,* 119 Or. App. 31, 849 P.2d 549, *rev. den.,* 317 Or. 162, 856 P.2d 317 (1993)); Or. Laws 2001, ch. 164 (adopting *former* ORS chapter 81 (2001), *renumbered as* ORS chapter 15 (2011)). We are mindful of the advice to the legislature that the statutory framework "largely replace[d]" the existing choice-of-law case law and, thus, we caution against any resort to that case law to resolve issues that the statutory framework addresses. Exhibit A, Senate Committee on Judiciary, HB 2414, Apr. 24, 2001 ("Conflicts Law Applicable to Contracts Report").[8]

Turning to the statutory standard, Sanders' argument that Virginia has a relevant connection is plausible. At a minimum, Sanders' cardholder agreement with Capital One is the source of the debt that gave rise to the alleged "account stated," and the terms of that agreement may affect whether the March 2010 balance can be the basis for an account-stated claim. *See* *Halvorson v. Blue Mt. Prune Growers Co-op.,* 188 Or. 661, 670, 214 P.2d 986 (1950) (explaining that, if the relationship of the parties is governed by the terms of an express contract, then a final accounting "at variance with the terms of the contract" cannot be the basis for an account-stated claim).

But we reject Sanders' argument that only Virginia has a "relevant connection." As Sanders recognizes, ORS 15.360(1) directs us to identify states with a "relevant connection with the transaction *or the parties,* such as the * * * domicile, habitual

272 residence or pertinent place of business of a party." (Emphasis *272 added.) Sanders does not dispute that his connection to Oregon was sufficient, by the time that Portfolio filed the action, to give Oregon personal jurisdiction over him.[9] He contends, however, that a state's "relevant connection with" the parties under ORS 15.360(1) must be determined *at the time of the transaction.* We disagree.

Under the statutory construction methodology that we explained above, we give primary consideration to the text and context of the pertinent statutes because "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Gaines,* 346 Or. at 171, 206 P.3d 1042 (internal

quotation marks and citation omitted). That inquiry persuades us that a "relevant connection" under ORS 15.360(1) is not limited to connections at the time of the transaction on which the claim is based, for two reasons.

First, the text of ORS 15.360(1) sets out a non-exclusive list of "relevant connections," and that list does not express the distinction for which Sanders advocates between a party's domicile at the time of events giving rise to a claim and a party's domicile at the time that the claim is filed. Second, the statutory context demonstrates that Oregon's connection with Sanders when the action was filed is a "relevant connection" in this case. Oregon's connection to Sanders as his state of domicile by the time the action was filed furnishes one basis for Oregon to exercise personal jurisdiction over Sanders and, as a result, authority to exercise jurisdiction over the action and to enter a judgment that will provide a final resolution of the parties' dispute. *See* ORS 14.030 ("When the court has jurisdiction of the parties, it may exercise it in respect to any cause of action or suit wherever arising," except for certain actions involving real property.); ORCP 4 A (Oregon has jurisdiction over a person who is "a natural person domiciled in this state" "when the action is commenced."). Indeed, the entire statutory framework for resolving conflicts of law presumes that, if Oregon's connection with a party makes it the forum jurisdiction, then that connection justifies applying Oregon law at least to resolve the conflict. For example, it is the fact that the action has been filed in an Oregon court that allows ORS 12.430 to govern our determination of the statute of limitations that applies to the claim.

While a connection with a party sufficient to give rise to jurisdiction may not be "relevant" in every case, and it ultimately may not outweigh considerations that support applying the law of another state, we are persuaded that the legislature did not intend to limit our consideration of a state's "relevant connection with" a party only to connections that existed at the time of the transaction. In this case, in which the issues in dispute turn on whether Portfolio can pursue its claim for account stated in an Oregon court, we conclude that Oregon's connection as Sanders' domicile—by giving rise to one statutory basis for Oregon's exercise of jurisdiction over the claim—is a "relevant connection" that requires us to move on to the second step in the inquiry under ORS 15.360. Thus, we answer the inquiry at the first step of ORS 15.360 by concluding that both Oregon and Virginia have a "relevant connection with the transaction or the parties."

(2) "Policies underlying any apparently conflicting laws"

At the second and third steps of the analytical framework, ORS 15.360 directs that, after identifying the states with a relevant connection to the transaction or parties, the court will identify "the policies underlying any apparently conflicting laws of these states that are relevant to the issue" and then evaluate "the relative strength and pertinence of these policies[.]" As set out above, Portfolio contends that these steps in the *273 analysis provide no mechanism for choosing Virginia law. It reasons that there are no "apparently conflicting laws" with respect to the substance of the account-stated claim and, thus, no pertinent "underlying policies" that could point to a choice of Virginia law, given Sanders' assertion that the laws of Oregon and Virginia are "the same" with respect to the "essential allegations of an account stated claim."

Portfolio's argument is persuasive. As an initial matter, we agree that Portfolio appropriately focuses only on the laws governing the merits of the account-stated claim. The "issue" for which we have turned to ORS chapter 15 is our charge under ORS 12.430 to determine whether Portfolio's account-stated claim is "substantively based" on the law of Virginia. And we have explained that ORS 12.430 distinguishes the law on which a claim is "substantively based" from the law governing the "limitation period" of the claim.

We also agree with Portfolio that, if the law of Virginia is "the same" as Oregon's with respect to the merits of the account stated claim, then those laws are not "apparently conflicting" within the meaning of ORS 15.360. Although the legislature did not define the phrase "apparently conflicting," and although it is not a phrase that had appeared in this court's conflicts-of-law decisions, it is a phrase that the Court of Appeals had used "when it appears that [the other state's] law may be different from the Oregon law or when there appears to be no applicable Oregon law." *Deerfield Commodities v. Nerco, Inc.,* 72 Or. App. 305, 316, 696 P.2d 1096, *rev. den.,* 299 Or. 314, 702 P.2d 1111 (1985); *see also* *Angelini v. Delaney,* 156 Or. App. 293, 300, 966 P.2d 223 (1998), *rev. den.,* 328 Or. 594, 987 P.2d 514 (1999) (explaining that "Oregon courts *first* look to whether there is a material difference between Oregon substantive law and the law of the other forum" (emphasis in original)).

That concept of "apparently conflicting"— if not the actual phrasing—is also captured by this court's decision in *Erwin,* which both *Deerfield* and *Angelini* cited for the proposition that Oregon law applies if there is no "apparent conflict," or "material difference" between the laws of Oregon and the other state. *Deerfield,* 72 Or. App. at 316, 696 P.2d 1096 (citing *Erwin* for the proposition that, if "there is no apparent conflict between the relevant principles of Pennsylvania and Oregon law, we are

free to apply the latter"); *Angelini,* 156 Or. App. at 300, 966 P.2d 223 (citing *Erwin* for the proposition that, "[i]f there is no material difference * * * [,] Oregon law applies"). As set out above, *Erwin* emphasized that, "before engaging in the mysteries of the solution of an actual conflict, we must make certain that we have a conflict of consequence which requires a choice." 264 Or. at 457, 506 P.2d 494; *see also Black's Law Dictionary* 374-75 (11th ed. 2019) (defining a "conflict of laws" as "[a] difference between the laws of different states or countries").

Thus, we agree with Portfolio's premise that, if the party moving for summary judgment identifies no difference between the substantive contract law of another state and the substantive contract law of Oregon, then ORS 15.360 provides no mechanism for the court to determine on summary judgment that the claim is substantively based on the law of another state.[10]

The solution, according to Portfolio, is to turn to the common-law conflicts decisions that predate the statutory framework. Although we are reluctant to chart that path away from statutes that appear to have been intended as a comprehensive framework for resolving conflicts disputes, we agree that Portfolio's proposal is the most consistent with the legislature's intention under the circumstances of this case.

We begin by emphasizing why courts should hesitate to resort to conflicts decisions that predate the statutory framework for resolving conflicts. First, the text of ORS 15.305 suggests that the legislature intended the provisions of ORS 15.300 to 15.380 to comprehensively resolve "all" conflicts regarding contract claims. Second, the *274 legislative history is also clear that the new statutory framework was drafted to "largely replace" the case law for resolving choice-of-law issues in contract claims. Exhibit A, Senate Committee on Judiciary, HB 2414, Apr. 24, 2001 ("Conflicts Law Applicable to Contracts Report").

However, the parties in this case have identified a choice-of-law scenario that the statutes do not resolve—a need to choose the state on whose law a contract claim is based even though the applicable contract laws are not "apparently conflicting." If that contract is not one for which the legislature has prescribed the governing law or one for which the parties have made an effective choice of law, then ORS chapter 15 provides no path. The legislature may have assumed that there would be no need for courts to engage in conflicts analysis when the parties identify no difference of consequence in the laws governing the merits of the contract claim. But, as this case highlights, where the parties identify a difference of consequence in the states' respective *statutes of limitations,* ORS 12.430 requires some mechanism for choosing whether a claim is "substantively based" on the law of another state, even if those substantive laws do not "apparently conflict[ ]." We are persuaded that our common-law conflicts principles fill that gap.

At the time that the legislature adopted ORS 12.430, common-law principles determined whether a claim was substantively based on the law of another state. Those principles specified that the law of Oregon "should apply" to a claim filed in Oregon court if there was no "conflict of consequence" between the applicable laws of Oregon and another state. *Erwin,* 264 Or. at 457-58, 506 P.2d 494; *Deerfield,* 72 Or. App. at 316, 696 P.2d 1096; *Angelini,* 156 Or. App. at 300, 966 P.2d 223. Although we have explained that the statutory framework for resolving this conflict "largely replace[d]" the framework outlined by the prior case law, nothing in the text of ORS 15.300 to 15.380 suggests that the legislature intended to abrogate that default-to-Oregon principle when the laws on which the claim is based do not "apparently conflict." Indeed, as we have explained, those statutes seem to have retained the principle that, when the laws are not "apparently conflicting," there is no path to choosing the law of another state unless the parties have made an "effective choice" of law to govern the contract claim. We, thus, conclude that the common-law path to resolving such cases is one that the legislature did not replace.

As indicated above, the answer under that common-law path is that Oregon law "should apply" to a claim filed in Oregon court if there is no "conflict of consequence." *Erwin,* 264 Or. at 457-58, 506 P.2d 494. *Erwin* described two different scholarly approaches to the question of whether there is a conflict of consequence that "requires a choice." One approach would declare that there is no conflict requiring a choice if "the laws of two states are the same or would produce the same results" but would otherwise compare "the interests of the two states as a means" of deciding the conflict. *Id.* at 458, 506 P.2d 494. Proponents of the other approach—perhaps proposing a difference only of semantics —would decline to declare a "conflict" unless, after considering the "the policy or governmental interest behind the law of each state," they found a "substantial conflict" between the "policies or interests in the particular factual context in which the question arises." *Id.* at 457, 506 P.2d 494. Without taking sides in the debate, this court agreed with the premise underlying both approaches: a conclusion that there is no conflict is a conclusion that Oregon law "should apply." *Id.* at 458, 506 P.2d 494.

The same answer is compelled by the record in this case. We have already explained that Sanders points to no difference between the account-stated law of Virginia and the account-stated law of Oregon that could create a conflict of consequence to the substance of Portfolio's claim. Under those circumstances, as we concluded in *Erwin,* an Oregon court should do "what comes naturally and appl[y] Oregon law" to resolve the substance of the account-stated claim. 264 Or. at 459-60, 506 P.2d 494. That conclusion resolves the statute of limitations dispute as well; because the claim is not substantively based on the law of Virginia, "[t]he *275 limitation period of this state applies to" the claim. ORS 12.430(2).

B. *Portfolio's Motion for Summary Judgment on the "Account-Stated" Claim*

We also allowed review to consider whether the Court of Appeals correctly determined that genuine issues of material fact preclude Portfolio from prevailing on its motion for summary judgment. As we have emphasized, the party moving for summary judgment has the burden of demonstrating "that there is no genuine issue as to any material fact" and that the party "is entitled to prevail as a matter of law." ORCP 47 C; *Amalgamated Transit Union,* 362 Or. at 491, 412 P.3d 162. In reviewing whether Portfolio demonstrated that "[n]o genuine issue as to a material fact exists," we "view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party," and we must be able to conclude that "no objectively reasonable juror could return a verdict for" Sanders on the account-stated claim. *Id.* Viewed in light of that standard, we agree with the Court of Appeals that genuine issues of material fact preclude Portfolio from prevailing as a matter of law on the account-stated claim.

1. *The law of account stated*

We briefly introduced the doctrine of account stated at the outset of the opinion but now return to that claim in greater detail. As we have repeatedly explained, "`[a]n account stated is an agreement between persons who have had previous transactions of a monetary character fixing the amount due in respect to such transactions and promising payment.'" *Sunshine Dairy,* 234 Or. at 85, 380 P.2d 637 (quoting *Steinmetz,* 106 Or. at 634, 212 P. 532). Although the doctrine has its historical origins in accountings between merchants, this court long ago recognized that the doctrine has been "extended to embrace every kind of transaction in which the relation of debtor or creditor is involved." *Crawford v. Hutchinson,* 38 Or. 578, 580-81, 65 P. 84 (1901).

Regardless of the nature of the underlying transaction, the "crux of an account stated is an agreement * * * that a certain amount is owing and will be paid." *Sunshine Dairy,* 234 Or. at 85, 380 P.2d 637. The agreement "is said to be in the nature of a new promise," and "the consideration of the promise is the stating of the account."[11] *Truman,* 17 Or. at 527, 21 P. 665. We have emphasized that, "[t]o constitute an account stated, each party must understand the transaction as a final adjustment of the respective demands between them taken into consideration in the accounting." *O'Neill v. Eberhard Co.,* 99 Or. 686, 695, 196 P. 391 (1921). However, and of particular importance in this case, we have explained that "assent of a debtor to an account stated may be implied from his retention of the account, without objection, for more than a reasonable time." *Halvorson,* 188 Or. at 669, 214 P.2d 986.

An account-stated claim, thus, differs from an action on the original account in two important ways. First, while an "account" alleges that the defendant has incurred a financial obligation but not necessarily that the defendant has agreed to the amount of the obligation, an "account stated" alleges agreement as to the amount of a financial obligation. *Cooley v. Roman,* 286 Or. 807, 809 n. 1, 596 P.2d 565 (1979), *overruled on other grounds by Assoc. Unit Owners of Timbercrest Condo. v. Warren,* 352 Or. 583, 288 P.3d 958 (2012). Second, because an "account stated" is based on a new agreement to the "accounting," we have explained that "it is not ordinarily necessary to give evidence of the original character of the debt or of the items constituting the account, for it is sufficient if the plaintiff proves the account *276 stated." *Del Monte Meat Co., Inc. v. Hurt,* 277 Or. 615, 618, 561 P.2d 627 (1977) (quoting *Steinmetz,* 106 Or. at 637, 212 P. 532).

As those two distinctions suggest, a claim that the parties have agreed to a final accounting of existing obligations assumes that the terms of the existing agreement do not already specify the amount of the obligation. *See, e.g., O'Neill,* 99 Or. at 695, 196 P. 391 (explaining that, with an account stated, the parties are agreeing to a "final adjustment of the respective demands"). Cases in the "modern" era have specifically rejected recovery on an "account stated" when the amount alleged to be owed is different from the amount specified in an existing contract. *Remington v. Wren,* 278 Or. 471, 474, 564 P.2d 1025 (1977); *Halvorson,* 188 Or. at 670, 214 P.2d 986.

In *Remington,* the plaintiff built a house for the defendants and then sent a final bill for an amount higher than the express contract price. 278 Or. at 473, 564 P.2d 1025. Although the defendants initially responded that they would pay the billed amount, three months later they sent a check for the contract price, and the plaintiff brought an account-stated claim to recover the difference. *Id.* We agreed with the defendants that "the plaintiff cannot maintain an action based upon an account stated when there was an express contract to pay a specific amount of money." *Id.* In reaching that conclusion, we quoted *Corbin on Contracts* for the proposition that, for an "account stated," "[t]he new promise must be coextensive with the existing debt or other duty, or must be to render a performance that is wholly and exactly included within that debt or duty.'" *Id.* at 474, 564 P.2d 1025 (quoting Arthur L. Corbin, 1A *Corbin on Contracts* § 212, 282 (1963)); *see also* Halvorson, 188 Or. at 670, 214 P.2d 986 (explaining that, if the relationship of the parties is governed by the terms of an express contract, then a final accounting "at variance with the terms of the contract" cannot be the basis for an account-stated claim).

2. *Application to this case*

From our review of the case law described above, we identify three requirements for an account-stated claim that are disputed in this case: (1) that Capital One intended to agree that the "new balance" in the March 2010 credit card statement was a final accounting of Sanders' credit card obligations; (2) that Sanders' delay in objecting to the amount stated as the "new balance" implies that he agreed that the March 2010 statement described the final balance owing on his obligation to Capital One;[12] and (3) that the balance stated in the March 2010 credit card statement did not vary from Sanders' obligations under the express terms of the credit card agreement. To prevail on summary judgment, Portfolio was required to demonstrate that there "is no genuine issue" as to any of those material facts. ORCP 47 C; *Amalgamated Transit Union,* 362 Or. at 491, 412 P.3d 162. Sanders has identified reasons to doubt that Portfolio met that burden with respect to any of the three requirements for its account-stated claim, but we limit our discussion to the first.

The first disputed issue of fact is whether Capital One intended, when sending the statement that is allegedly the basis for an account stated, to agree that the "new balance" in the March 2010 credit card statement was a final accounting of Sanders' credit card obligations. We explained in *O'Neill* that "[t]he binding force of an account stated *277 will not be given to the mere furnishing of an account which was not with a view to establishing a balance due, or finally adjusting the matters of account between the parties[.]" 99 Or. at 695, 196 P. 391. Portfolio acknowledges that an account stated must be based on a "final account" of the parties' past transactions giving rise to the debt, but it asserts that, in the context of an ongoing relationship, it is enough for Capital One to have intended that the March 2010 statement would be a "a final accounting of all *prior* transactions between the parties" and that there is no dispute as to that fact.

Portfolio does not identify any case in which this court has recognized an account-stated claim based on what would essentially be an "interim final" accounting—an agreement between parties engaged in ongoing transactions to settle the balance for past transactions—and that would not be a standard usage of the term "final." *See Webster's Third New Int'l Dictionary* 851 (unabridged ed. 2002) (defining "final" as "boundary, limit, end"). In any event, Portfolio's argument for that "interim final" accounting rule is beyond the scope of this case, because Portfolio does not contend that Sanders used the credit card for any transactions after the March 2010 statement. Indeed the monthly credit card statements that Portfolio submitted in support of its motion for summary judgment show that, as of November 2009, Capital One had made Sanders' account "unusable." Thus, the only question presented by the facts of this case is whether Capital One intended to propose the "new balance" in the March 2010 credit card statement as the final accounting of Sanders' credit card obligations.

Regardless of whether a reasonable fact-finder might infer that Capital One intended that balance statement to represent the final amount of Sanders' obligations, that is not the only reasonable inference when the record is viewed in the light most favorable to Sanders. The Court of Appeals correctly pointed to evidence that Capital One continued to send credit card statements after March 2010 in which it asserted that the amount of Sanders' obligation on the past transactions was increasing due to claimed interest charges on the existing balance. A reasonable factfinder could view such statements as evidence that Capital One did not intend to agree that the March 2010 balance was the final balance that Sanders owed for his past credit card transactions.

Moreover, the evidence that Sanders' monthly statements showed a lower "new balance" in months preceding March 2010, even after the account became "unusable" also could permit a reasonable factfinder to doubt that Capital One intended the March 2010 statement of "balance"—as opposed to one of the earlier statements of "new balance" —to represent the final amount due on the past transactions. Indeed, the March 2010 notice itself would permit a reasonable factfinder to infer that

Capital One did not intend the notice to be a final accounting. It specified that the "Payment Due" was not a "Payoff Amount" and that Sanders needed to call a number on the statement "for an exact payoff amount." The notice also advised that "[y]ou are responsible for paying the full balance on your account as well as any associated collections expenses, attorney fees and court costs *unless the law does not allow us to collect these amounts,* as provided in your customer agreement." (Emphasis added.) Viewing the March 2010 statement in the light most favorable to Sanders, the nonmoving party, a reasonable factfinder could conclude that Capital One did not intend to agree that the "new balance" represented the final accounting of Sanders' credit card debt. Portfolio's failure to demonstrate that there is an absence of a "genuine issue" as to that first material fact requires reversal of the trial court's grant of summary judgment to Portfolio.

III. CONCLUSION

We conclude that Oregon's statute of limitations applies to Portfolio's account-stated claim. Thus, the Court of Appeals correctly held that the claim is not time barred and that Sanders is not entitled to summary judgment on his affirmative defense. We also conclude that the Court of Appeals correctly held that genuine issues of material fact preclude Portfolio from demonstrating that it is entitled to summary judgment on *278 the merits of its account-stated claim. *See* ORCP 47 C.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court for further proceedings.

[*] Appeal from Multnomah County Circuit Court, Eric J. Neiman, Judge pro tempore. 292 Or App 463, 425 P3d 455 (2018).

[1] When another person is substituted in place of the creditor in relation to a debt, the substitute is given "all of the rights, priorities, remedies, liens and securities of the party for whom he is substituted." *Maine Bonding v. Centennial Ins. Co.,* 298 Or. 514, 521, 693 P.2d 1296 (1985) (quoting *United States F. & G. Co. v. Bramwell,* 108 Or. 261, 277, 217 P. 332 (1923)).

[2] The record contains what Sanders describes as a "generic" Capital One cardholder agreement, which neither party describes as the actual agreement between Sanders and Portfolio. However, because Portfolio produced the agreement in response to Sanders' request for production of the actual agreement, Sanders has relied on it as representative of the terms that Portfolio believes the actual agreement contains. We agree that that is a permissible inference and refer to the agreement contained in the record for that purpose.

[3] The cardholder agreement in the record specifies that the applicable statute of limitations for all purposes, "including the right to collect debt," would "be the longer period provided by Virginia or the jurisdiction where you live." But neither party contended that the provision amounted to "an effective choice" of law for the account-stated claim.

[4] Although Sanders appears to have been a Washington resident when Capital One mailed him the March 2010 statement on which the account-stated claim is based, neither party argues that the State of Washington has a relevant connection to the account-stated claim.

[5] An exception to the general rules that ORS 12.430 provides for choosing the statute of limitations based on the laws on which the claim is substantively based is set out in ORS 12.450, which provides that, "if the applicable limitation period of another state is `substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against the claim,' then Oregon's statute of limitations applies." *Miller v. Ford Motor Co.,* 363 Or. 105, 118, 419 P.3d 392 (2018) (quoting ORS 12.450). No party contends that ORS 12.450 governs this case.

[6] The Commentary also explains that a claim would be substantively based "[u]pon the law of more than one state," as addressed in ORS 12.430(1)(b), "[i]f different issues involved in a single claim are found to be governed by the substantive laws of different states." Exhibit F, Senate Judiciary Committee, SB 297, Apr. 1, 1987 (commentary to the UCLLA accompanying report by Joe Willis).

[7] The legislature enacted a similar set of statutes for choosing the most appropriate law in tort cases. *See* ORS 15.400-15.460; Or. Laws 2009, ch. 451.

[8] The commentary from the Oregon Law Commission also explained to the legislature that the bill deliberately replaces consideration of "governmental interests" with consideration of policies because "[m]ost laws governing private transactions and disputes concern the interests of private parties, and may be adopted at their behest, rather than interests of a state or government." Exhibit A, Senate Judiciary Committee, HB 2414, Apr. 24, 2001 ("Comments in Support of Testimony from the Oregon Law Commission").

[9] The parties describe Sanders as a "resident" of Oregon. Although we have emphasized in the context of personal jurisdiction that the concept of "domicile" requires residence plus "an intention to remain there permanently or indefinitely," *Elwert v. Elwert,* 196 Or. 256, 265, 248 P.2d 847 (1952) (internal quotation marks and citation omitted), we do not understand Sanders to dispute that Oregon was also his "domicile." But he also was personally served while present in the state of Oregon, which is independently a sufficient basis for personal jurisdiction under ORCP 4 A(1) (a court has jurisdiction over a "natural person present within this state when served").

[10] We express no opinion regarding whether Virginia's law of account stated differs from Oregon's in some manner of consequence to the account-stated claim. Rather, Sanders has identified none, and we decline to undertake a search for a conflict *sua sponte* under the circumstances of this case.

[11] Portfolio argues that the Court of Appeals erred in applying Oregon law to evaluate the account-stated claim. That argument is perplexing given Portfolio's insistence elsewhere in briefing that there is no difference between the laws of Oregon and Virginia with respect to the merits of the account-stated claim. We accepted that premise as a necessary component to our earlier conclusion that the claim is "substantively based" on the law of Oregon and, thus, governed by Oregon's statute of limitations. As did the Court of Appeals, we look to Oregon cases to resolve the account-stated claim.

[12] Portfolio contends that Sanders' assent is established as a matter of law, simply by his delay in objecting to the March 2010 balance, citing early cases like *Vanbebber v. Plunkett,* 26 Or. 562, 566, 38 P. 707 (1895), in which this court described the question of whether a debtor objected within a "reasonable time" as "a question of law for the court" when the "facts are undisputed." However, more recent decisions have emphasized that a debtor's failure to object to the statement within a reasonable time is only "evidence" and that "[w]hether silence under the particular circumstances amounts to an admission of correctness and whether the delay was unreasonable are questions of fact for the jury." *Standard Prod. Co. v. ICN United Med. Labs.,* 279 Or. 633, 635, 569 P.2d 594 (1977) (internal quotation marks and citation omitted); *see also* *Halvorson,* 188 Or. at 670, 214 P.2d 986 ("[w]hat is a reasonable time depends upon the circumstances of the case, including the nature of the transaction, the relationship of the parties, and the usual course of their business"). On this record, we decline to decide whether the early cases are reconcilable with, or implicitly overruled by, the later cases.

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Susan CLARK, for herself and/or on behalf of all others similarly situated, Appellant,
v.
EDDIE BAUER LLC and Eddie Bauer Parent, LLC, Appellees.

(SC S069438).

Supreme Court of Oregon.

Argued and submitted November 29, 2022.
June 29, 2023.

On certified question from the United States Court of Appeals for the Ninth Circuit; certified order dated April 14, 2022, certification accepted May 19, 2022.

United States Court of Appeals for the Ninth Circuit No. 2135334.

Che Corrington, Hattis & Lukacs, Bellevue, Washington, argued the cause and filed the briefs for appellant.

Michael Vatis, Steptoe & Johnson LLP, New York, New York, argued the cause and filed the brief for appellees. Also on the brief was Sara Kobak, Schwabe, Williamson & Wyatt, PC, Portland.

Christopher A. Perdue, Assistant Attorney General, Salem, filed the brief for amicus curiae Oregon Department of Justice. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Chris Mertens, Mertens Law LLC, Portland, filed the brief for amicus curiae Oregon Consumer Justice. Also on the brief was Kelly Jones, The Law Office of Kelly D. Jones, Portland.

Nadia H. Dahab, Sugerman Dahab, Portland, filed the brief for amicus curiae Oregon Trial Lawyers Association.

Anna-Rose Mathieson, Complex Appellate Litigation Group LLP, San Francisco, California, filed the brief for amici curiae Chamber of Commerce of the United States of America, National Retail Federation, Retail Litigation Center, and Oregon Business & Industry Association.

Before Flynn, Chief Justice, and Duncan, Garrett, DeHoog, and Bushong, Justices, and Balmer and Walters, Senior Judges, Justices pro tempore.[*]

DeHOOG, J.

The certified question is answered.

DeHOOG, J.

Under Oregon's Unlawful Trade Practices Act (UTPA), ORS 646.605 to 646.656, a person who suffers an "ascertainable loss of money or property" as a result of another person's violation of the UTPA may maintain a private action against that person. ORS 646.638(1). This case, which comes before us on a certified question of Oregon law from the United States Court of Appeals for the Ninth Circuit, requires us to determine whether a consumer can suffer an "ascertainable loss" under the UTPA based on a retailer's misrepresentation about price history or comparative prices. More specifically, we must consider whether a consumer suffers a cognizable "ascertainable loss" under ORS 646.638(1) when she buys items at an outlet store that have been advertised as being sold at a substantial discount but that have never been sold at that or any other location at the "list," or non-sale price. The Ninth Circuit's certified question, which we have accepted, is as follows:

> "Does a consumer suffer an `ascertainable loss' under [ORS] 646.638(1) when the consumer purchased a product that the consumer would not have purchased at the price that the consumer paid but for a violation of [ORS] 646.608(1)(e), (i), (j), (ee), or (u), if the violation arises from a representation about the product's price, comparative price, or price history, but not about the character or quality of the product itself?"

For the reasons that follow, our answer to that question is yes.

I. BACKGROUND

We take the facts from the Ninth Circuit's certification order. *Clark v. Eddie Bauer LLC,* 30 F4th 1151 (9th Cir 2022) (*Clark II*). Defendants Eddie Bauer LLC and Eddie Bauer Parent, LLC, operate the Eddie Bauer Outlet chain of stores, where they sell branded clothing.[1] More than 90 percent of the products offered at the outlet stores are manufactured solely for sale at the outlet stores and are not sold elsewhere. Defendants advertise clothing at the Eddie Bauer Outlet stores as being sold at a substantial discount, typically between 40 percent and 70 percent off. However, with limited exceptions, the clothing is never sold—at the outlet stores or anywhere else—at the "list" price, *i.e.,* the price shown on each product's original tag; the clothing sold at the outlet stores is only ever sold at "discounted" prices. *Id.* at 1153.

In 2017, plaintiff purchased two articles of clothing from one of defendants' outlet stores in Oregon. She purchased a "Fleece Zip," which had an attached tag indicating an original price of $39.99, but whose accompanying signage advertised the garment as being sold at 50 percent off, resulting in a "sale" price of $19.99. Plaintiff also purchased a "Microlight Jacket" with a tag price of $99.99. The signage for that jacket indicated that it was on sale for $49.99. For both items, plaintiff paid the "sale" price. In 2018, plaintiff returned the Microlight Jacket and received a $49.99 credit, which she applied toward the purchase of a "StormDown Jacket." The product tag for that jacket showed a list price of $229.00. However, a sticker on the tag showed a reduced price of $199.99, and adjacent signage noted an additional 50 percent discount, resulting in an end "sale" price of $99.99, the amount that plaintiff paid. *Id.*

Plaintiff subsequently filed a complaint in federal district court, alleging that defendants had violated multiple provisions of the UTPA, including, among others, ORS 646.608(1)(j) (making false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions), and ORS 646.608(1)(ee) (advertising price comparisons without conspicuously identifying the origin of the price the seller is comparing to the current price).[2] In addition to the above facts, which are undisputed for purposes of our consideration, plaintiff alleged that she would not have made any of the three purchases if she had known that the goods were not, in fact, being sold at a discount. That is, plaintiff alleged that she had been fraudulently induced to buy those garments by defendants' false representation that she was buying them at a bargain price. In her complaint, plaintiff sought actual or statutory damages, punitive damages, equitable relief in the form of disgorgement or restitution, and a permanent injunction prohibiting defendants from engaging in further conduct in violation of the UTPA.[3]

Defendants moved to dismiss plaintiff's complaint on the ground that it failed to allege an "ascertainable loss of money or property," as required of a complainant pursuing a private right of action under the UTPA. ORS 646.638(1). Defendants argued that plaintiff had received exactly the products that she believed she was buying, and that their value at the time of sale was at least what plaintiff had paid. They noted that plaintiff had not alleged, for example, that the Fleece Zip was worth less than the $19.99 sale price or that it did not possess the features or quality that plaintiff had expected it to have.[4] Defendants argued that, to establish an ascertainable loss under the UTPA, plaintiff was required to show that the value or character of the goods that she bought was different than that of the goods that she thought that she was buying. Defendants contended that a person cannot establish an ascertainable loss by simply proving the person's "subjective disappointment" upon learning that a purchase was not the bargain it had been made out to be.

The district court granted defendants' motion to dismiss. The court held that the complaint failed to state a claim under the UTPA, because it did not allege that defendants had made false representations about the character or quality of the garments that plaintiff bought, which the district court understood to be essential under this court's decision in *Pearson v. Philip Morris, Inc.,* 358 Or 88, 122, 361 P3d 3 (2015). Echoing language found in ORS 646.608(1)(e), one of the provisions that plaintiff had relied on, the district court held:

> "Some misstatement as to a characteristic, quality, or feature of the product is required. [Plaintiff's] complaint provides no such allegation. As a result, the Court must find that she did not adequately plead an ascertainable loss."

Clark v. Eddie Bauer LLC, No. C20-1106-JCC, 2021 WL 1222521 at *6 (WD Wash, Apr 1, 2021) (*Clark I*).[5]

Plaintiff appealed the district court's ruling to the Ninth Circuit, arguing that the district court had erred in concluding that the complaint did not adequately allege ascertainable loss. Plaintiff argued that defendants' (and the district court's) view as to what constitutes an ascertainable loss under the UTPA is too limited, noting that many of the provisions of ORS 646.608, including ones she had relied on, prohibit deception in ways that do not relate to the quality or characteristics of a product. She offered what she contended were three viable ways of establishing the required ascertainable loss. First, plaintiff argued that she had suffered an ascertainable loss by purchasing products that she would not have purchased but for the misrepresentations, a theory that plaintiff referred to as the "purchase price" theory, which, she contended, found support in *Pearson.* Second, plaintiff argued that she could establish a loss under an "advantageous bargain" theory because the garments that she had purchased had been worth less than defendants' pricing scheme had deceptively led her to believe. Under that theory, which, according to plaintiff, the Court of Appeals had recognized in *Simonsen v. Sandy River Auto, LLC,* 290 Or App 80, 413 P3d 982 (2018), her loss would be measured by the differences between the "list," or non-sale price of each item and the amounts that she ultimately paid. Finally, plaintiff argued as a third theory that defendants' false advertising artificially inflated consumer demand, which enabled defendants to charge higher prices for their products across the board. Plaintiff referred to that theory as the "premium price" theory.

Upon reviewing the parties' arguments, the Ninth Circuit noted that, unlike the district court, it was not persuaded that this court's decision in *Pearson* required it to reject plaintiff's various theories of loss. *Clark II,* 30 F4th at 1156. However, it also did not understand any of the Oregon cases cited by the parties to resolve the question before it. *Id.* Accordingly, the Ninth Circuit invited this court to weigh in on that issue and to answer the question whether a consumer can suffer an "ascertainable loss of money or property" within the meaning of ORS 646.638(1) based on a retailer's misrepresentation about price history or comparative prices. *Id.* at 1157.[6]

II. ANALYSIS

A. *Background of the UTPA*

The Oregon legislature first enacted consumer-protection legislation in 1965. Or Laws 1965, ch 490, §§ 3-4. Those early statutes targeted a narrow list of unfair business practices and permitted only district attorneys to enforce their prohibitions. Over the next few years, those statutes came to be seen as "weak and ineffective," in part because they did not authorize lawsuits "by the defrauded consumer himself, either individually or as a member of a victimized class." Ralph James Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience,* 54 Or L Rev 117, 119 (1975). Oregon's Attorney General at the time, Lee Johnson, testified at a hearing before the legislature that those first consumer-protection statutes failed to provide robust enforcement provisions:

> "The most serious defect with the present law is the lack of adequate enforcement provisions both from the standpoint of legal remedies and an appropriate enforcing agency. Under the present law, enforcement is the exclusive responsibility of the district attorney. * * * The committee also concluded that private individuals who are aggrieved by the deceptive trade practice should have some way of attaining restitution."

Exhibit 1, House Committee on Judiciary, HB 1088, Feb 10, 1971 ("Consumer Protection Act Proposal").

The legislature responded to those concerns by enacting the UTPA, which vastly expanded the range of prohibited conduct[7] and authorized private plaintiffs to seek actual or statutory damages if they suffered an "ascertainable loss of money or property" as a result of any trade practice that the UTPA deemed unlawful.[8] Or Laws 1971, ch 744, § 13, *codified at* ORS 646.638(1). As this court explained in *Weigel v. Ron Tonkin Chevrolet Co.,* 298 Or 127, 134, 690 P2d 488 (1984), the legislature created a private right of action in the UTPA to "encourage private enforcement of the prescribed standards of trade and commerce in aid of the act's public policies as much as to provide relief to the injured party."

For purposes of the certified question, it is undisputed that defendants' conduct in pricing its goods as alleged in the complaint violated certain provisions of the UTPA. The certified question, however, raises the preliminary issue of what constitutes an "ascertainable loss." We turn to that issue.

The UTPA does not expressly define "ascertainable loss." We therefore construe that term using the methodology set out in *State v. Gaines,* 346 Or 160, 171-72, 206 P3d 1042 (2009). As we stated in *Gaines,* our "paramount goal" is to ascertain the

intent of the legislature. *Id.* at 171. To do so, we consider the statutory text and context, along with any relevant and helpful legislative history. *Id.* at 172. Because the words of a statute are the best evidence of the legislature's intent, we give "primary weight to the [statute's] text and context." *State ex rel Rosenblum v. Nisley,* 367 Or 78, 83, 473 P3d 46 (2020). In considering that statutory text, we give words of common usage their ordinary meaning. *Gaines,* 346 Or at 175. To the extent that a statute includes legal terms of art, we "seek to understand their established legal meanings." *State v. Iseli,* 366 Or 151, 163, 458 P3d 653 (2020). Context for statutory terms includes, among other things, the historical context of the statute at issue, as well as statutes related to it. *State v. Clemente-Perez,* 357 Or 745, 766, 359 P3d 232 (2015).

In addition, when, as here, a statutory term was adopted from a model act, this court "assume[s] that the legislature contemplated that that term would reflect its national understanding" under the model act at the time the model act was adopted in Oregon. *Wright v. Turner,* 354 Or 815, 825, 322 P3d 476 (2014). Thus, in interpreting a term from a model act, we also consider the persuasive value of "judicial interpretations of that term that would have been available to the legislature" at the time of adoption. *Id.* (citing *State ex rel Western Seed v. Campbell,* 250 Or 262, 270-71, 442 P2d 215 (1968), *cert den,* 393 US 1093 (1969) ("When one state borrows a statute from another state, the interpretation of the borrowed statute by the courts of the earlier enacting state ordinarily is persuasive.")).

Although this court has not previously addressed the specific issue framed by the Ninth Circuit, we have interpreted the term "ascertainable loss" to mean, generally, "any determinable loss," even a loss that cannot be measured exactly. *Weigel,* 298 Or at 137. In *Pearson,* the court stated that an "ascertainable loss" is one that is "capable of being discovered, observed, or established," and "objectively verifiable, much as economic damages in civil actions must be." 358 Or at 117. The court further made clear in *Pearson* that, in private actions under the UTPA, only *economic* losses may be recovered; "noneconomic losses cognizable in a civil action—such as physical pain, emotional distress, or humiliation * * * will not satisfy a private UTPA plaintiff's burden." *Id.* Notably, however, the court in *Weigel* explained that "[t]he private loss indeed may be so small that the common law likely would reject it as grounds for relief, yet it will support an action under the statute." 298 Or at 136.

Furthermore, we have explained that it is appropriate to take a broad view of what constitutes an ascertainable loss: "[I]n enacting ORS 646.638, the legislature was concerned as much with devising sanctions for the prescribed standards of trade and commerce as with remedying private losses, and * * * such losses therefore should be viewed broadly." *Weigel,* 298 Or at 135-36. That broad reading of ORS 646.638(1) is consistent with the legislature's intent that courts interpret the UTPA liberally to protect consumers. *See, e.g., Denson v. Ron Tonkin Gran Turismo, Inc.,* 279 Or 85, 90 n 4, 566 P2d 1177 (1977) (noting that "the legislative history of the Oregon Unlawful Trade Practices Act supports the view that it is to be interpreted liberally as a protection to consumers"). As one stakeholder explained to the legislature in 1971, "[t]he fundamental philosophy" of the [UTPA's] drafting committee was that none of the prohibited acts had sufficient social value to be allowed to continue and that the function of the law should be to "protect society," including protecting "gullible people from themselves." Tape Recording, House Committee on Judiciary, HB 1088, Feb 10, 1971, Tape 5, Side 1 (statement of Charles Merten).

B. *Acceptance of the Certified Question*

Returning to the certified question, the Ninth Circuit has asked whether plaintiff can show that she suffered an ascertainable loss as a result of defendant's violation of the UTPA "if the violation arises from a representation about the product's price, comparative price, or price history, but not about the character or quality of the product itself."[9] We observe two things about that question. First, in referring to circumstances in which a consumer has "purchased a product that the consumer would not have purchased at the price that the consumer paid," the question appears to reference our discussion of the "purchase price" theory in *Pearson,* which both the Ninth Circuit and the federal district court addressed in their own opinions. Second, because the Ninth Circuit distinguished cases such as plaintiff's—involving allegations related to false pricing as opposed to misrepresentations regarding a product's character or quality—that court appears to have understood *Pearson* to endorse the "purchase price" theory as to some violations of the UTPA but not necessarily as to others.

In our view, it was appropriate to accept the Ninth Circuit's certified question to address two issues: (1) whether this court has in fact previously recognized a purchase price theory for any purpose; and (2) whether, regardless of the outcome of that inquiry, it is a viable theory for purposes of the alleged UTPA violations in plaintiff's case. Because, however, it is not necessary to decide the viability of plaintiff's other theories of loss to address those purposes for which we accepted certification, we respectfully decline the Ninth Circuit's invitation to broaden our inquiry to consider the viability of those other

theories. Thus, we proceed to consider whether, under *Pearson* or otherwise, plaintiff's reliance on a purchase price theory to establish ascertainable loss is viable under the UTPA.[10]

C. *Our Focus on "Ascertainable Loss"*

We begin with a general observation regarding the UTPA: An individual consumer's ability to pursue a private right of action typically does not depend on which particular UTPA violation the complaint alleges. That is, the UTPA does not limit private rights of actions to specific unfair trade practices, whether involving a false representation as to a product's character or quality or, indeed, *any* false representation. Rather, under the plain terms of ORS 646.368(1),[11] if a person can prove an ascertainable loss resulting from any unfair trade practice identified in ORS 646.608, she may pursue a private right of action.[12] Thus, the proper focus here is on whether the complaint alleges an ascertainable loss, and not on whether it alleges a particular form of misrepresentation.

Here, therefore, plaintiff only was required to allege that, as a result of any practice prohibited under the UTPA, she suffered an ascertainable loss—that is, a loss capable of being observed or determined, however small.[13] *Pearson,* 358 Or at 117 (ascertainable loss is loss "capable of being discovered, observed, or established," and "objectively verifiable"); *Weigel,* 298 Or at 136-37 (ascertainable loss is "any determinable loss," including loss that cannot be measured exactly; loss may be "so small that the common law likely would reject it as grounds for relief"). We turn to whether plaintiff's purchase price theory of loss is an "ascertainable loss" under Oregon law.

D. *The Viability of Plaintiff's Purchase Price Theory*

As discussed above, the UTPA defines a host of unlawful trade practices, which may cause ascertainable losses in myriad ways. Ascertainable loss, in turn, can be established in various ways. The question before the court is whether plaintiff's purchase price theory is a viable means of establishing ascertainable loss under the UTPA. For the reasons that follow, we conclude that it is a viable theory of loss.

We begin with plaintiff's assertion that, in *Pearson,* this court recognized the viability of the purchase price theory. Because the validity of the purchase price theory of loss was not directly at issue in *Pearson,* a discussion of that case will place the court's statements regarding ascertainable loss in context and help explain their significance here.

In *Pearson,* the plaintiffs were two individuals who brought a putative class action alleging that Philip Morris had committed an unlawful trade practice under ORS 646.608(1)(e), which prohibits, among other things, representations that goods have characteristics, benefits, or qualities that they do not have. The plaintiffs alleged that Philip Morris had violated that provision by falsely representing that its "Marlboro Light" cigarettes would deliver less tar and nicotine than its regular "Marlboro" cigarettes. The principal issue before the court in that case was whether the plaintiffs had "carried their burden to show that * * * evidence common to the class will generate common answers for the individual members"—in other words, whether common issues predominated and, consequently, whether it was appropriate to certify the class. *Pearson,* 358 Or at 115. On that point, the court noted that the dispute between the parties centered on two elements of the plaintiffs' UTPA claim: proof of ascertainable loss and causation related to that loss.

The plaintiffs in *Pearson* had proffered two distinct theories of ascertainable loss: (1) they argued that they and the putative class members had purchased a product that was worth less than they had paid for it and that their damages arose from that "diminished value"—that is, the ascertainable loss was the difference between the value of the product as advertised and the value of the product that they received; and (2) they argued that they and other class members had purchased Marlboro Light cigarettes with the belief that they would deliver less tar and nicotine than regular Marlboros, and that they had not received what they had been deceptively led to believe they were buying. Under that theory, their damages would be measured by the amount that they had each paid for the defendant's product—that is, they argued that they were entitled to a full refund of the "purchase price."

With respect to the plaintiffs' "diminished value" theory of loss, the court observed that the undisputed evidence established that there was not (nor had there ever been) a price differential between Marlboro Lights and regular Marlboros. As a result, the plaintiffs had not paid more for cigarettes that purportedly would deliver less tar and nicotine than they would have paid for cigarettes without that feature. Thus, there was no "diminished value" to speak of. *Pearson,* 358 Or at 124 (observing

that "plaintiffs' theory of diminished value provides no logically viable theory on which classwide economic losses can be established"). The court therefore rejected the viability of the plaintiffs' diminished value theory of loss under the specific facts of that case, which in turn rendered it unnecessary to explore whether common issues predominated as to that theory.

However, upon turning to the plaintiffs' purchase price theory, the court reversed its approach, first focusing on whether common issues predominated. The court explained that a key issue in making that determination was whether, to prevail on their class claim, the plaintiffs would have to prove "reliance"—that is, whether the plaintiffs would have to prove that Philip Morris's misrepresentation had been a substantial factor in each class member's decision to purchase Marlboro Lights. *Id.* at 125-26. The court noted that ORS 646.638(1) (providing for a private right of action) does not expressly require reliance, but it does require that a person pursuing a private action under the UTPA demonstrate "an ascertainable loss * * * as a result of" an unlawful trade practice. In other words, the statute requires a plaintiff to show that the unlawful trade practice "caused" the ascertainable loss. *Id.* However, the court stated, "[w]hether reliance is required to establish causation turns on the nature of the unlawful trade practice and the ascertainable loss alleged." *Id.* at 126. And as to the case before it, where the alleged unlawful trade practice happened to be a misrepresentation regarding a product's features, the court held,

> "[c]ausation is logically established if a purchaser shows that, without the misrepresentation, the purchaser would not have bought the product and thus should be entitled to a refund. * * * As a function of logic, not statutory text, when the claimed loss is the purchase price, and when that loss must be `as a result of' a misrepresentation, reliance is what `connects the dots' to provide the key causal link between the misrepresentation and the loss."

Id. In rejecting the plaintiffs' argument that, under the circumstances of the case, they did not have to establish reliance on the part of all class members, the court stated:

> "It is not the nature of the misrepresentation in this case that requires proof of reliance. It is the misrepresentation coupled with plaintiffs' theory for having suffered a loss in the form of the purchase price because they did not get what they believed they were buying."

Id. at 127. Ultimately, the court determined that the plaintiffs had failed to show that they could litigate the issue of reliance—as relevant to their purchase price theory— through common evidence rather than through the testimony of the individual class members; they therefore had not carried their burden to show that, as to that element of their case, common issues predominated over individual ones. *Id.* at 135-36.

Notably, unlike its decision regarding the plaintiffs' diminished value theory, the court did not expressly determine whether the plaintiffs' purchase price theory could be viable under the facts of that case. However, the court presumed that it was valid for purposes of analyzing the classwide reliance issue. *See id.* at 126 (explaining requirement of proving individual causation when the theory of loss is that "the purchaser would not have bought the product and thus should be entitled to a refund," *i.e.,* "when the claimed loss is the purchase price"); *id.* at 127 (explaining that a showing of reliance was essential given the "plaintiffs' theory for having suffered a loss in the form of the purchase price because they did not get what they believed they were buying").

And, in her concurring opinion in *Pearson,* Justice Walters elaborated on why, in her view, a purchase price theory of loss—one in which there is no indication that a product's objective "value" is less than the product's represented value—should be cognizable under the UTPA. Relying on this court's decision in *Weigel,* Justice Walters explained that, because the UTPA was designed to encourage private enforcement of the law's standards, a party's losses should be viewed broadly. For that reason, she explained:

> "[P]rivate claims under the [UTPA] are not limited to those where a plaintiff shows `an economic loss in the sense of a difference between the price paid and some objective measure of market value.' The act also permits a claim when a plaintiff can establish a loss based on the fact he or she expended funds `for goods that are not as desired by the customer and represented by the seller irrespective of their market value to others.'"

Pearson, 358 Or at 142 (Walters, J., concurring) (quoting *Weigel,* 298 Or at 133, 134 (citations omitted)). Further, Justice Walters stated, a plaintiff "who can show that he or she would not have purchased a product but for the seller's misrepresentations about that product[ ] may seek return of the money paid for the product irrespective of its market value." *Id.* at 142-43.

As the foregoing suggests, the court in *Weigel* had earlier suggested that it might be possible to prove an ascertainable loss with evidence that the product was not what was bargained for, even if the plaintiff could not establish that the product's value was less than the seller had represented. In *Weigel,* the court agreed that a showing of diminished value was one way to prove ascertainable loss under the UTPA, but the court observed that it was not necessarily the only way to make that showing. The court posited that, in requiring proof of an ascertainable loss, the legislature may well have intended only to "exclude a civil action by a customer who was attracted by a forbidden misrepresentation but in fact did not act upon it, or who received immediate satisfaction at no expense when bringing the matter to the seller's attention." 298 Or at 134. In the court's view, that understanding of the statute was plausible, given that the UTPA authorized both public and private enforcement, and, at least as to public enforcement, did not require proof that any particular person had suffered an economic loss. The court noted:

> "The civil action authorized by ORS 646.638 is designed to encourage private enforcement of the prescribed standards of trade and commerce in aid of the act's public policies as much as to provide relief to the injured party. This is apparent from the section itself. It allows recovery of actual damages or $200, whichever is greater, plus punitive damages, costs, and attorney fees."

Weigel, 298 Or at 134-35 (footnote omitted). The court in *Weigel* then quoted with approval the Connecticut Supreme Court's interpretation of the phrase "ascertainable loss" in that state's own law:

> "`Whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known. * * * In one sense the buyer has lost the purchase price of the item because he parted with his money reasonably expecting to receive a particular item or service. * * * In another sense he has lost the benefits of the product which he was led to believe he had purchased. That the loss does not consist of a diminution in value is immaterial[.]'"

Id. at 136-37 (quoting *Hinchliffe v. American Motors Corp.,* 184 Conn 607, 614, 440 A2d 810, 814 (1981)). Thus, the court in *Weigel* agreed that, in at least some instances, ascertainable loss might well be established by proof that a consumer would not have purchased the product but for a seller's misrepresentation; in such cases, the plaintiff's loss would be measured by the purchase price of the item.

We recognize that, as in *Pearson,* the *Weigel* court's discussion of the purchase price theory was not the holding of that case. As we observed, the record in that case supported a finding of reduced value—it therefore was unnecessary to conclusively decide whether a purchase price theory of loss would be viable. *Id.* at 137 ("Scrutiny of the record reveals that the present case also does not turn on the question whether any objective loss in market value is required."). Here, however, we must decide whether that theory is viable under the UTPA. For much the same reason that we stated in *Weigel* —and Justice Walters articulated in her concurrence in *Pearson*—we conclude that the purchase price theory is a viable means of establishing ascertainable loss as required under ORS 646.638 and is, therefore, a cognizable theory of loss in plaintiff's case.

At its essence, the purchase price theory is that one person has been induced by another person's unlawful activities to pay money for something that the first person would not otherwise have bought. In plaintiff's case, what she wanted was items of clothing whose selling price had, at some earlier time, been what defendants' false price listings indicated. What she received, on the other hand, was merchandise that had never been offered for sale at those prices. Thus, whether or not those items ever *sold* at those higher price points, and whether or not defendants' alleged pricing scheme can be viewed as representing that the items previously had retail or market values equivalent to the prices shown on their product tags, plaintiff paid money to defendants for articles of clothing that she would not have bought had she known their true price history. The money that plaintiff is out as a result is her "loss."

Nothing in the UTPA ties the notion of "ascertainable loss" to proof that a person received something of lesser "value" than the person paid. As the Connecticut Supreme Court observed in discussing that state's statute, it should not matter that a person unlawfully led to believe that she was buying one thing ultimately received another thing of equal or even greater value. *Hinchliffe,* 184 Conn at 614, 440 A2d at 814 ("To the consumer who wishes to purchase an energy saving subcompact, for example, it is no answer to say that he should be satisfied with a more valuable gas guzzler.").

To hold that there is no ascertainable loss under those circumstances would suggest one of two things: either (1) the legislature, despite rendering this very practice unlawful and authorizing private citizens to enforce the UTPA, intended for a

person in plaintiff's shoes to be left without recourse under the UTPA; or (2) the parties' transactions took place in a perfectly efficient economy, one in which a person deceived into buying an unwanted product could, entirely without financial or personal cost, resell the item for exactly the price that she had paid for it.

Neither view is tenable. The first understanding, as the *Weigel* court and Justice Walters have explained, is inconsistent with the objectives of the UTPA, which are themselves indicated by the legislature's empowerment of private citizens to enforce its provisions—including the ones at issue in this case—and its allowance of nominal damages where substantial loss cannot be shown. And the latter ignores reality. We decline to attribute either rationale to the legislature, which would be necessary to hold that a person does not suffer an ascertainable loss so long as she receives something of equal or greater value than the money she was deceived into giving up for it.

In resisting that conclusion, defendants observe that, when, as in *Pearson* or the *Hinchliffe* hypothetical, a seller misrepresents a product's characteristics or quality, there necessarily is a difference in value between the product as advertised and the product as it really is. In contrast, they reason, when, as here, the misrepresentation concerns a product's price history, the represented value of the product at the time of sale is in fact the product's exact value. Thus, in defendants' view, the only harm that plaintiff has suffered is "subjective disappointment" that she failed to obtain the bargain that she believed she was getting, which defendants contend is not compensable as economic injury under the UTPA.

Defendants' distinction is misplaced. To the extent that *Pearson* addressed the issue, the court expressly recognized that there was *not* necessarily a difference in value whenever a product's characteristics differed from those that the seller had advertised. As explained above, the plaintiffs in *Pearson* had argued that, because there was a difference between the advertised product—cigarettes that were "light," delivering less tar and nicotine—and the product that they actually received —cigarettes that were not "light" when smoked normally—the product that they bought necessarily had a lesser value than the product they thought they were buying, and they were therefore entitled to damages in the amount of that difference. The court rejected that argument because Marlboro Lights were and always had been sold by Philip Morris at the same price as regular Marlboros. Thus, the distinction that defendant would make, between a seller who misrepresents a product's physical characteristics or quality and a seller who mispresents the product's price history, is not supported by our case law.

Defendants also point to several cases from other jurisdictions in which courts have rejected the purchase price theory, reasoning that, in arguing that a purchase of an item in reliance on a misrepresentation constitutes a loss of the purchase price, the plaintiffs were "conflat[ing] the deceptive act with the injury." *Naimi v. Starbucks Corp.,* 798 Fed Appx 67, 70 (9th Cir 2019) (memorandum opinion); *see also* *Shaulis v. Nordstrom, Inc.,* 865 F3d 1, 11 (1st Cir 2017) (construing Massachusetts law; concluding that viewing "mere purchase" as cognizable injury "merges the alleged deception with the injury"); *Small v. Lorillard Tobacco Co.,* 94 NY2d 43, 56, 720 NE2d 892, 898 (1999) (no injury alleged under New York law where the complaint "sets forth deception as both act and injury").

We disagree with the rationale expressed by those courts. In *Shaulis,* the only one of the above opinions to substantively explore the issue, the First Circuit considered whether, under the Massachusetts "Consumer Protection Act" (Chapter 93A), an allegation that the plaintiff had been "`induced' to make a purchase that she would not have made, but for" the defendant's pricing scheme was sufficient to state a claim. 865 F3d at 10. Similarly—but not identically—to ORS 646.638(1), Chapter 93A provides a private cause of action to a person "who has been injured by another person's use or employment of any method, act or practice declared to be unlawful" under that act. Mass Gen Laws, ch 93A, § 9(1); *see also id.* § 2(a) (prohibiting "unfair or deceptive acts or practices in the conduct of any trade or commerce"). Citing its own decision in an earlier case, the First Circuit observed that recent decisions of the Massachusetts Supreme Judicial Court "had `moved away' from the `per se' theory of injury supported by earlier cases—that is, a claim that an unfair or deceptive act alone constitutes injury— and had `returned to the notion that injury under [C]hapter 93A means economic injury in the traditional sense.'" *Shaulis,* 865 F3d at 7 (quoting *Rule v. Fort Dodge Animal Health, Inc.,* 607 F3d 250, 254-55 (1st Cir 2010) (brackets in *Shaulis*)).

That development, the First Circuit concluded, required it to reject the plaintiff's theory that she had been injured in the amount of the purchase price when she bought a sweater from the defendant's outlet store that sold for $49.97 but displayed a much higher "Compare At" price of $218.00 on the same tag. *Id.* at 4. Notably, however, none of the Massachusetts decisions that the First Circuit identified as exhibiting that recent trend involved an alleged "injury" comparable to that alleged by the plaintiff before it or, significantly, plaintiff in this case. Rather, those cases involved true "violation as injury" scenarios, one asserting that a retailer had unlawfully written customers' personal identification

information on credit card transaction forms—but had not used or mishandled that information in any way— and another raising a utility company's "fail[ure] to comply with certain storm preparedness regulations," when no storm had occurred in the relevant time frame. *Id.* at 8-9. As the First Circuit understood those decisions, they rejected the plaintiffs' claims as premised on alleged injuries that were "merely hypothetical or speculative." *Id.* at 9 (explaining that decisions treated plaintiffs' theories as "akin to a per se theory of injury," alleging "only a *possibility* of adverse consequences—which did not occur" (emphasis in original)).

In applying that understanding to the plaintiff's "induced purchase" theory, the *Shaulis* court never meaningfully engaged her argument that the cognizable injury she had suffered was the loss of money that she would have retained if the defendant had not unlawfully deceived her.[14] Instead, the court first identified a scenario in which a retailer engages in the same "Compare At" pricing scheme but fails to make a sale, and then observed that the plaintiff had not alleged that the sweater was poorly made or that its materials had been misrepresented. *Id.* at 11 (stating that the plaintiff identified "no objective injury traceable to the purchased item itself"). True, the first scenario *would* be a violation-as-injury case, but that was not the case before that court, nor does it reflect the facts of this case. And although the plaintiff's failure to allege that the product she purchased was in some way defective may have meant that she had not made out a different theory of "injury," it fails to illustrate how the plaintiff's "induced purchase" theory merged the deceptive act with the alleged injury—her expenditure of money. More to the point, the First Circuit's observation that the plaintiff had not identified any "injury traceable to the purchased item" appears misplaced: Under Chapter 93A—much like under ORS 646.368(1)—the injury must be "traceable" to the *violation,* and not to the item deceptively marketed. Mass Gen Laws, ch 93A, § 9(1) (providing cause of action to a person "who has been injured *by another person's use or employment of any method, act or practice declared to be unlawful*" under the act (emphasis added)).

Thus, insofar as plaintiff's purchase price theory in this case might fail under *Shaulis* and similar cases, we reject the underlying rationale that it somehow "merges" the alleged violation with the asserted loss. As the court acknowledged in *Weigel,* individuals who were "attracted by a forbidden misrepresentation but in fact did not act upon it, or who received immediate satisfaction at no expense when bringing the matter to the seller's attention," will have been subjected to deception, but they will not have suffered injury as a result. *Weigel,* 298 Or at 134. However, when a person acts in response to the deception by spending money that the person would not otherwise have spent, the person has been injured to the extent of the purchase price as a result of that deception. That is, there has been both a violation—the seller's misrepresentation as to the item's price history— *and* a resulting ascertainable loss—the expenditure of the purchase price. That is what ORS 656.638(1) requires.

To summarize, although neither *Pearson* nor *Weigel* held that the purchase price theory was a valid means of establishing ascertainable loss under the UTPA, neither forecloses such a theory, either, as the federal district court evidently believed. Moreover, both *Weigel* and Justice Walters's concurrence in *Pearson* express sound reasoning that, in our view, supports its recognition here. For much the same reasoning as that expressed in those opinions, we conclude that, if plaintiff can prove that she would not have purchased defendants' garments had defendants not misrepresented their price history, plaintiff will satisfy the "ascertainable loss" requirement under the UTPA.

III. CONCLUSION

In answer to the question propounded to us by the Ninth Circuit, we hold that, an "ascertainable loss" within the meaning of the UTPA can, under some circumstances, flow from a consumer's decision to purchase a product in reliance upon the retailer's misrepresentation as to price history or comparative prices. Thus, plaintiff's purchase price theory is a viable theory of ascertainable loss even in the absence of a showing that the seller misrepresented some characteristic or quality of the product sold.

The certified question is answered.

[*] Nelson, J., resigned February 25, 2023, and did not participate in the decision of this case. James, J., did not participate in the consideration or decision of this case.

[1] Defendants also operate non-outlet retail stores and sell clothing through their website, but plaintiff's claim before the Ninth Circuit solely concerns sales at the Eddie Bauer Outlet stores.

[2] Plaintiff also alleged that defendants violated ORS 646.608(1)(e) (by representing that the goods had characteristics or qualities that they do not have), ORS 646.608(1)(i) (by advertising goods with intent not to provide them), and ORS 646.608(1)(u) (by engaging in other unfair or deceptive conduct in trade or commerce).

[3] Plaintiff also sought to certify a class of similarly situated Oregon consumers. We have not been asked, and do not decide, whether any of plaintiff's theories of loss and related claims were susceptible to treatment on a classwide basis.

[4] Plaintiff did allege that she believed that the price of $39.99 listed on the product tag attached to the Fleece Zip was its "regular and usual price" and that it therefore was "worth and had a value of $39.99." Although plaintiff does not define "worth" or "value" in her complaint or briefing, we take from that context that "value" means retail or fair market value.

[5] The district court also made other rulings adverse to plaintiff, which plaintiff challenges on appeal in federal court. However, the Ninth Circuit's certified question did not put those rulings at issue in this proceeding, and we therefore do not discuss them.

[6] The Ninth Circuit acknowledged that it had only discussed plaintiff's "purchase price" theory at length, but it invited this court to weigh in on whether any of plaintiff's theories of loss were cognizable under the UTPA. *Clark II,* 30 F4th at 1157. As we explain below, we respectfully decline that broader invitation and, instead, likewise focus our consideration on the viability of the purchase price theory.

[7] Today, under the UTPA, more than 79 trade practices are identified and declared unlawful. ORS 646.608(1)(a) — (aaaa). Those include, as relevant here, making false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, ORS 646.608(1)(j), and including a price comparison in an advertisement unless the seller conspicuously identifies the origin of the price the seller is comparing to the current price, ORS 646.608(1)(ee).

[8] ORS 646.632 provides for enforcement actions in the public interest by the state. Unlike private claims brought under the ORS 646.638(1), state enforcement actions do not require proof that any consumer has suffered economic loss or other injury as a result of an unlawful trade practice. *Pearson,* 358 Or at 116.

[9] We note that the certified question appears to assume that a representation about a product's price, comparative price, or price history is *not* a representation about a characteristic of the product itself. We have never considered that question. However, because it has no bearing on the conclusions that we reach here, we—like the Ninth Circuit—assume for purposes of this opinion that a representation about a product's former price is not a representation about "the character or quality of the product itself."

[10] We express no view whether plaintiff's other proffered theories of ascertainable loss are viable under Oregon law.

[11] ORS 646.638(1) provides, in part:

"[With certain exceptions not relevant here,] a person that suffers an ascertainable loss of money or property, real or personal, as a result of another person's willful use or employment of a method, act or practice declared unlawful under ORS 646.608, may bring an individual action in an appropriate court to recover actual damages or statutory damages of $200, whichever is greater."

[12] Notably, in addition to prohibiting misrepresentations about a product's "characteristics, ingredients, uses, benefits, quantities or qualities," ORS 646.608(1)(e) also prohibits merchants from representing that goods have sponsorships or approvals that they do not have; ORS 646.608(1)(d) prohibits merchants from misrepresenting the geographic origin of a product; and, as pertinent here, ORS 646.608(1)(j) prohibits making "false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reduction. Other provisions involve representations that have nothing whatsoever to do with a product, such as ORS 646.608(1)(q), which prohibits misrepresentations as to how long it will take to deliver a good, and still others do not involve misrepresentations at all, such as ORS 646.608(1)(n), which prohibits soliciting potential customers telephonically or door-to-door without providing certain information, and ORS 646.608(1)(r), which prohibits inducing or attempting to induce membership in a pyramid club.

[13] As the Ninth Circuit recognized, nothing in this court's decision in *Pearson* suggests otherwise. The plaintiffs in *Pearson* alleged that Philip Morris had committed an unlawful trade practice under ORS 646.608(1)(e), which, as noted, prohibits false representations regarding the "sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities" of goods. In that case, the plaintiffs allege that Philip Morris had violated that provision by falsely representing that its "Marlboro Light" cigarettes would deliver less tar and nicotine than regular "Marlboro" cigarettes did. That is, unlike this case, the action in *Pearson* involved a provision that, at least as applicable in that case, necessarily required the plaintiffs to allege a misrepresentation concerning a product's character or quality. Thus, in that case, we had no reason to discuss the pleading requirements for a UTPA claim based on false price comparisons, nor did we suggest that such a claim would require an allegation based on "[s]ome misstatement as to a characteristic, quality, or feature of the product," as the district court held. *Clark I,* 2021 WL 1222521 at *6.

[14] As we understand the arguments in *Shaulis,* the plaintiff's "induced purchase" theory, including the alleged injury measured by the item's actual sale price, is indistinguishable from plaintiff's "purchase price" theory in this case.

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STATE ex rel Ellen F. ROSENBLUM, in her official capacity as Attorney General for the State of Oregon, Petitioner on Review,
v.
LIVING ESSENTIALS, LLC, a Michigan limited liability company; and Innovation Ventures, LLC, a Michigan limited liability company, Respondents on Review.

Nos. (CC 14CV09149), (CA A163980), (SC S068857).

Supreme Court of Oregon.

Argued and submitted May 5, 2022.
May 4, 2023.

On review from the Court of Appeals.[*]

Carson L. Whitehead, Assistant Attorney General, Salem, argued the cause and filed the briefs for petitioner on review. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Michael J. Sandmire, Buchalter Ater Wynne, Portland, argued the cause and filed the brief for respondents on review. Also on the brief was Rachel C. Lee, Stoel Rives LLP, Portland.

Chris Mertens, Mertens Law, LLC, Portland, filed the brief for *amicus curiae* Oregon Consumer Justice.

Nadia H. Dahab, Sugerman Dahab, Portland, and John W. Stephens, Esler Stephens & Buckley, Portland, filed the brief for *amicus curiae* Oregon Trial Lawyers Association.

Paloma Sparks, Oregon Business & Industry, Salem, filed the brief for *amicus curiae* Oregon Business & Industry Association.

Before Flynn, Chief Justice, Duncan, Garrett, and DeHoog, Justices, and Balmer and Walters, Senior Judges, Justices pro tempore.[**]

GARRETT, J.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

GARRETT, J.

This case arises under the Unlawful Trade Practices Act (UTPA), ORS 646.605 to 646.656.[1] The UTPA sets out an extensive list of unlawful business practices that the legislature has deemed harmful to Oregon consumers, and it provides for public and private enforcement actions.

The Attorney General brought this action against defendants, alleging that they had made representations about their products that violated two different provisions of the UTPA. The trial court ruled for defendants, explaining that the relevant provisions of the UTPA required the state to prove that the misrepresentations were "material to consumer purchasing decisions," and that the state had not done so. The Court of Appeals affirmed that decision. *State ex rel Rosenblum v. Living Essentials, LLC*, 313 Or App 176, 497 P3d 730 (2021). We allowed the state's petition for review to consider whether the lower courts correctly construed the statute. As explained below, we conclude, contrary to the trial court and the Court of Appeals, that the UTPA provisions at issue contain no "material to consumer purchasing decisions" requirement. We also reject defendants' argument that, without such a requirement, the provisions facially violate the free speech provisions of the state and federal constitutions. Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further proceedings.

I. BACKGROUND

A. *The UTPA Generally*

We begin with a brief overview of the statute, including procedural requirements relevant to the issues on review. The UTPA is a comprehensive statute that protects consumers from unlawful trade practices. *State ex rel Redden v. Discount Fabrics,* 289 Or 375, 382, 615 P2d 1034 (1980). The UTPA includes an extensive list of trade practices that are unlawful. ORS 646.607, ORS 646.608(1).

The UTPA is enforceable by private parties and by public prosecuting attorneys, including the Attorney General and local district attorneys. ORS 646.632 (public enforcement); ORS 646.638 (private civil actions); *Discount Fabrics,* 289 Or at 384-86 (discussing the differences in the elements to be proved and the burden of proof between the two types of actions). Public officials may bring an action in the name of the state to enjoin violations, seek restitution for individuals deprived of money or property, and seek civil penalties for willful violations of an injunction, voluntary compliance agreement, or the UTPA's listed practices. ORS 646.642; *Discount Fabrics,* 289 Or at 382 n 6.

In a public action, the prosecuting attorney must have probable cause to believe that a person "is engaging in, has engaged in, or is about to engage in" an unlawful trade practice. ORS 646.632(1). Before filing suit, the prosecuting attorney must provide notice to the person to be charged. ORS 646.632(2). Notice must include the alleged unlawful practice and the relief sought. *Id.* After receiving notice, the person to be charged has 10 days to respond to the prosecuting attorney with an "assurance of voluntary compliance" (AVC). *Id.* The AVC must describe the actions, if any, that the person to be charged will take to ameliorate the alleged unlawful practice. *Id.* The AVC is not an admission of a violation. *Id.* The prosecuting attorney, if satisfied with the AVC, can submit it to the court for approval and filing with the clerk of the court, if approved. *Id.* An AVC constitutes a judgment in favor of the state. *Id.* Once approved by and filed with the court, a violation of the AVC constitutes contempt of court. ORS 646.632(4).

The prosecuting attorney may reject an AVC as unsatisfactory if the AVC "does not contain a promise to make restitution in specific amounts or through arbitration," or if the AVC "does not contain any provision * * * which the prosecuting attorney reasonably believes to be necessary to ensure the continued cessation of the alleged unlawful trade practice, if such provision was included in a proposed assurance attached to the notice." ORS 646.632(3). If the AVC is rejected as unsatisfactory, the prosecuting attorney may initiate a civil action. *See* ORS 646.632 (providing that a prosecuting attorney may bring suit in the name of the state after complying with the notice and AVC requirements).

B. *Historical Facts*

We take the following undisputed facts from the opinion of the Court of Appeals and from our own review of the record.

Defendants manufacture, market, and sell 5-hour ENERGY, a beverage sold at retail in two-ounce bottles throughout the United States. Defendants advertise 5-hour ENERGY to consumers, including in Oregon, through radio, television, internet, and print media. The drink is available in "Original," "Extra-Strength," and "Decaf" versions. The Original formula contains 200 milligrams of caffeine per bottle, Extra-Strength has 230 milligrams of caffeine, and Decaf has 6 milligrams of caffeine. Each version also contains a proprietary blend of noncaffeine ingredients, including B-vitamins, amino acids, and other ingredients.

This action concerns certain representations that defendants made in Oregon about the characteristics of 5-hour ENERGY. Advertisements stated that the noncaffeine ingredients in the Original and Extra-Strength formulas provide extra energy, alertness, and focus. Specifically, the advertisements stated that 5-hour ENERGY "contains a powerful blend of B-vitamins for energy, and amino acids for focus"; that it "is packed with B-vitamins for energy, and amino acids for a sharp, focused mind"; and that it "contains a healthy powerful blend of B-vitamins for energy, amino acids for focus and better mood, and enzymes to help you feel it fast." Advertisements also stated that the Original and Extra-Strength formulas provide more energy than an equivalent amount of caffeine. Specifically, advertisements stated that 5-hour ENERGY products have "less caffeine than some Starbucks coffees, plus it has vitamins and nutrients." Defendants advertised the Decaf formula as providing alertness and focus, attributing those benefits to the noncaffeine ingredients. Specifically, defendants' website advertised the Decaf formula as "contain[ing] B-vitamins for energy and amino acids for focus, plus Choline," and stated that choline "is vital to the production of neurotransmitters in the brain that affect memory, intelligence and mood."

Throughout this opinion, we will refer to the foregoing representations regarding the noncaffeine ingredients as the "NCI representations."

Defendants also ran an "Ask Your Doctor" advertising campaign, with statements that 5-hour ENERGY had "asked over 3,000 doctors" to review the product. Those advertisements claimed that "over 73%" of the doctors who reviewed the product would recommend it to their "healthy patients who use energy supplements." Throughout this opinion, we will refer to those representations as the "Ask Your Doctor campaign."

The state initiated this action, alleging, as relevant to the issues on review, that the foregoing representations violated two provisions of the UTPA, ORS 646.608(1)(b) and (1)(e).[2] Those provisions state, respectively, that

> "(1) A person engages in an 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, characteristics, 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."

ORS 646.608(1). The state alleged that defendants violated paragraph (1)(e) by representing that the noncaffeine ingredients in 5-hour ENERGY provide energy and alertness, when those ingredients do not have those effects. The state further alleged that defendants' "Ask Your Doctor" campaign violated both paragraphs (1)(b) and (1)(e) by falsely implying that doctors approved of 5-hour ENERGY. The state sought equitable relief and civil penalties.

Before filing suit, the state notified defendants of the alleged violations, as required by ORS 646.632(2), and defendants submitted an AVC in response. The AVC promised, generally, that defendants would comply with the UTPA, and, specifically, that defendants would refrain from making "material representations that are false or mislead consumers acting reasonably to their detriment." The AVC also offered to pay $250,000 to the state to use "as allowed by law, including, but not limited to, restitution, consumer education, the Consumer Protection & Education Account established pursuant to ORS 180.095, or charitable purposes." The state rejected the AVC and subsequently filed its complaint as allowed by ORS 646.632(1), alleging that the AVC was inadequate under ORS 646.632(3). The state took the position that the AVC was not satisfactory because it contained only a promise to refrain from "material" misrepresentations that "misled consumers acting reasonably to their detriment," while, in the state's view, the relevant statutory provisions do not contain that qualification.

Following a bench trial, the trial court ruled in favor of defendants on all claims. In its written findings of fact and conclusions of law, the trial court listed the elements that the state needed to prove to succeed on its claim under ORS 646.608(1)(b) and (1)(e). One element, according to the trial court, of a paragraph (1)(b) claim for causing likelihood of confusion as to source, sponsorship, approval, or certification, was that the defendants' conduct "caused confusion or misunderstanding that was material to consumer purchasing decisions." Under paragraph (1)(e), the misrepresentation provision, the trial court stated that one required element was that defendants "made representations that were material to consumer purchasing decisions."

With respect to the state's paragraph (1)(e) claims based on the NCI representations, the trial court found that some of the representations were not inherently false and that other representations were nonactionable "puffery." It found that the nonpuffery representations "may imply falsely the effect of the specific [noncaffeine ingredients] in a bottle of [5-hour ENERGY] and the expected effect of five hours of energy," but it did not make particularized findings of falsity because of its ruling on materiality. The trial court also found that, for all formulas, none of the NCI representations was "willful," as required for the imposition of civil penalties.[3] The court then found that, for the Original and Extra-Strength formulas, none of the NCI representations "materially influence[d] consumer purchasing decisions." Because the trial court found that the state had failed to satisfy that materiality element for the Original and Extra Strength formulas, and the willfulness element for all three formulas, it ruled that the state had failed to establish that any NCI representation violated ORS 646.608(1)(e).

With respect to the state's paragraph (1)(b) and (1)(e) claims based on the "Ask Your Doctor" campaign, the trial court explained that there was "some evidence that the ads could be misleading," but it ultimately found that the representations at issue were not substantively misleading or confusing, nor were they material to consumer purchasing decisions. Thus, the court ruled for defendants on those counts.

Defendants requested approximately $2 million in attorney fees under ORS 646.632(8), which provides for mandatory attorney fees if a defendant prevails and if the court finds that the AVC was satisfactory and had been submitted in good faith to the prosecuting attorney. The trial court denied that request in a supplemental judgment, finding that the AVC was not satisfactory because the state's interpretation of the UTPA in rejecting the AVC had been reasonable at the time the AVC was submitted.

C. *The Appeal*

On appeal, the state raised seven assignments of error to the trial court's rulings on the merits. Among those assignments, the state argued that the trial court (1) erred by construing ORS 646.608(1)(b) and (1)(e) to include a materiality element; (2) applied the wrong legal standard for willfulness; (3) applied the wrong legal standard for a misrepresentation under paragraph (1)(e); and (4) applied the wrong legal standard for a likelihood of confusion or misunderstanding under paragraph (1)(b). Defendants cross-appealed the trial court's denial of attorney fees. The Court of Appeals affirmed the trial court's judgment on the merits and reversed the supplemental judgment denying attorney fees. *Living Essentials, LLC,* 313 Or App at 218-19.

The Court of Appeals agreed with the trial court that "material to consumer purchasing decisions" is a required element of both ORS 646.608(1)(b) and (1)(e). As to paragraph (1)(b), the Court of Appeals interpreted the phrase "cause[s] likelihood of confusion or of misunderstanding" by consulting dictionary definitions of those words, then reasoning that, to meet that standard, "the unlawful conduct *necessarily* must be material to the consumer's decision to buy the product." *Id.* at 187 (emphasis in original).

Turning to ORS 646.608(1)(e), the court interpreted the text to prohibit making misleading assertions "about various attributes that, by their nature, *can* have the potential to affect a purchasing decision," but noted that the text "does not expressly say whether it is limited to attributes that actually do have that potential, or whether it reflects a legislative judgment that *every* misrepresented characteristic— regardless of how innocuous—has the potential to mislead and should constitute a violation of the UTPA." *Id.* at 188 (emphases in original).

The Court of Appeals then consulted statutory context and legislative history, ultimately finding further support for the conclusion that paragraphs (1)(b) and (1)(e) both contain an implicit element of materiality. The court noted that the UTPA regulates "trade" and "commerce," which are defined as "directly or indirectly affecting the people of this state," a qualifier that the court took to indicate that "the acts to be remedied as unlawful trade practices are ones that have affected consumers—in other words, ones that materially bear on consumer purchasing choices." *Id.* at 188-89.

As to the legislative history, the Court of Appeals explained that the UTPA was "largely borrowed" from the Uniform Deceptive Trade Practices Act (UDTPA), which, in turn, was derived from the federal Lanham Trademark Act and the *Restatement (Second) of Torts. Id.* at 191-92. The court found those sources instructive, explaining that the Lanham Act "contemplate[s] that the prohibited deception be material to a consumer's purchasing decisions." *Id.* at 193. On the whole, the court concluded, it was

> "difficult to imagine how making actionable *immaterial* misrepresentations under ORS 646.608(1)(b) and (e) would serve to accomplish the purpose of the UTPA to prevent consumers from harm. There is no need to provide a remedy for misrepresentations that are irrelevant to consumers' purchasing decisions to accomplish the goal of protecting consumers."

Id. at 194 (emphasis in original). Observing, finally, that construing ORS 646.608(1)(b) and (1)(e) not to require materiality would raise concerns under Article I, section 8, of the Oregon Constitution, the Court of Appeals concluded that materiality is required. *Id.* at 194-96. That conclusion made it unnecessary for the court to address the state's other assignments of error described above.[4]

The state petitioned for review, which we allowed.

II. STATUTORY CONSTRUCTION

The question before us involves the trial court's interpretation of ORS 646.608(1)(b) and ORS 646.608(1)(e). Specifically, the question is whether those provisions contain an implicit requirement that defendants' acts were "material to consumer purchasing decisions."[5] Issues of statutory construction present questions of law that we review for legal error. *State v. Ramoz,* 367 Or 670, 704, 483 P3d 615 (2021). We resolve those questions by seeking to give effect to the intent of the legislature as demonstrated by the text, context, and any helpful legislative history. *State v. Gaines,* 346 Or 160, 171-72, 206 P3d 1042 (2009).

The statutory provisions at issue are ORS 646.608 (1)(b) and (1)(e). Again, those provisions state:

> "(1) A person engages in an 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, characteristics, 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."

ORS 646.608(1). The dispute in this case is whether those provisions contain an implicit additional requirement—that is, whether they require proof that the "likelihood of confusion or of misunderstanding," in paragraph (1)(b), or the "represent[ation]," in paragraph (1)(e), would be "material to consumer purchasing decisions." We will briefly summarize the parties' arguments before examining the text, context, and legislative history.

The state contends that the Court of Appeals erred in construing both provisions to include a "material to consumer purchasing decisions" requirement. The state observes that no such requirement is expressly contained in the text, and it disagrees with the Court of Appeals' conclusion that that requirement is implicit in the words that the legislature chose. The state contends that paragraphs (1)(b) and (1)(e) describe practices, among numerous others in the UTPA, that the legislature identified as hostile to consumers' interests and therefore inherently objectionable, regardless of how they may contribute to a consumer's purchasing decision in a particular context. The state also points out that the UTPA allows for both public enforcement by prosecuting attorneys and private enforcement by injured consumers, and that public enforcement actions, unlike private actions, do not require proof of concrete injury.

Defendants' response tracks the reasoning of the Court of Appeals. Defendants argue that, as a textual matter, paragraphs (1)(b) and (1)(e) implicitly require a showing that the act was "material to consumer purchasing decisions," and that such a requirement is supported by the context and purpose of the UTPA, as evidenced by the legislative history. Defendants argue that the UTPA regulates trade, which it defines in part as "directly or indirectly affecting" Oregonians, and that the legislature did not have an interest in prohibiting conduct that would not materially affect consumers by influencing their decisions about whether to purchase goods, real estate, or services.

A. *Text*

We begin with the text, as that is the best evidence of legislative intent. *Gaines,* 346 Or at 171-72.

Starting with paragraph (1)(b), the text supports the state's view that materiality is not a requirement. That provision states that a person engages in an unlawful practice if the person "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services." ORS 646.608(1)(b). The text is addressed to a "likelihood of confusion or of misunderstanding" about the listed attributes; it says nothing expressly about whether the potential confusion or misunderstanding must be of the sort that would materially affect a consumer's

purchasing decision. We thus consider whether that additional element is necessarily implied by the words that the legislature chose. As the legislature did not define those terms for purposes of the statute, we presume that the legislature intended for them to have their ordinary meanings. *See* Gaines, 346 Or at 171.

The key phrase in the statute is "[c]auses likelihood of confusion or of misunderstanding." ORS 646.608(1)(b). When used as a verb, as here, "cause" means "1: to serve as cause or occasion of: bring into existence: make" or, "2: to effect by command, authority or force." *Webster's Third New Int'l Dictionary* 356 (unabridged ed 2002). "Cause" is also a legal term of art, and it is defined as "[s]omething that produces an effect or result." *Black's Law Dictionary* 273 (11th ed 2019). We understand the first *Webster's* definition and the *Black's* definition to refer to the same thing: the catalyst in a cause-and-effect sequence. The second part of the *Webster's* definition seems inapposite here, as nothing in the statute suggests that any command, authority, or force is required to effect the "likelihood of confusion or of misunderstanding." Rather, the provision as a whole indicates that "causes" in paragraph (1)(b) simply refers to a cause-and-effect relationship. Thus, "causes" in paragraph (1)(b) means "to produce an effect or result" or "bring into existence."

"Likelihood" is defined as "probability ." *Webster's* at 1310. We thus understand the legislature to have used the phrase "causes likelihood of confusion or of misunderstanding" to mean that a person produces, creates, or brings about a probability that confusion or misunderstanding will occur.

The third relevant word is "confusion," which has multiple definitions, some of which are clearly not applicable here.[6] In context, the definitions that are potentially relevant are the following:

> "2 a: a state of being discomfited, disconcerted, chagrined, or embarrassed esp. at some blunder or check b: state of being confused mentally: lack of certainty, orderly thought, or power to distinguish, choose, or act decisively: perplexity [.]"

Webster's at 477.[7] Because the UTPA protects consumers by regulating commercial transactions in the marketplace, the references to a "lack of certainty" and the "power to distinguish, choose, or act decisively" seem more apt than the references to being "chagrined" or "embarrassed," although those are potentially relevant.

The final word in the phrase is "misunderstanding," which means:

> "1: a failure to understand: misinterpretation 2: disagreement, quarrel ."

Webster's at 1447. As between those definitions of "misunderstanding," the entire text of ORS 646.608(1)(b) suggests that former definition is more apposite; given the reference to "confusion" earlier in the statute, it seems more likely that the legislature was concerned with business practices that could lead consumers to have a failure of understanding or a misinterpretation as opposed to those that might lead to a disagreement or quarrel.

Considered together, then, the dictionary definitions suggest that ORS 646.608(1)(b) refers to conduct whereby a person (1) produces or brings about (2) a probability (3) that another person will experience either (i) a lack of understanding or a misinterpretation, or (ii) a state of being that involves mental confusion, or being discomfited or disconcerted, or a diminished ability to distinguish or choose, regarding (4) the "source, sponsorship, approval, or certification of real estate, goods or services." Nothing in those requirements implies that the representation must have a material influence on consumer purchasing decisions.

This is not the first case in which we have construed ORS 646.608(1)(b). In *Daniel N. Gordon, PC v. Rosenblum,* 361 Or 352, 367, 393 P3d 1122 (2017), ORS 646.608(1)(b) was applied to a law firm's debt collection practices. In that case, we explained that there are three elements to a claim under ORS 646.608(1)(b): (1) A "person" (2) "in the course of the person's business, vocation or occupation" (3) "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of real estate, goods or services." As to the third element, we examined the causal relationship required between the person's action and the resulting confusion. We explained that "the person must cause the likelihood of confusion or misunderstanding experienced by the other person." *Id.* at 369 (internal quotation marks omitted); *see id.* (interpreting the statute in the context of a company whose actions were likely to cause confusion about interest rates on debt and liability for attorney fees). We were not presented there with the question whether the statute includes a "materiality" requirement. We did say, however, that the elements of a violation of ORS 646.608 (1)(b) are "apparent on the face of the statute." *Id.* at 367.

In this case, the Court of Appeals held that the concept of materiality, though not apparent on the face of the statute, is necessarily implied:

> "[F]or a seller's unlawful trade practice to `bring into existence' or `effect by authority' a `state of being discomfited, disconcerted, chagrined, or embarrassed' or a `lack of certainty' or `power to distinguish, choose, or act decisively' with respect to its product, the unlawful conduct *necessarily* must be material to the consumer's decision to buy the product. Said another way, if a seller's allegedly unlawful practice is immaterial to the consumers' purchasing decisions, it is unlikely to create a state of discomfort, chagrin, or uncertainty, or affect the consumer's power to distinguish, choose, or act decisively with respect to that product."

Living Essentials, LLC, 313 Or App at 187 (emphasis in original).

We disagree with that conclusion. As a logical matter, the question whether a consumer is confused about some attribute of a product is not necessarily connected to the question whether the consumer intends to purchase the product. For example, a consumer might be led by a false advertisement to form an incorrect understanding about the "certification" status of a product, a misunderstanding that will exist regardless of whether the consumer has any interest in purchasing the product. The proposition that the only statements *capable* of misleading are those that are material to the purchasing decision is not correct. In short, the plain text of ORS 646.608(1)(b) does not include a materiality requirement, and we are not persuaded that materiality is necessarily or logically implied by the words that the legislature used.

We take the same view of the second provision at issue, ORS 646.608(1)(e), which makes it an unlawful practice to "represent[ ]" that goods, services, [and] real estate have certain attributes that they "do not have" (or that a "person" has certain attributes that the person "does not have"). "Representation" is defined for purposes of the UTPA as "any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact." ORS 646.608(2). Thus, paragraph (1)(e) prohibits making misrepresentations (including a failure to disclose), by speech or conduct, about certain attributes of goods, services, real estate, or persons. That text flatly prohibits such misrepresentations without regard to their possible effect. It is therefore even less supportive than paragraph (1)(b) of the interpretation that such conduct is actionable only if it is "material to consumer purchasing decisions."

In sum, the text of ORS 646.608(1)(b) and (1)(e) supports the state's argument that the materiality element described by the Court of Appeals does not exist in either provision. We proceed to consider statutory context and, to the extent it is helpful, legislative history.

B. *Statutory Context*

Context includes "other provisions of the same statute" and "the statutory framework within which the law was enacted." *PGE v. Bureau of Labor and Industries,* 317 Or 606, 611, 859 P2d 1143 (1993); *Klamath Irrigation District v. United States,* 348 Or 15, 23, 227 P3d 1145 (2010) (internal quotation marks and citation omitted). Relevant context for ORS 646.608(1)(b) and (1)(e) thus includes the rest of ORS 646.608(1) as well as the rest of the UTPA.

The purpose of the UTPA is to protect consumers from unlawful trade practices. *See, e.g., Denson v. Ron Tonkin Gran Turismo, Inc.,* 279 Or 85, 90 n 4, 566 P2d 1177 (1977) ("[T]he bill seeks to protect consumers rather than businesses."). In fulfilling the purpose of protecting consumers, the legislature has prohibited an extensive list of trade and business practices in ORS 646.607 and ORS 646.608(1).

Defendants' primary contextual argument is that the UTPA is aimed at restricting acts that "affect" Oregon consumers, as reflected in the statute's definitions of trade and commerce:

> "`Trade' and `commerce' mean advertising, offering or distributing, whether by sale, rental or otherwise, any real estate, goods or services, and include any trade or commerce directly or indirectly affecting the people of this state."

ORS 646.605(8). Defendants argue that "affect" means "to act upon" or "to produce a material influence upon or alteration in." In support of inferring a materiality requirement in ORS 646.608(1)(b) and (1)(e), the Court of Appeals relied on that definition of "trade" and "commerce" as well as two of the UTPA's remedial provisions. ORS 646.632(1) allows a

prosecuting attorney to bring suit to restrain "unlawful trade practices," and ORS 646.636 allows a court to order equitable relief to "restore" to a person money or property "of which the person was deprived" by means of an unlawful practice or "as may be necessary to ensure cessation of unlawful trade practices." The Court of Appeals reasoned that, in light of those provisions, "the UTPA `as a whole' appears to envision that the acts to be remedied as unlawful trade practices are ones that have affected consumers— in other words, ones that materially bear on consumer purchasing choices." *Living Essentials, LLC,* 313 Or App at 189.

We agree with the Court of Appeals that the UTPA as a whole reflects an intent to regulate trade practices that affect consumers. But it does not follow that the legislature considered the only practices that affect consumers to be those that would materially influence their purchasing decisions as to a particular good or service. The legislature could have determined that practices that lead to confusion or inaccurate perceptions about goods and services have negative effects on a well-functioning marketplace, *e.g.,* by undermining consumer confidence, and that those negative effects indirectly "affect" consumers regardless of whether consumers purchase a good or service. To put it another way, one can understand the UTPA as a legislative judgment that the specified unlawful practices are *inherently* "material" in the sense that they are all adverse to the societal interest in a healthy marketplace where consumers can expect goods and services to be as they are represented to be. Consequently, the reference in the definition of "`trade' and `commerce'" to "directly or indirectly affecting the people of this state" does not suggest that we should construe specific prohibitions in the UTPA to include additional requirements of materiality that are not expressed in their text. The more obvious contextual reading is that the legislature stated its general intention to regulate practices that affect consumers and then provided a list of specific unlawful practices that, in the legislature's judgment, do that.

That conclusion is also consistent with this court's decision in *Searcy v. Bend Garage Company,* 286 Or 11, 592 P2d 558 (1979), where we considered whether a different UTPA provision, ORS 646.608(1)(f), includes a "materiality" element. That provision makes it a violation to "[r]epresent[ ] that real estate or goods are original or new if the real estate or goods are deteriorated, altered, reconditioned, reclaimed, used or secondhand." The plaintiff bought a used car from defendant, who had checked a box on a sales form indicating that the car was new. The defendant argued that the plaintiff had not relied on that misrepresentation. *Searcy,* 286 Or at 15. Based on that argument, the defendant requested the following jury instruction:

> "A representation is an actual definite statement or actual definite conduct that is *material* and that was relied upon by the plaintiffs. It can also include concealment of a *material* fact that would normally have been relied upon by the plaintiffs and that defendant had a duty to disclose to plaintiffs."

Id. at 16 (emphases in original). The defendant argued that the term "representation" in paragraph (1)(f) requires materiality because materiality is expressly required by another provision, ORS 646.608(1)(t), which prohibits the failure to disclose a "known material defect or material nonconformity" upon delivery of real estate, goods, or services. This court rejected that view. *Searcy,* 286 Or at 16 ("Many of the enumerated unlawful trade practices involve representations. *See* ORS 646.608(1)(e), (f), (g), (j), (k), (l), and (s). But in the section defining `representation' the legislature did not require that a concealed fact be material.").

Defendants note that *Searcy* addressed a different UTPA provision, paragraph (1)(f); that it dealt with a jury instruction rather than the substantive elements of a claim; and that *Searcy* has "no bearing" on whether materiality is required for paragraphs (1)(b) and (1)(e). But *Searcy* is not so easily ignored. Defendants are correct that that case, strictly speaking, involved the correctness of the trial court's jury instruction about the meaning of "representation." But this court's conclusion that the instruction was correct, despite the omission of a reference to materiality, depended in part on its observation that ORS 646.608(1)(f), like several other provisions *including* paragraph (1)(e), prohibits certain representations without regard to materiality.

Searcy does not control our interpretation of paragraph (1)(e), but reading a materiality element into that paragraph would be difficult to reconcile with *Searcy*'s interpretation of paragraph (1)(f), which has a similar construction. Both provisions prohibit making inaccurate representations about a product or service. Neither provision expressly contains a materiality element. Ultimately, defendants offer no persuasive reason why this court should take a different view of one provision than we took of the other in *Searcy.*

C. *Legislative History*

Thus far, we have concluded that the plain text and context of paragraphs (1)(b) and (1)(e) are inconsistent with the inclusion of a materiality element. In that light, legislative history is likely to be unavailing. *Gaines,* 346 Or at 172 ("[W]e clarify that a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it.").

Tracking the analysis of the Court of Appeals, defendants argue that the UTPA provisions at issue were taken from the UDTPA, and that it was understood at the relevant time (*i.e.,* 1971) that the UDTPA requires materiality. For several reasons, that argument fails.

It is true that, in enacting the UTPA in 1971, the legislature adopted language from numerous provisions of the UDTPA, promulgated by the Uniform Law Commission. *See* Or Laws 1971, ch 744, § 7; Tape Recording, House Committee on Judiciary, HB 1088, Feb 10, 1971, Tape 5, Side 1 (statement of Attorney General Lee Johnson).[8] The UTPA provisions at issue here, ORS 646.608(1)(b) and (1)(e), were drawn from the list of deceptive trade practices in the UDTPA.[9] Those UDTPA provisions, however, do not contain a "materiality" requirement in their text, nor does the written commentary to those provisions refer to such a requirement. *See* Exhibit 5, House Committee on Judiciary, Subcommittee on Consumer Protection, HB 1088, Apr 5, 1971 (UDTPA draft with commentary). Thus, the UDTPA materials with which legislators were presented in 1971 would not have given them any indication that, in enacting UTPA provisions which make no reference to "materiality," they were somehow implicitly incorporating that element from other sources of law.

Defendants contend that the UDTPA was nevertheless understood to require materiality. Defendants have not cited any case law to support that proposition, but, even if they had, we have previously said that interpretations of the UDTPA "are of limited value in discerning the legislative intent behind the [UTPA]" because the "policy underpinnings of [the UTPA] (protection of consumers) differ somewhat from the Uniform Act (protection of businesses)." *Denson,* 279 Or at 90 n 4.[10] Defendants also argue that the UDTPA provisions that correspond to paragraphs (1)(b) and (1)(e) have their origins in case law under the federal Lanham Trademark Act and the *Restatement (Second) of Torts* (Tent Draft No. 8, 1963), both of which, defendants contend, require materiality for representations to be actionable. Defendants have produced no evidence from the legislative history, however, and we are aware of none, to suggest that legislators were made aware of the content of those sources of authority.

At bottom, defendants' contention is that, although a requirement of materiality is not found in the text of paragraphs (1)(b) and (1)(e), in the corresponding provisions of the UDTPA, or in the commentary to the UDTPA that the legislature considered, we should infer that the legislature implicitly intended to incorporate that requirement from other sources of law that legislators did not discuss. That argument falls far short of what would be necessary to overcome the seemingly unambiguous text of paragraphs (1)(b) and (1)(e).

We briefly address defendants' reliance on maxims of statutory construction. Defendants argue, as the Court of Appeals also concluded, that the canon of constitutional avoidance counsels in favor of construing the statute to include a materiality requirement. Defendants also raise an "absurd results" argument. However, when the text, context, and legislative history provide a single unambiguous interpretation of the statute, we do not reach such maxims. *Coos Waterkeeper v. Port of Coos Bay,* 363 Or 354, 371-72, 423 P3d 60 (2018). In this case, the text, context, and legislative history demonstrate that the statute unambiguously does not require proof that a defendant's conduct was "material to consumer purchasing decisions."

III. CONSTITUTIONALITY

Having concluded that ORS 646.608(1)(b) and (1)(e) do not contain a specific materiality requirement, we next address defendants' argument that, without such a requirement, those paragraphs violate the free speech provisions of the Oregon and federal constitutions, either facially or as applied to defendants' conduct.

A. *Article I, Section 8, of the Oregon Constitution*

The Oregon Constitution provides, "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Or

Const, Art I, § 8.

1. *The* Robertson *Framework*

Our analytical framework for evaluating a law's constitutionality under Article I, section 8, was established in *State v. Robertson,* 293 Or 402, 649 P2d 569 (1982). We have summarized that framework as follows:

> "[U]nder the first category of the *Robertson* framework, a law that is `written in terms directed to the substance of any "opinion" or any "subject" of communication' is unconstitutional unless the restriction is wholly confined within an historical exception. If the law passes that test but `is directed in terms against the pursuit of a forbidden effect' and `the proscribed means [of causing that effect] include speech or writing,' then the law falls into the second category of *Robertson* and is examined for overbreadth. If a law is `directed only against causing the forbidden effects,' it falls into the third category of *Robertson*. A law that falls into the third category can be challenged by arguing that the law `could not constitutionally be applied to [a person's] particular words or other expression.'"

State v. Babson, 355 Or 383, 393-94, 326 P3d 559 (2014) (internal citations omitted).

A "category one" law, which by its terms prohibits speech based on its substance, is unconstitutional unless it falls "wholly" within a historical exception such as perjury or fraud. The historical exceptions can be extended "to contemporary circumstances or sensibilities." *Robertson,* 293 Or at 433-34 ("If it was unlawful to defraud people by crude face-to-face lies, for instance, free speech allows the legislature some leeway to extend the fraud principle to sophisticated lies communicated by contemporary means.").

A "category two" law is one that, "by [its] terms, purport[s] to proscribe speech or writing as a means to avoid a forbidden *effect.*" *State v. Illig-Renn,* 341 Or 228, 235, 142 P3d 62 (2006) (emphasis added); *see also* Robertson, 293 Or at 415 (explaining that the coercion statute, which included the element of "mak[ing] a demand upon another person," was "directed in terms against the pursuit of a forbidden effect" and that the statute falls in category two because "speech is a statutory element in the definition of the offense"); *State v. Moyle,* 299 Or 691, 701-02, 705 P2d 740 (1985) (holding that a harassment statute, which prohibited "subject[ing] another to alarm by conveying a telephonic or written threat," was a category two law because verbal threats were an express element of the crime).

If a law falls in category two, then we analyze it for overbreadth. *State v. Plowman,* 314 Or 157, 164, 838 P2d 558 (1992). A category two law is unconstitutionally overbroad if it "more than rarely" reaches protected expression and is not susceptible to a narrowing construction." *State v. Rangel,* 328 Or 294, 300, 977 P2d 379 (1999) ("A `law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited.'" (Quoting Robertson, 293 Or at 410.)); *Illig-Renn,* 341 Or at 232 ("[A] statute that proscribes protected conduct only at its margins remains valid.").

"Category three" laws, on the other hand, prohibit forbidden results without referring to expression. *Plowman,* 314 Or at 164-65 (holding that a bias crime statute, prohibiting two or more persons from acting together based on their perception of the victim's race, color, religion, national origin, or sexual orientation to cause physical injury to the victim, is a category three law because the crime can be committed "without speaking a word" and without holding an opinion other than the perception of the victim's characteristics). Category three laws may be challenged only "as applied." *Id.* at 164.

Defendants argue that both ORS 646.608(1)(b) and (1)(e), without an implied element of materiality, violate Article I, section 8, either facially or as applied to defendants' conduct. As explained below, we reject defendants' facial challenges, and we decline to address their as-applied arguments in this posture.

2. *ORS 646.608(1)(e)*

Paragraph (1)(e) provides that a person engages in an unlawful practice if the person

> "[r]epresents that real estate, goods or services have sponsorship, approval, characteristics, 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."

Defendants argue that ORS 646.608(1)(e) is a category one law because it "expressly prohibits speech" about the attributes that goods have. The state agrees that paragraph (1)(e) is a direct restriction of speech that is properly analyzed under *Robertson* category one. However, the state argues that the statute is constitutional because it falls within the historical exception for fraud.

We agree that paragraph (1)(e) is a category one law because, by its terms, it prohibits speech based on its substance. The statute makes it unlawful to "represent" that a product has attributes that the product does not have. And the UTPA defines a "representation" in terms of communication: "any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact." ORS 646.608(2). Whether the representation violates paragraph (1)(e) turns on the substance of the representation itself rather than on any resulting effect: False representations violate the statute, while true representations do not. Thus, ORS 646.608(1)(e) prohibits expression based on its substance.

Category one laws are unconstitutional under Article I, section 8, unless they fall within a historical exception. To be within a historical exception, "the scope of the restraint [must be] wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson,* 293 Or at 412. Examples of such exceptions are perjury, solicitation, forgery, extortion, and fraud. *Id.*

The state argues that ORS 646.608(1)(e) is permissible under Article I, section 8, because the framers of Oregon's constitution would not have understood the protection for free expression to reach deceptive representations about the attributes of goods, services, or real estate. In other words, the statute falls within the historical exception for fraud. Defendants argue that the fraud exception is inapplicable because paragraph (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.[11]

The concept of fraud was "well established" when Oregon's free expression guarantee was adopted. *See Robertson,* 293 Or at 433-34; *see, e.g.,* Or Laws 1854, ch 4, § 30 (criminalizing the act of obtaining money, goods, or merchandise by false pretenses with intent to defraud); General Laws of Oregon, Crim Code, ch III, § 565, p 415 (Deady & Lane 1843-72) (providing for imprisonment and civil damages for anyone convicted of "gross fraud or cheat at common law").

This court has also held that, in determining whether a historical exception applies, an exact match is not required between a contemporary restriction on speech and the analogous restriction that would have been recognized in 1859. *See Robertson,* 293 Or at 433-34 ("Constitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle."). Thus, not every element of common-law fraud must be present for a contemporary law to fall within the historical exception for fraud. Rather, the exception applies if the law falls within "the spirit of Article I, section 8," by "remain[ing] true to the initial principle." *State v. Ciancanelli,* 339 Or 282, 318, 121 P3d 613 (2005).

Defendants are correct that paragraph (1)(e) does not require a showing of culpability—it does not require an intent to deceive, nor does it require knowledge of the falsity of a representation. However, this court has already concluded that those elements of the common-law tort are not required to bring a law within the historical fraud exception. In *Vannatta v. Keisling,* 324 Or 514, 931 P2d 770 (1997), *overruled on other grounds, Multnomah County v. Mehrwein,* 366 Or 295, 462 P3d 706 (2020), we considered whether a statutory provision that penalized a candidate for violating a pledge to abide by campaign expenditure limits violated Article I, section 8. *Id.* at 543-44. We explained that election laws that are "targeted at fraud" fit within the constitutional exception. *Id.* at 544. The fact that the statute at issue did not track all the elements of the common-law tort—*e.g.,* it did not require a culpable mental state—did not prevent this court from concluding that the statute was constitutional, because the statute was permissibly aimed at "misleading conduct." *See id.* at 544-45. On the contrary, we noted that "[t]he fact that a candidate may have intended to abide by expenditure limitations when he or she made the pledge, and only later decided to ignore that promise, does not make the failure to abide by the promise any less a fraud on the voters who have relied on the candidate's Voters' Pamphlet statement to choose their candidate." *Id.* at 544 n 28. The possibility that some voters could have relied on a candidate's pledge was sufficient to apply the fraud exception, irrespective of the candidate's mental state. *See also State v. Moyer,* 348 Or 220, 234-38, 230 P3d 7 (2010) (citing *Vannatta* for the rule that "a statute that prohibits fraud on the electorate need not include an intent element to come within a historical exception").

Thus, although defendants assert that the historical understanding of fraud "punishes only culpable speech," this court has already recognized that the historical understanding was more expansive, at least for misrepresentations thought to affect the public interest. Our opinion in *Moyer* discussed the historical recognition of "misrepresentations that contribute[ ] to `public inconvenience.'" 348 Or at 234 (citing William Blackstone, 4 *Commentaries on the Laws of England* 41-42 (1769)). We noted that "providing false identifying information to * * * public bodies" would have been recognized as such an actionable misrepresentation, *id.,* and concluded that it was unlikely that the framers of Oregon's constitution intended "false communication in connection with public records and matters of legitimate governmental concern to be protected by Article I, section 8's guarantee of the free expression of opinion." *Id.* at 236. In reaching that conclusion, we expressly rejected the defendants' argument that an intent to deceive was required. *Id.* at 237 (citing *Vannatta,* 324 Or at 544 n 28).[12]

Though it did not address the fraud exception, our decision in *Ciancanelli* provides further support for the conclusion that the framers of Article I, section 8, would not have expected it to protect false representations of the sort described in ORS 646.608(1)(e). In *Ciancanelli,* we explained that, "among the various historical crimes that are `written in terms' directed at speech, those whose *real* focus is on some underlying harm or offense may survive the adoption of Article I, section 8, while those that focus on protecting the hearer from the message do not." 339 Or at 317 (emphasis in original); *id.* at 318 (explaining that framers were more likely to accept restrictions on speech that "have at their core the accomplishment or present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society"). Thus, where the direct prohibition on speech exists to prevent a non-speech harm, such as fraud, the conflict between that objective and the fundamental free-speech principle enshrined in Article I, section 8, is less stark than where the legislature acts to restrict speech based on a perceived harm inherent in the speech itself.

That understanding further persuades us that paragraph (1)(e) falls within the historical exception for fraud. Although paragraph (1)(e) is written in terms directed to the substance of speech, it is plain that the provision, like others in the UTPA, is aimed not at shielding people from supposedly detrimental messages or ideas themselves—an objective that would be anathema to Article I, section 8—but at the goal of protecting people from the *economic* harm that, in the legislature's judgment, arises from deceptive conduct in the market for goods, services, and real estate. That principle was familiar to the common law, as evidenced by, among other things, the law of trademarks. *See* *Amoskeag Manufacturing Company v. Spear,* 2 Sand Ch 599, 605-06 (NY Ch 1849) (explaining the "nature of the wrong" of trademark infringement as a combination of deceiving the public and diverting profits from another business); *Avery & Sons v. Meikle & Co.,* 81 Ky 73, 87 (1883) (describing the harm caused by deceiving consumers by copying the appearance of the plaintiff's goods as including "the inculcation of truth and honor in the conduct of trade and commerce"); *see also Restatement (Third) of Unfair Competition* § 2 comment b (1995) (explaining the historical development of common law aimed at preventing economic harm caused by deceptive marketing).

In short, ORS 646.608(1)(e) is a restriction on speech that serves a purpose—avoidance of economic harm based on deceptive commercial practices—that was recognized when Article I, section 8, was drafted and is consistent with how the framers would have conceived of fraud. The statute has "at [its] core" the prevention of an "underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society," *Ciancanelli,* 339 Or at 318, which makes it unlikely that the framers would have viewed it as incompatible with the free speech guarantee that they enshrined in the constitution. Accordingly, we conclude that paragraph (1)(e)'s prohibition on false representations about the "sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities" of a good, service, or real estate, made in the course of business, is not facially unconstitutional.

3. *ORS 646.608(1)(b)*

Paragraph (1)(b) provides that a person engages in an unlawful trade practice if the person "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services." ORS 646.608(1)(b). Defendants argue that that provision is unconstitutional either because it is a *Robertson* category one law that does not fall within a historical exception, or because it is a *Robertson* category two law that is overbroad. The state argues that paragraph (1)(b) is a *Robertson* category three law that is not subject to a facial challenge; alternatively, the state argues that the provision is a category two law that is reviewed for overbreadth, and that the statute is not overbroad. For the reasons that follow, we agree with the state that paragraph (1)(b) is a category three law.

On its face, paragraph (1)(b) does not regulate speech. Rather, the statute prohibits a result—"caus[ing] a likelihood of confusion or of misunderstanding." By its terms, the statute neither prohibits expression based on its substance (category one) nor identifies expression as a proscribed means of producing the specified result (category two). If paragraph (1)(b) is properly understood not to directly regulate speech at all, then it is not susceptible to a facial challenge; rather, a person who contends that the statute has been applied in a manner that unconstitutionally burdens protected expression is limited to bringing an as-applied challenge. *Illig-Renn,* 341 Or at 232.

Defendants argue that, although ORS 646.608(1)(b) is not expressly written in terms directed at speech, it must nevertheless be evaluated under *Robertson* category one or category two as an example of a "creatively worded" law that can only be violated through expression. Defendants' argument has its roots in several of this court's cases but ultimately fails.

As discussed earlier in this opinion, the fundamental difference between *Robertson* categories one and two, on the one hand, and category three, on the other, is that a category three law is not written in terms directed to expression at all. The general rule of *Robertson* is that, to trigger scrutiny under categories one or two, a law must *expressly* prohibit expression based on its substance or as a means of producing a targeted result—that is, expression must be a "statutory element." *Illig-Renn,* 341 Or at 235 (reiterating that we have limited facial overbreadth challenges to statutes that "more or less expressly identify protected speech as a statutory element of the offenses that they define"). The critical distinction is that "between making speech the crime itself, or an element of the crime, and using speech to *prove* the crime. * * * [A] defendant who makes a facial challenge to a statute under Article I, section 8, must demonstrate the former—that the legislature intended to punish the speech itself." *Plowman,* 314 Or at 167 (emphasis added).

This court has, however, observed a theoretical exception to the rule that expression must be an "element" of the law to allow for a facial challenge. That exception recognizes the possibility that laws can be creatively drafted to avoid prohibiting speech as such, while making it nonetheless clear that objectionable speech is the focus of the law. We first addressed that possibility in *Moyle,* in which we explained that "[t]he constitutional prohibition against laws restraining speech or writing cannot be evaded simply by phrasing statutes so as to prohibit `causing another person to see' or `to hear' whatever the lawmakers wish to suppress." *Moyle,* 299 Or at 699. We noted that, in principle, the legislature has plenary power to protect persons from whatever conduct the legislature regards as harmful, subject to constitutional limits. "A difficulty arises, however, when a statute defines a crime in terms of causing a kind of harm which necessarily results only from speech or writing, so that the statutory definition is only the other side of the coin of a prohibition of the speech or writing itself." *Id.*

We proceeded to explain that the statute in that case was *not* such a law. In *Moyle,* the statute prohibited harassment, "defined as alarming another person by conveying a telephonic or written threat to inflict serious physical injury or commit a felony." *Id.* at 693. This court held that the effect described—causing fear of injury to persons or property—did not "merely mirror[ ] a prohibition of words themselves" because it could be caused by means other than expression. *Id.* at 701. Thus, the statute was not a *Robertson* category one law. However, because the statute expressly addressed the use of words to *cause* the forbidden effect, it required scrutiny for overbreadth (category two).

Similarly, in *Illig-Renn,* we considered the constitutionality of the then-extant version of ORS 162.247(1)(b), which made it a crime to "refuse[ ] to obey a lawful order by [a] peace officer," and held that the statute was not subject to a facial challenge. 341 Or at 230. We reiterated that,

> "in the context of challenges under Article I, section 8, of the Oregon Constitution, this court has limited facial overbreadth analysis to statutes that more or less expressly identify protected speech as a statutory element of the offenses that they define, or that otherwise proscribe constitutionally protected speech `in [their] own terms.' And, more to the point, we have stated specifically that, when a statute does *not* refer to protected speech `in terms,' it is not an appropriate subject for overbreadth analysis and may only be challenged `as applied.'
>
> "The foregoing does not mean that we will ignore a clear case of facial unconstitutionality or overbreadth merely because the statute manages to avoid any direct reference to speech or expression. As this court acknowledged in [*Moyle*], `[t]he constitutional prohibition against laws restraining speech or writing cannot be evaded simply by phrasing statutes so as to prohibit "causing another person to see" or "to hear" whatever [speech or expression] the lawmakers wish to suppress.' But, in general, we will not consider a facial

> challenge to a statute on overbreadth grounds if the statute's application to protected speech is not traceable to the statute's express terms."

341 Or at 235-36 (emphasis in original; internal citations omitted). As to the statute challenged in that case, this court rejected the defendant's argument that the statute expressly restrains expression because the refusal to obey a police officer's order "conveys a message of opposition or dissent whether by verbal means or an expressive act." We reasoned that the statute is concerned with the "act" of refusing to obey an order, and the fact that such an act might also be intended to convey a message was not relevant. *Id.* at 237. In short, we applied the general rule that where a statute is not expressly aimed at restricting speech, analysis for facial overbreadth was inappropriate, irrespective of the statute's foreseeable effect on expression.

Our most recent discussion of these issues was in *Babson.* In that case, the defendants argued that a legislative rule regulating the use of the steps of the state Capitol between 11 p.m. and 7 a.m. required analysis under *Robertson* category two because it had an "`obvious and foreseeable' application to speech"—*i.e.,* it would prevent the defendants from staging an around-the-clock political protest. 355 Or at 398. This court rejected that argument. In doing so, we explained:

> "When expression is a proscribed means of causing the harm prohibited in a statute, it is apparent that the law will restrict expression in some way because expression is an element of the law. For that type of law, the legislature must narrow the law to eliminate apparent applications to *protected* expression. However, if expression is not a proscribed means of causing harm, and is not described in the terms of the statute, the possible or plausible application of the statute to protected expression is less apparent. That is, in the former situation, every time the statute is enforced, expression will be implicated, leading to the possibility that the law will be considered overbroad; in the latter situation, the statute may never be enforced in a way that implicates expression, even if it is possible, or even apparent, that it *could* be applied to reach protected expression. When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them."

Id. at 400 (emphasis in original; internal citations omitted). We then discussed our previous holdings in *Moyle* and *Illig-Renn* and reaffirmed that, as a general rule, to warrant review for facial overbreadth, a law must expressly restrain speech; a statute that does not directly refer to speech is not subject to overbreadth analysis, even though it may have "obvious" applications to speech. The legislative rule in *Babson* did not expressly restrict speech, nor was it "simply a mirror of a prohibition on words," 355 Or at 403, of the sort that *Moyle* and *Illig-Renn* cautioned would still subject a statute to a facial challenge.

In sum, this court in *Moyle, Illig-Renn,* and *Babson* has described a theoretical category of laws that do not expressly restrict speech but that, nonetheless, are appropriately reviewed for facial overbreadth because they are functionally indistinguishable from such express restrictions—they "mirror" a prohibition on the words themselves. As we noted in *Moyle,* a law that makes it unlawful to cause someone to "see" or "hear" something is nothing but an alternative way of prohibiting expression. We refer to that category as "theoretical" because this court has not yet decided a case in which a law was held to fall within it. Rather, as the foregoing cases illustrate, even laws that have obviously foreseeable applications to speech are not properly viewed as facial restrictions *of* speech without an indication that "the legislature intended to punish the speech itself." *Plowman,* 314 Or at 167.

With that background, we return to ORS 646.608 (1)(b). The statute prohibits a person, in the course of the person's business, from "caus[ing] a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services." Unlike many of the other prohibitions that immediately follow it in the UTPA, which use terms such as "represent," "solicit," "disparage," and "advertise" to describe what a person may not do, paragraph (1)(b) is written without any reference to communication. It may be, of course, that speech is the means through which the forbidden result—the causation of a likelihood of confusion—will often come about. It may even be said that paragraph (1)(b) has obvious and foreseeable applications to speech. But that was also true of the laws in *Moyle, Illig-Renn,* and *Babson.* Here, the text and context suggest that, far from desiring to "punish the speech itself," *Plowman,* 314 Or at 167, the legislature was indifferent as to whether the likelihood of confusion is brought about by speech or by some other, nonexpressive means. The fact that paragraph (1)(b) does not mention expression, while so many other prohibitions in subsection (1) do, tends to suggest that, when it came to paragraph (1)(b), the legislature contemplated that speech is *not* the only means by which a likelihood of confusion might be created, and that the legislature intended to forbid that result

whether caused by speech or not. Thus, paragraph (1)(b) is not the sort of "mirror of a prohibition on words" that we have said would trigger overbreadth analysis.

In arguing to the contrary, defendants contend that paragraph (1)(b) can only be violated through speech. Even assuming that that premise would justify analysis under *Robertson* categories one or two,[13] we are not persuaded by defendants' bare assertion that "expressive communication is the only way that a person could cause confusion as to goods' approval or certification." Although this court has previously recognized that "selling is a form of communicative behavior," that statement came in a case that involved doorto-door solicitation. *City of Hillsboro v. Purcell,* 306 Or 547, 555, 761 P2d 510 (1988). We have never held that all conduct associated with the sale of goods and services is expressive. Here, the statute could reach such things as the manner in which products are packaged, the location at which they are sold, or even where they are placed on a store shelf, if a likelihood of confusion or misunderstanding were likely to result. Suppose, for example, a person sets up a sales booth at a location where the public could infer, based on signage created by other sellers, that *all* products being sold at that location share common "approval" or "certification." If the person's product lacks such approval or certification, a likelihood of confusion or misunderstanding could be created simply by the person's choice of location.

For the foregoing reasons, we conclude that ORS 646.608(1)(b) is a category three law under *Robertson* that is not subject to a facial challenge.

4. *Defendants' remaining "as-applied" challenges*

Defendants alternatively argue that, if paragraphs (1)(b) and (1)(e) are not unconstitutional on their face, they are unconstitutional as applied to defendants' conduct. Neither party has presented well-developed arguments on that question, and we decline to reach it. As explained earlier in this opinion, the trial court found in defendants' favor on multiple grounds, which the state separately challenged on appeal. Having concluded that materiality is a required element of the statutory claims that the state did not prove, the Court of Appeals did not reach all of the state's assignments of error. Thus, our conclusion today that materiality is not a required element does not mean that the state will ultimately prevail on any of its claims. The Court of Appeals on remand will have the opportunity to consider the other bases for the trial court's judgment in defendants' favor (including its conclusions regarding the legal standard for willfulness, the legal standard for false representation under paragraph (1)(e), and the legal standard for likelihood of confusion or misunderstanding under paragraph (1)(b)). Depending on the resolution of those issues, the trial court judgment could be affirmed on other grounds, which would render it unnecessary to consider defendants' argument that paragraphs (1)(b) and (1)(e), as applied to their conduct, violate Article I, section 8, of the Oregon Constitution. Accordingly, it is premature for this court to consider that issue.

B. *The First Amendment to the United States Constitution*

We now turn to defendants' argument that, without a requirement of materiality, paragraphs (1)(b) and (1)(e) violate the First Amendment to the United States Constitution.

Under the First Amendment, states may regulate false or deceptive commercial speech. *Friedman v. Rogers,* 440 US 1, 10 n 9, 99 S Ct 887, 59 L Ed 2d 100, *reh'g den,* 441 US 917 (1979) ("By definition, commercial speech is linked inextricably to commercial activity: while the First Amendment affords such speech `a limited measure of protection,' it is also true that `the [s]tate does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.'"). The Supreme Court has held that commercial speech receives "a different degree of protection" than other types of speech. *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 US 748, 771 n 24, 96 S Ct 1817, 48 L Ed 2d 346 (1976). It has explained that commercial speech is more objective and verifiable than other types of speech, and that commercial speech is less at risk of being "inhibited by proper regulation." *Friedman,* 440 US at 10.

The test for determining whether a regulation of commercial speech violates the First Amendment comes from *Central Hudson Gas & Elec. v. Public Serv. Comm'n,* 447 US 557, 566, 100 S Ct 2343, 65 L Ed 2d 341 (1980). That four-part test first examines whether the speech at issue is protected by the First Amendment: that is, whether it concerns lawful activity and is not misleading. If, under that prong, the speech concerns unlawful activity or is "more likely to deceive the public than to inform it," the government can prohibit it as unprotected speech. *Id.* at 563. However, if the communication concerns lawful activity and is not misleading, "the government's power is more circumscribed." *Id.* at 564. In that scenario, the

speech is protected, and we analyze the other three steps: whether the government has a substantial interest, whether the regulation directly advances that interest, and whether the regulation is not more extensive than necessary to serve that interest. *Id.*

The regulations at issue affect speech that "[c]auses likelihood of confusion or of misunderstanding" and "representations" that a product has certain characteristics that it does not have. Because ORS 646.608(1)(b) and (1)(e) concern misleading commercial speech, they are permissible under *Central Hudson.*

IV. CONCLUSION

From the text, context, and legislative history, we conclude that violation of ORS 646.608(1)(b) and (1)(e) may be established without proof that a defendant's conduct was material to consumer purchasing decisions. We further conclude that neither provision is facially unconstitutional.[14]

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

[*] On appeal from the Multnomah County Circuit Court, Kelly Skye, Judge. 313 Or App 176, 497 P3d 730 (2021).

[**] Nelson, J., resigned February 25, 2023, and did not participate in the decision of this case. Bushong and James, JJ., did not participate in the consideration or decision of this case.

[1] This case was brought in 2014. ORS 646.608, ORS 646.607, and ORS 646.605, which are all part of the UTPA, have been amended since then. However, those amendments did not affect the provisions at issue in this case, and they do not affect our analysis. Therefore, all references in this opinion to chapter 646 of the Oregon Revised Statutes are to the current version of the statute unless stated otherwise.

[2] The state alleged other UTPA violations that are not at issue on review.

[3] The UTPA provides that a showing of a "willful" violation is required for the imposition of civil penalties whether an action is brought by a private party, ORS 646.638(1), or by a public prosecuting attorney, ORS 646.642(3). Willfulness is not an element of a violation of ORS 646.608(1), however. Thus, the trial court's ruling on willfulness is not pertinent to the questions we address on review, which concern whether ORS 646.608(1)(b) and (1)(e) require a showing of materiality to consumer purchasing decisions and, if they do not, whether those provisions are unconstitutional.

[4] The Court of Appeals also addressed defendants' cross-appeal, which challenged the trial court's denial of attorney fees. Because the AVC promised to pay $250,000 to the state for "restitution," among other purposes, and it stated that defendants would comply with Oregon law, the Court of Appeals concluded that the AVC was satisfactory as a matter of law. Accordingly, the court reversed the trial court's denial of attorney fees and remanded to the trial court for a determination of the amount of fees due to defendants.

[5] Neither party develops an argument explaining whether this element, if it existed, would refer to a reasonable consumer, a specific consumer, or a group of consumers. Because we reject defendants' argument regarding materiality altogether, we need not address that question.

[6] Those definitions include "overthrow" and "defeat" as in the fall of a city; "a situation or condition marked by lack of order, system, arrangement"; and the legal definition of "a merging of two rights in one or of two apparently or really antagonistic interests in one." *Webster's* at 477.

[7] Related definitions include "3 a: an act of confusing, of mixing, pouring, blending, or heaping together in disorder with identities and distinctions blended b: an act of mistaking one thing for another, of failing to note distinctions, and of falsely identifying <~ between public and private morality-D.W. Brogan>." *Webster's* at 477. However, those definitions, which focus on an "act" rather than an effect, fit poorly in the context of ORS 646.608(1)(b) and the UTPA as a whole, which are concerned with effects on consumers.

[8] A digitized version of that tape recording is available at http://records.sos.state.or.us/ORSOSWebDrawer/Record/7812750 (accessed Apr 25, 2023).

[9] The UTPA was based on more than one model statute, but it appears clear that the list of prohibited practices came in part from the UDTPA. Tape Recording, Senate Committee on Consumer Affairs, SB 50, Feb 3, 1971 (statement of Sen Willner), *available at* http://records.sos.state.or.us/ORSOSWebDrawer/RecordHtml/7359889 (accessed Apr. 25, 2023) (discussing the three sources of model consumer legislation, which were the Council of State Governments, the Federal Trade Commission's model act, and the National Consumer Law Center's "Consumer Act"). When considering House Bill (HB) 1088, the legislature had a copy of the commentary to the UDTPA, annotated with the paragraph designations in the bill that corresponded to the 13 practices listed in the UDTPA. *See* Exhibit 5, House Committee on Judiciary, Subcommittee on Consumer Protection, HB 1088, Apr 5, 1971 (annotated excerpt from UDTPA). The other model consumer legislation statutes did not contain a specific list of prohibited practices, but prohibited "deceptive practices" generally. *See*

15 USC §§ 41-58 (1970) (Federal Trade Commission Act) ("[U]nfair or deceptive acts or practices in commerce, are declared unlawful."); Carolyn L. Carter & Jonathan Sheldon, *Unfair and Deceptive Acts and Practices* §§ 3.4.2.1-3.4.2.2, 193 (8th ed 2012) (explaining that the FTC and the Council of State Governments collaborated to develop a model law that had options for states to either adopt the general "deceptive practices" prohibition from federal law or the list of trade practices in the UDTPA).

[10] Additionally, the UTPA does not include any express instruction from the legislature to apply and construe the UTPA in a way that promotes uniformity with the uniform law. *See* ORS 646.605-646.656. When the legislature intends to maintain a uniform interpretation, it can say so. *E.g.,* ORS 646.475(1) (stating that the Uniform Trade Secrets Act "shall be applied and construed * * * to make uniform the law * * * among states enacting [the act]"). The absence of such an instruction makes it even more difficult for legislative history to overcome the evident meaning of the text in context.

[11] A claim for fraud requires a plaintiff to prove falsity, materiality, knowledge of falsity, intent to deceive, and reliance, in addition to the representation, injury, and causation elements. *Discount Fabrics,* 289 Or at 384-85 (comparing the elements of common-law fraud to the UTPA).

[12] Contemporaneous dictionaries also distinguished between forms of fraud based in part on whether a person had acted with scienter. *Bouvier's Law Dictionary* 546-47 (1860) distinguished between forms of fraud as follows:

"An *actual* or *positive fraud* is the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another.

"By *constructive fraud* is meant such a contract or act, which, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, yet, by its tendency to deceive or mislead them, or to violate private or public confidence, or to impair or injure the public interests, is deemed equally reprehensible with positive fraud, and therefore, is prohibited by law, as within the same reason and mischief as contracts and acts done *malo animo.*"

(Italics in original.)

[13] As noted above, this court has held that a statute that *is written* to "mirror" a prohibition of words should be treated as an express restriction on speech. That is not the same thing as saying that a law should be viewed as a restriction on speech just because all or most of its foreseeable applications are to speech. As we said in *Plowman,* there must be an indication that the legislature intended to punish the "speech itself." 314 Or at 167.

[14] In light of our decision, it is unnecessary to reach the parties' arguments concerning attorney fees and the AVC. Resolution of those issues will depend on how the merits are resolved on remand.

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370 P.3d 850 (2016)
276 Or. App. 797

DANIEL N. GORDON, PC, an Oregon professional corporation; and Daniel N. Gordon, individually, Plaintiffs-Respondents,
v.
Ellen ROSENBLUM, Attorney General; and Oregon Department of Justice, Defendants-Appellants.

161208399; A154184.

Court of Appeals of Oregon.

Argued and Submitted September 19, 2014.
Decided March 9, 2016.

Appeal from the Circuit Court, Lane County, 161208399, Karsten H. Rasmussen, Judge.

851 *851 Matthew J. Lysne, Assistant Attorney General, argued the cause for appellants. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

R. Daniel Lindahl, Portland, argued the cause for respondent Daniel N. Gordon, PC. With him on the brief was Lindahl Kaempf PC.

Daniel N. Gordon argued the cause and filed the brief pro se.

Before ARMSTRONG, Presiding Judge, and HADLOCK, Chief Judge, and EGAN, Judge.[*]

EGAN, J.

This civil case involves the Unlawful Trade Practices Act (UTPA), specifically ORS 646.607(1) and ORS 646.608(1)(b),[1] and the Unlawful Debt Collection Practices Act (UDCPA), ORS 646.639.[2] Plaintiffs, an attorney and his law firm, brought this action for a declaratory judgment against defendants, the Oregon Department of Justice (DOJ) and the Attorney General, seeking a declaration that the UTPA and UDCPA do not apply to their alleged litigation and debt collection practices. Plaintiffs also sought a permanent injunction. Plaintiffs moved for summary judgment on all claims. Defendants 852 *852 filed a cross-motion for summary judgment, contending (among other things) that plaintiffs had violated the UTPA and UDCPA. The trial court concluded that the UTPA and UDCPA did not apply to plaintiffs' alleged litigation and debt collection practices, and accordingly, granted plaintiffs a permanent injunction, enjoining defendants from filing an action against plaintiffs for violations of the UTPA.

On appeal, defendants raise seven assignments of error, addressing three main issues: (1) whether the UTPA applies to plaintiffs' debt collection litigation, (2) whether the UDCPA applies to plaintiffs' debt collection litigation, and (3) whether the trial court erred in granting a permanent injunction in favor of plaintiffs. For the reasons discussed below, we reverse the declaratory judgment in part and remand with instructions to enter judgment declaring the rights of the parties in accordance with this opinion; reverse the permanent injunction; and otherwise affirm.

In an appeal arising from cross-motions for summary judgment, the granting of one motion and the denial of the other are both subject to appellate review. *Doyle v. City of Medford,* 256 Or.App. 625, 632, 303 P.3d 346 (2013). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. *Hamlin v. Wilderville Cemetery Association,* 259 Or.App. 161, 163, 313 P.3d 360 (2013) (citing ORCP 47 C). In determining whether a genuine issue of material fact exists, we review the summary judgment record "in the light most favorable" to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Id.* at 163-64, 313 P.3d 360 (citation omitted).

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff Daniel N. Gordon is an attorney licensed to practice in Oregon. Gordon is the president of plaintiff Daniel N. Gordon, PC. (the Gordon firm), a law firm that represents creditors and debt collectors in their attempt to collect debts — usually defaulted consumer credit card debt.

From 2002 to 2012, the Financial Fraud/Consumer Protection Section of the Civil Enforcement Division of DOJ[3] received numerous complaints regarding the debt collection practices by the Gordon firm. Based on those complaints, in June 2011, DOJ conducted a preliminary investigation of the Gordon firm and determined that further investigation was warranted. DOJ served the Gordon firm with a "civil investigative demand" (CID) pursuant to ORS 646.618,[4] in which it included a demand for "Exhibit A Documents to be Produced" and "Exhibit B Interrogatories."

The Gordon firm responded to the CID and Gordon participated in a deposition. In its response to the CID Exhibit B Interrogatories, the Gordon firm explained that it "represent[s] clients in all stages of debt collection activity, from pre-suit collection efforts and negotiation, through the civil process, and including post-judgment execution efforts." Typically, the Gordon firm collected on credit card debt owed to financial institutions such as U.S. Bank and American Express. The Gordon firm also provided the following summary of its collection activities that involved Oregon consumers from 2008 to 2010. The following chart is a summary of that information (listed under each year is the number of accounts per debt collection activity):

Activity	2008	2009	2010
Pursued a debt	15,085	15,047	16,240
Collected on a debt (in whole or in part)	2,582	4,095	4,207
Resolved a debt before judgment	1,440	1,665	1,719
Obtained a judgment against a debtor	2,369	3,998	9,151

853 *853

Based on that information, DOJ concluded that the Gordon firm "collected on a significant amount of attorneys' fees and interest on the debt through the process available to judgment creditors, *e.g.,* garnishment." DOJ noted that the many debt collection actions that ended in default judgments were concerning because "we are aware that many of the debtors will not question debt collection efforts because they know they owe the underlying debt" and "many * * * lack financial or legal resources to understand the nature of the action against them or the consequences."

In its response to the CID Exhibit A Documents to be Produced, the Gordon firm provided copies of its files, specifically, a sampling of complaints that detailed the initiation of a lawsuit against a debtor. DOJ reviewed those complaints and observed that "[a]ll of the lawsuits alleged a non-statutory right to attorneys' fees and to interest on the underlying debt" and "[m]any [complaints] did not attach the credit cardmember contract that allegedly provided this right, or in some cases, the [Gordon firm] attached the wrong contract." DOJ noted that those practices were problematic "[b]ecause the [Gordon firm] regularly failed to attach the contract in the civil proceedings, [and therefore] it collected these amounts without ever having to prove that it or the creditor/owner of the debt was entitled to those sums."

DOJ also observed instances in which the Gordon firm "failed to follow the correct choice-of-law provisions in the applicable cardmember agreements." As a result of failing to follow the correct choice-of-law provisions, the Gordon firm "either applied the wrong interest rate or filed claims for debts that were barred by the relevant state's statute of limitations provisions." DOJ noted that those instances were especially problematic, because "these issues were never litigated because the debtors would not challenge the lawsuit."

Based on the Gordon firm's response to the CID and Gordon's deposition, DOJ generally concluded that

> "the [Gordon firm] had a pattern and practice of filing thousands of breach of contract actions against credit card debtors and obtaining default judgments for attorneys' fees and interest in a manner that apparently took advantage of the debtors' legal ignorance, lack of resources and general belief that they could not fight the claim."

Specifically, DOJ found that plaintiffs violated the UTPA by (1) "[f]iling legal complaints seeking fee and interest awards without having adequate evidentiary basis to support entitlement to such fees or interest"; (2) "[m]aking false/misleading representations to courts that a consumer contract includes attorney fees when plaintiffs have no basis for such representation"; and (3) "[f]ailing to disclose to consumers and to courts that plaintiffs do not have the applicable contract at the time of filing a complaint, and, therefore, [do] not have a basis to assert the right to collect attorney fees or interest." As a result, DOJ concluded that it had probable cause to sue to enjoin the Gordon firm and its attorneys from continuing to engage in unlawful trade practices under the UTPA, ORS 646.607(1), (6) and ORS 646.608(1)(b), and the UDCPA, ORS 646.639(2).

Following DOJ's investigation into plaintiffs' alleged violations of the UTPA and the UDCPA, DOJ served the Gordon firm with a "Proposed Assurance of Voluntary Compliance" (AVC) under ORS 646.632(2).[5] The AVC included, among others, the following proposed remedies to which the Gordon *854 firm would agree to adhere: (1) state the amount of debt claimed to be owed separate from any additional charges or fees (*i.e.,* attorney fees and interest) added in its validation notices and/or demand letters; (2) not seek to recover its attorney fees as part of any judgment obtained by default; and (3) not attempt to collect time-barred debt. DOJ demanded that the Gordon firm execute the AVC, and if the firm refused, DOJ warned that it intended to sue to enjoin the firm's debt collection activities. The Gordon firm did not sign the AVC, and, instead, plaintiffs initiated this action against defendants.

Plaintiffs sought two forms of relief — a declaratory judgment and an injunction. In their first claim for relief, plaintiffs sought the following four declarations, each of which was denominated as a count: (1) "ORS 646.608(1)(b) and ORS 646.607(1) do not apply to plaintiffs' collection activities taken on behalf of their clients as to third-parties"; (2) "Gordon is not subject to the UTPA with respect to defendants' alleged violations and their attempt to regulate Gordon's conduct through enforcement of the UTPA"; (3) "plaintiffs' litigation activities as complained of by defendants are not subject to the UDCPA"; and (4) "defendants' attempt to regulate plaintiffs' activities in the practice of law violates Article III, section 1, of the Oregon Constitution by interfering with the [judiciary's powers]."

In plaintiffs' second claim for relief, they requested an injunction to prohibit defendants from enforcing the UTPA or UDCPA against plaintiffs in their litigation activities. Defendants answered that plaintiffs are subject to the UTPA and UDCPA and denied that plaintiffs were entitled to any relief.

Plaintiffs moved for summary judgment, and defendants filed a cross-motion for summary judgment. With regard to the claim for declaratory relief, the trial court granted summary judgment in plaintiffs' favor on Counts 1 and 3 and in defendants' favor on Counts 2 and 4.[6] With regard to the claim for injunctive relief, the court granted summary judgment in plaintiffs' favor. Consistent with those rulings, the court entered a judgment that provided, in part:

> "(1) ORS 646.608(1)(b) and ORS 646.607(1) of the Unlawful Trade Practices Act do not apply to plaintiffs' collection activities taken on behalf of their clients against third-parties; and
>
> "(2) Plaintiffs' litigation activities taken on behalf of their clients against third-parties are not subject to the Unlawful Debt Collection Practices Act (ORS 646.639 *et seq.*) as incorporated by ORS 646.607(6) of the Unlawful Trade Practices Act.
>
> "IT IS FURTHER ORDERED AND ADJUDGED the defendants are permanently enjoined from bringing future enforcement actions under the Unlawful Trade Practices Act against plaintiffs relating to litigation activities taken on behalf of their clients against third-parties."

(Capitalization in original.)

On appeal, defendants raise multiple assignments of error addressing the following issues: (1) whether the UTPA applies to plaintiffs' debt collection litigation, (2) whether the UDCPA applies to plaintiffs' debt collection litigation, and (3) whether the trial court erred in granting a permanent injunction in favor of plaintiffs.[7]

*855 II. ANALYSIS

A. *Unlawful Trade Practices Act*

In Count 1 of plaintiffs' first claim for relief, plaintiffs sought a declaration that they are not subject to the UTPA — specifically, ORS 646.607(1) and ORS 646.608(1)(b) — with respect to their debt collection practices on behalf of their creditor and debt collector clients. Defendants responded that "ORS 646.607(1) applied to plaintiffs because they allegedly employed `unconscionable tactics' in the collection of debts and that ORS 646.608(1)(b) applied to plaintiffs because they allegedly caused or created confusion about the source and certification of debts they collected, including rights to attorney fees, interest or other charges." The trial court concluded and declared that neither ORS 646.607(1) nor ORS 646.608(1)(b) applied to "plaintiffs' collection activities taken on behalf of their clients against third-parties."

On appeal, defendants contend that the trial court's declaration concerning Count 1 was based on an erroneous construction of ORS 646.607(1) and ORS 646.608(1)(b). Thus, we must construe the statutes in question.

In construing a statute, we first look at the text and context of the statute, then consider legislative history if it appears useful to our analysis, and lastly apply general maxims of statutory construction. *State v. Gaines,* 346 Or. 160, 164-65, 206 P.3d 1042 (2009); *PGE v. Bureau of Labor and Industries,* 317 Or. 606, 610-12, 859 P.2d 1143 (1993).

Before addressing the specific provisions of the UTPA at issue, we briefly highlight the UTPA's underlying policies and basic structure:

> "The UTPA is a remedial statutory scheme, `enacted as a comprehensive statute for the protection of consumers from unlawful trade practices.' *Pearson v. Philip Morris, Inc.,* 358 Or. 88, 115, 361 P.3d 3 (2015); *Raudebaugh v. Action Pest Control, Inc.,* 59 Or.App. 166, 171, 650 P.2d 1006 (1982). As such, it is to be construed liberally to effectuate the legislature's intent, to the extent that a proposed construction is supported by the operative text. *See* *Denson v. Ron Tonkin Gran Turismo, Inc.,* 279 Or. 85, 90 n. 4, 566 P.2d 1177 (1977) (suggesting that the UTPA `is to be interpreted liberally as a protection to consumers' and businesses alike); *Wolverton v. Stanwood,* 278 Or. 341, 345, 563 P.2d 1203 (1977) (finding a `middle ground' between a `broad reading' of the UTPA's general policy and the inherent limits of the operative text; construing the requirement that actionable conduct occur `in the course of business' so as to apply `only to those unlawful practices which arise out of transactions which are at least indirectly connected with the ordinary and usual course of [a] defendant's business'). Thus, our inquiry is pervasively informed by the appreciation that the UTPA is a remedial statutory scheme that should, to the extent consonant with the *Gaines* construct, be construed so as to effectuate its consumer protection purposes."

State ex rel. Rosenblum v. Johnson & Johnson, 275 Or.App. 23, 32, 362 P.3d 1197 (2015) (brackets in *Wolverton*). We now address, in turn, whether each of the implicated provisions of the UTPA can apply to plaintiffs.

1. *ORS 646.607(1) can apply to plaintiffs' debt collection litigation.*

We begin with the text of ORS 646.607(1), which provides in part:

> "A person engages in an unlawful trade practice if in the course of the person's business, vocation or occupation the person:
>
> "(1) Employs any unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation[.]"

Thus, to establish a violation of ORS 646.607(1), the following requirements must be met: (1) a person, (2) in the course of the person's business, vocation, or occupation, (3) employs any unconscionable tactic, (4) in connection with selling, renting, or disposing of real estate, goods, or services, or collecting or enforcing an obligation.

The parties dispute whether the trial court correctly construed ORS 646.607(1) as imposing a requirement that, for a person to employ *856 an "unconscionable tactic," that person must be in a "transaction" with the party adversely affected by that practice — in this case, the debtor. We note that ORS 646.607(1) does not, by its terms, impose a requirement that a person who employs an unconscionable tactic be a party to a particular transaction with a customer or debtor. To require that a "person" who "employs any unconscionable tactic" be a party to a particular transaction with a customer or debtor would add words to the statute. *See* ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit

what has been inserted[.]"). Thus, nothing in the text of ORS 646.607(1) requires that there be a contractual or consumer relationship between a violator and customer.

Instead, plaintiffs rely on the definition of "unconscionable tactics" for their argument that the statute imposes such a requirement. For purposes of the UTPA, ORS 646.605(9) defines the term "unconscionable tactics" by listing examples:

> "`Unconscionable tactics' include, *but are not limited to,* actions by which a person:
>
> "(a) Knowingly takes advantage of *a customer's* physical infirmity, ignorance, illiteracy or inability to understand the language of the agreement;
>
> "(b) Knowingly permits *a customer* to enter into a transaction from which the customer will derive no material benefit;
>
>
>
> "(c) Permits *a customer* to enter into a transaction with knowledge that there is no reasonable probability of payment of the attendant financial obligation in full by the customer when due; or
>
> "(d) Knowingly takes advantage of *a customer* who is a disabled veteran, a disabled servicemember or a servicemember in active service, or the spouse of a disabled veteran, disabled servicemember or servicemember in active service. * * *"

(Emphases added.) Plaintiffs emphasize that each of "the specific examples of `unconscionable tactics' describe actions involving `a customer.'" Therefore, plaintiffs reason that the principle of *ejusdem generis* applies. That principle describes the process of finding the meaning of a general term (here, "unconscionable tactics") by identifying common characteristics of the specific examples. *Lewis v. Cigna Ins. Co.,* 339 Or. 342, 350-51, 121 P.3d 1128 (2005). According to plaintiffs, in applying the principle of *ejusdem generis,* "it is necessary to conclude that the legislature intended that an action can be an unconscionable tactic only if it involves `a customer.'" Consequently, plaintiffs argue that, "[b]ecause DOJ's complaints about the Gordon firm do not involve conduct directed toward `a customer,' but instead involve actions taken in litigation with adverse parties, the firm's actions cannot violate ORS 646.607(1)." We agree with plaintiffs that an act can be an unconscionable tactic only if it involves "a customer." However, we disagree with plaintiffs that the specific examples of "unconscionable tactics" indicate that "a person" who employs the unconscionable tactics against a customer, must have a consumer transaction with that customer.

The statute defining the term "unconscionable tactics" — ORS 646.605(9) — provides examples of interactions between "a person" and "a customer." The examples do not establish that the interaction must be between a person and that person's customer. The legislature's use of "a" as an indefinite article preceding "customer" refers to an "unidentified, undetermined, or unspecified person." *See Carroll and Murphy,* 186 Or. App. 59, 68, 61 P.3d 964 (2003) (explaining that the legislature uses "a," as an indefinite article, to refer to an unidentified, undetermined, or unspecified object and uses "the" to indicate the intention to refer to a definite object); *State v. Rodriguez,* 217 Or.App. 24, 30-31, 175 P.3d 471 (2007) ("[W]e ordinarily assume that the use of the indefinite article, as opposed to the definite article, has legal significance.").

The use of "a customer" indicates that the statute applies to a person who buys and receives real estate, goods, or services, which distinguishes the statute from applying to someone who does not buy and receive real estate, goods, or services. Each debtor that plaintiffs pursue a debt against is "a" customer *857 — that is, the debtor is a customer of the credit card company. Nothing in the text of the statute defining "unconscionable tactics" requires that "a customer" must be a customer of the person employing the unconscionable tactic.

In addition, the definition of unconscionable tactics "include, but are not limited to" the enumerated examples. As a result, the nonexclusive list of examples allows for other "unconscionable tactics" used in collection practices that would violate ORS 646.607(1). A plain text and contextual reading of ORS 646.607(1) does not indicate that plaintiffs must be in a consumer relationship with the debtor for the statute to apply — in other words, the statute does not require plaintiffs and a debtor to have a consumer relationship.

Next, we turn to the legislative history of ORS 646.607(1). ORS 646.607(1) was enacted in 1977 as section 4 of Senate Bill (SB) 296. *See* Or. Laws 1977, ch. 195, § 4. ORS 646.605(9), defining "unconscionable tactics," was enacted as part of the same bill. Or. Laws 1977, ch. 195, § 1(8). SB 296 added those statutory sections to the UTPA.

At a committee hearing on SB 296, Paul Romain — Chief Counsel for the Consumer Protection Division of DOJ and sponsor of SB 296 — testified about the purpose of section 4 of the bill as amended. Romain explained that section 4 clarified that loans and extensions of credit are not covered under the bill. Tape Recording, Senate Committee on Labor, Consumer and Business Affairs, SB 296, Mar. 7, 1977, Tape 12, Side 1 (statement of Paul Romain). However, Romain said that, if financial institutions that make loans and extensions of credit "use unconscionable tactics in collecting that loan, then we have jurisdiction over that." *Id.* He stated that the "problem that we have is that in the actual collection of that obligation there is really nobody out there that regulates that." *Id.* He specified that the "unconscionable tactics" provision in the bill was meant to cover collection of a debt. *Id.*

That legislative history supports our textual reading of the statute because it explains that SB 296 covers unconscionable tactics used in debt collection practice. Moreover, as discussed above, the "legislative history of the Oregon [UTPA] supports the view that it is to be interpreted liberally as a protection to consumers." *Denson,* 279 Or. at 90 n. 4, 566 P.2d 1177. Therefore, we conclude that plaintiffs' debt collection practices can be covered by ORS 646.607(1), because plaintiffs' premise that the statute could never apply to their conduct because debtors are not their customers is incorrect.[8]

The trial court erred when it declared that ORS 646.607(1) did not apply to plaintiffs' debt collection activities.

2. *ORS 646.608(1)(b) can apply to plaintiffs' debt collection litigation.*

We turn to ORS 646.608(1)(b), another section of the UTPA, which provides, in relevant part:

> "(1) A person engages in an 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."

"Real estate, goods or services" are defined as "those that are or may be obtained primarily for personal, family or household purposes * * * and includes loans and extensions of credit." ORS 646.605(6)(a).

The trial court concluded that ORS 646.608(1)(b) did not apply to plaintiffs' litigation and debt collection practices because "[t]he act of legal representation is totally *858 unconnected from `loans or extensions of credit,' the `real estate goods or services' at issue here," based on *Wolverton,* 278 Or. at 345, 563 P.2d 1203. In *Wolverton,* the court concluded that ORS 646.608(1)(b) "should be applied only to those unlawful practices which arise out of transactions which are at least indirectly connected with the ordinary and usual course of defendant's business, vocation or occupation." *Id.* In this case, the trial court explained its reasoning:

> "Here, plaintiffs are in the business of legal representation. The act of legal representation is totally unconnected from `loans or extensions of credit,' the `real estate, goods or services' at issue here. Neither is legal representation itself a `real estate, good or service.' By engaging in legal representation services, plaintiffs are intrinsically one step removed from the transactions at issue between plaintiffs' clients and their customers. There is nothing in the UTPA statute that gives this Court reason to conclude that it should treat plaintiffs as if they were themselves the lenders of the credit debts at issue."

On appeal, defendants contend that plaintiffs are subject to ORS 646.608(1)(b) because the text and context of the statute demonstrate "that there is no requirement that an unlawful practice must arise from a `transaction' that an alleged violator was a party to." Defendants argue that the case law also establishes that there is no requirement of an underlying transaction between the violator and the victim of an unlawful practice. *See Raudebaugh,* 59 Or.App. at 176, 650 P.2d 1006 (to recover under the UTPA, purchasers need not prove that the complained-of representation was made directly to purchasers or to a third party with intent that it be transmitted to purchasers). Defendants also contend that *Wolverton,* the case on which the trial court relied, does not support an interpretation that ORS 646.608(1)(b) does not apply to plaintiffs.

Plaintiffs respond that ORS 646.608(1)(b) does not apply to their legal representation of creditors in debt collection litigation because that "does not involve providing real estate, goods or services to consumers," but instead "involves actions by the Gordon firm in the course of representing its clients in litigation against debtors who obtained credit from the Gordon firm's

clients." In other words, plaintiffs "recognize[ ] that professionals may violate the UTPA through false or misleading representations to consumers about *their own* goods or services" but argue that defendants' claim against "the Gordon firm does not involve the Gordon firm's own goods or services," but, rather, involves "the firm's clients' goods and services."

Therefore, we must determine whether the unlawful practice in the course of the person's business prohibited by ORS 646.608(1)(b) must be with respect to that person's own real estate, goods, or services.

We begin by noting that the statute's text does not explicitly require that the unlawful practice in the course of the person's business must be with respect to that person's own real estate, goods, or services. Defendants argue that *Raudebaugh,* which interprets ORS 646.608(1), is instructive and we agree.

In *Raudebaugh,* the plaintiffs — purchasers of a home — claimed that the defendant — a pest inspector — falsely represented to the sellers of the home that the home was free from insect infestation and, in doing so, violated the UTPA, specifically ORS 646.608(1)(e) and (g). 59 Or.App. at 168, 650 P.2d 1006. The defendant pest inspector argued that "in order to recover under the UTPA plaintiffs must allege and prove that the alleged representation was made either directly by defendant to plaintiffs or to a third party with the intent that it be transmitted to plaintiffs" because "that is an essential element in the traditional common law test for actionable fraud." *Id.* at 170, 650 P.2d 1006. We held that the plaintiffs did not need to prove that the alleged representation was made directly by the defendant to the plaintiffs or to a third-party with the intention that it be transmitted to plaintiffs. *Id.* at 172, 650 P.2d 1006 (citing *Wolverton,* 278 Or. at 345, 563 P.2d 1203 ("The elements of common law fraud are distinct and separate from the elements of a cause of action under the [UTPA] and a violation of the [UTPA] is much more easily shown.")). Thus, *Raudebaugh* establishes that ORS *859 646.608(1) does not require an underlying transaction between the violator — in this case, plaintiffs — and the victim — debtor — of an unlawful practice.

Plaintiffs argue that *Raudebaugh* is distinguishable because

> "the UTPA claim in *Raudebaugh* involved a violation made in the course of a consumer transaction involving the very service that defendant was in the business of providing to consumers. *Raudebaugh* would be relevant if, instead of suing the inspection company, the plaintiffs (or DOJ) had sued the inspection company's lawyers, alleging a UTPA violation based on representations about the inspection report that the lawyers made during litigation about the inspection report."

We disagree with plaintiffs. In *Raudebaugh,* the plaintiffs and the seller were in a direct transaction, but the plaintiffs were still able to prove that the defendant pest inspector, a third party, violated the UTPA because of the misrepresentation that it made to the seller on which the plaintiffs relied. Similar to *Raudebaugh,* a debtor and a creditor are in a direct transaction, but a debtor may be able to prove that plaintiffs, a third party, violated the UTPA because of their misrepresentations to the debtor about that transaction on which the debtor relied. Thus, we reject plaintiffs' argument that *Raudebaugh* is materially distinguishable. In this case, defendants can prove that plaintiffs violated the UTPA even though they were not a party to the original creditor-debtor transaction.

Defendants also contend that *Wolverton,* a case on which the trial court relied, does not establish that ORS 646.608(1)(b) does not apply to plaintiffs because, when considered in its factual context, *Wolverton* "did not construe ORS 646.608(1) to require a `transaction' by the person who engaged in the unlawful practice — as that was not an issue in dispute." Instead, defendants argue that "*Wolverton* clarified when and whether a transaction in question actually relates to a per[so]n's `business, vocation or occupation' — an issue that is not in dispute in this case[.]" We agree with defendants that *Wolverton* does not apply to the issue in this case; therefore, the trial court erred in relying on *Wolverton* to conclude that ORS 646.608(1)(b) did not apply to plaintiffs.

Plaintiffs also make a policy argument, opining that, if there "is no difference between a lender or financing company and a law firm representing a lender or financing company in litigation" then "it would dramatically broaden the UTPA by making it applicable to lawyers and law firms in contexts never before imagined."[9] We reject plaintiffs' policy argument. This is not a case where the law firm representing a lender is being held responsible for the lender's misdeeds. Rather, this is a case of a law firm allegedly making misrepresentations directly to debtors to the debtors' detriment. ORS 646.608(1)(b) can apply narrowly to plaintiffs' alleged conduct because DOJ alleged that plaintiffs — albeit an attorney and law firm representing a creditor — made representations to debtors in the course of their debt collection that caused "confusion" and

"misunderstanding" to the debtors about the ongoing loan or extension of credit transaction the debtors have with the creditors.

Moreover, as mentioned, the UTPA should be applied broadly to favor consumers — "The general policy of the UTPA is to discourage deceptive trade practices and to provide a viable remedy for consumers who are damaged by such conduct." *Raudebaugh,* 59 Or. App. at 171, 650 P.2d 1006. In this case, the *860 consumers — the debtors — may be damaged by plaintiffs' conduct if they rely on incorrect information provided to them by plaintiffs. As a result, the UTPA should be construed to effectuate its consumer protection purposes. ORS 646.608(1)(b) can apply to plaintiffs' debt collection practices because plaintiffs' argument that the statute could never apply to their practice based on debtors not being their customers is incorrect.

Thus, the trial court erred when it declared that ORS 646.608(1)(b) did not apply to plaintiffs' debt collection activities.

B. *Unlawful Debt Collection Practices Act*

In Count 3 of plaintiffs' first claim for relief, plaintiffs sought a declaration that their litigation activities are not subject to the UDCPA — ORS 646.639.[10] ORS 646.639 provides, as relevant:

> "(2) It shall be an unlawful collection practice for a debt collector, while collecting or attempting to collect a debt to do any of the following:
>
> "(k) Attempt to or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten to take any action which the debt collector in the regular course of business does not take.
>
> "* * * * *
>
> "(m) Represent that an existing debt may be increased by the addition of attorney fees, investigation fees or any other fees or charges when such fees or charges may not legally be added to the existing debt.
>
> "(n) Collect or attempt to collect any interest or any other charges or fees in excess of the actual debt unless they are expressly authorized by the agreement creating the debt or expressly allowed by law."

The trial court agreed with plaintiffs and concluded that "Oregon case law establishes that the UDCPA does not apply to [plaintiffs'] litigation activities, but rather only to non-litigation collection efforts."

On appeal, defendants contend that plaintiffs' alleged conduct — the manner in which they seek to add fees and interests onto the underlying debt by "filing lawsuits that will likely go to default judgment without providing any proof that they are entitled to the additional fees and interest" — violates three separate provisions of the UDCPA: ORS 646.639(2)(k), ORS 646.639(2)(m), and ORS 646.639(2)(n). Defendants argue that the text of each of those provisions unambiguously provide that plaintiffs' alleged conduct may give rise to liability under the UDCPA, and that the existing Oregon case law on which the trial court relied is distinguishable.

Plaintiffs respond that their "legal representation of clients in debt-collection litigation is not covered by [paragraphs] (2)(k), (2)(m), (2)(n), or any other provision of the UDCPA * * * and, consequently, DOJ may not use the UDCPA as a device to dictate the manner in which the Gordon firm practices law and represents its clients in debt-collection litigation." Plaintiffs argue that Oregon case law holds that debt-collection litigation is not an unlawful debt-collection practice under the UDCPA.

As a threshold matter, the parties do not dispute that plaintiffs are a "debt collector" as defined by the UDCPA, and we agree.[11] Thus, an attorney may be liable under the UDCPA. The only issue we are asked to address here is whether an attorney's debt collection *litigation* is subject to the pertinent provisions of the UDCPA.

We turn to the three separate provisions of the UDCPA at issue.

*861 1. *ORS 646.639(2)(k) does not apply to plaintiffs' debt collection litigation.*

ORS 646.639(2)(k) states:

"(2) It shall be an unlawful collection practice for a debt collector, while collecting or attempting to collect a debt to do any of the following:

"* * * * *

"(k) Attempt to or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten to take any action which the debt collector in the regular course of business does not take."

The trial court held that ORS 646.639(2)(k) did not apply to plaintiffs because *Porter v. Hill,* 314 Or. 86, 838 P.2d 45 (1992), and subsequent Oregon cases establish that the UDCPA does not apply to litigation activities, but rather only to nonlitigation collection efforts. *See id*. at 95, 838 P.2d 45 (holding that "filing a civil action to collect an alleged debt is not an act attempting to enforce a `right' or `remedy' proscribed by ORS 646.639(2)(k) merely because all or part of the alleged debt does not exist").

On appeal, defendants contend that the trial court erred when it concluded that plaintiffs' alleged debt collection practices did not or could not violate ORS 646.639(2)(k) because the plain text of the statute "unambiguously establishes that plaintiffs' alleged debt collection practices violate that provision." Defendants concede that existing case law recognizes that the mere filing of a complaint or counterclaim for an allegedly nonexistent debt does not trigger UDCPA liability. However, defendants contend that, "in contrast to *Porter,* defendants do not allege that plaintiffs violated the UDCPA by `actually filing a legal action.' To the contrary, defendants allege that plaintiffs violated the UDCPA by engaging in a course of conduct * * * in which plaintiffs would obtain default judgments from * * * debtors and could ultimately secure payment for attorney fees, interest, or other charges that plaintiffs did not prove or demonstrate they had a `right' to receive."

Plaintiffs renew their argument on appeal relying on *Porter* and its progeny. We agree with plaintiffs and conclude that *Porter* establishes that ORS 646.639(2)(k) does not apply to plaintiffs' litigation activities.

In *Porter,* a lawyer sued a former client on his own behalf to collect fees, and the client counterclaimed, contending that the lawyer's lawsuit violated ORS 646.639(2)(k) because it sought to collect a debt and late fees that were not actually owed. *Porter,* 314 Or. at 88, 838 P.2d 45. In that case, the defendant client argued that "a debt that does not exist is a `right * * * [that] does not exist.'" *Id.,* 314 Or. at 90, 838 P.2d 45. The defendant client also argued that "by filing the action, [plaintiff lawyer] attempted to enforce a remedy (collecting a debt in a legal action) with knowledge or reason to know that that remedy does not exist in the absence of a debt." *Id.* The plaintiff lawyer countered that "a debt is not a `right' within the meaning of ORS 646.639(2)(k)" and asserted that "that paragraph does not address the existence or amount of debt, but rather addresses only the method by which a debt is collected." *Id.* The Supreme Court agreed with the plaintiff lawyer's argument and held that "filing a civil action to collect an alleged debt is not an act attempting to enforce a `right' or `remedy' proscribed by ORS 646.639(2)(k) merely because ah or part of the debt does not exist." *Id.* at 95, 838 P.2d 45. The court reasoned that "[n]othing in the statute evidences a legislative concern with the existence or amount of the underlying debt *as distinct from the use of abusive methods to pressure debtors to pay their debts.*" *Id.* at 92, 838 P.2d 45 (emphasis added). Therefore ORS 646.639(2)(k) "prohibit[s] certain methods of collecting debt, such as enforcing a right to collateral to the debt in order to pressure the debtor to pay the debt," but does not prohibit a lawyer from filing a civil action to collect an alleged debt. *Id.; see also Steele v. A & B Automotive & Towing Service, Inc.,* 135 Or.App. 632, 641, 899 P.2d 1206 (1995) ("Regardless of the existence or validity of the debt alleged, defendant did nothing `duplicitous or coercive' in responding to plaintiff's request for an invoice for the disputed services, or in filing a legal action to determine whether plaintiff is, in fact, liable for the disputed debt.").

862 *862 Defendants allege broadly that plaintiffs violated the UDCPA through abusive methods by "obtain[ing] default judgments from * * * debtors and could ultimately secure payment for attorney fees, interest, or other charges that plaintiffs did not prove or demonstrate they had a `right' to receive." Defendants clarify in reply that "plaintiffs likely violated the UDCPA by repeatedly filing complaints without adequate evidentiary support to show the entitlement to attorney fees and interest, by making false or misleading representations that a contract gives rise to an award of attorney fees or interest, and by failing to disclose that they do not have the contract at the time of filing the complaint."

We reject defendants' argument that a lack of evidentiary support to show entitlement to fees or the failure to disclose the correct contract at the time of filing the complaint is equivalent to not having a "right" or "remedy" to the alleged debt under ORS 646.639(2)(k). Even if plaintiffs did not show adequate evidentiary support to demonstrate their client's entitlement to

the alleged debt or failed to attach the contract to the complaint at the time of filing that does not mean that the "right" or "remedy" no longer exists.

Defendants allege that plaintiffs engaged in abusive methods that are barred under *Porter.* However, alleging incorrect facts in a complaint or failing to include proper evidentiary support when filing an action are not abusive methods under ORS 646.639(2)(k). *But see* *Isom v. P.G.E.,* 67 Or.App. 97, 106, 677 P.2d 59, *rev. den.,* 297 Or. 272, 683 P.2d 92 (1984) (ORS 646.639(2)(k) applied when debt collector, a utility, had terminated the debtors' electrical service "when it had reason to believe that the right to terminate was not available"); *Rowe v. Bank of the Cascades,* 68 Or.App. 490, 494-95, 683 P.2d 93 (1984) (ORS 646.639(2)(k) applied where the debt collector, a bank, had frozen the debtors' checking account for the purpose of attempting to collect the debtors' debt to a different bank). Because plaintiffs did not engage in the type of abusive methods that are barred under the UDCPA, and instead, filed civil actions against debtors, plaintiffs did not violate the UDCPA.

Under *Porter,* the filing of a civil action against debtors does not violate the UDCPA. Therefore, the trial court did not err in declaring that ORS 646.639(2)(k) did not apply to plaintiffs' debt collection litigation.

2. *ORS 646.639(2)(n) does not apply to plaintiffs' debt collection litigation.*

ORS 646.639(2)(n) provides:

> "(2) It shall be an unlawful collection practice for a debt collector, while collecting or attempting to collect a debt to do any of the following:
>
> "* * * * *
>
> "(n) Collect or attempt to collect any interest or any other charges or fees in excess of the actual debt unless they are expressly authorized by the agreement creating the debt or expressly allowed by law."

The trial court concluded that ORS 646.639(2)(n) did not apply to plaintiffs' alleged debt collection litigation. The trial court reasoned that "the Oregon Court of Appeals extended application of the *Porter* decision [in *Hedrick v. Spear,* 138 Or.App. 53, 60-61, 907 P.2d 1123(1995)] to ORS 646.639(2)(n), which punishes collecting or attempting to collect fees and interest in excess of the debt owed unless specifically authorized by the agreement creating the debt."

On appeal, defendants contend that *Hedrick* is distinguishable from this case. Again, defendants contend that "the particular *methods* plaintiffs allegedly employ to collect or attempt to collect unauthorized attorney fees, interest, or other charges violates ORS 646.639(2)(n)." (Emphasis in original.) Plaintiffs renew their arguments on appeal, arguing that *Hedrick* is instructive, and we agree.

In *Hedrick,* the plaintiff attorney brought an action against the defendant, his former client, to collect fees for legal services. 138 Or.App. at 55, 907 P.2d 1123. The plaintiff and the defendant did not have a written agreement, but the bottom of each bill from the plaintiff contained a late payment charge. *Id.* The defendant client filed *863 a counterclaim against the plaintiff attorney for violation of the UDCPA, specifically, ORS 646.639(2)(n), arguing that the late payment charge was an unlawful charge. *Id.* at 59, 907 P.2d 1123. We concluded that the analysis in *Porter* applied "with equal force to this claim" and held that "the filing of a legal action seeking to recover allegedly unauthorized charges is not `the collection or attempt to collect' prohibited by ORS 646.639(2)(n)." *Hedrick,* 138 Or.App. at 61, 907 P.2d 1123.

Hedrick extended the rationale in *Porter* to ORS 646.639(2)(n), and we adhere to that precedent here. Filing a legal action to recover alleged or disputed interest and fees is not prohibited by ORS 646.639(2)(n). Therefore, the trial court did not err in declaring that ORS 646.639(2)(n) did not apply to plaintiffs' debt collection litigation.

3. *ORS 646.639(2)(m) does not apply to plaintiffs' debt collection litigation.*

ORS 646.639(2)(m) provides:

> "(2) It shall be an unlawful collection practice for a debt collector, while collecting or attempting to collect a debt to do any of the following:

"* * * * *

"(m) Represent that an existing debt may be increased by the addition of attorney fees, investigation fees or any other fees or charges when such fees or charges may not legally be added to the existing debt."

Although the trial court did not specifically explain why ORS 646.639(2)(m) did not apply to plaintiffs, the trial court entered judgment in plaintiffs' favor, concluding that plaintiffs' debt collection litigation on behalf of their clients is not subject to the UDCPA generally — including all of the provisions in ORS 646.639. Defendants argued in its briefing to the trial court and do so again on appeal that plaintiffs violated this provision. On appeal, defendants argue that "plaintiffs' alleged debt collection practices violate the plain and unambiguous text of that provision; plaintiffs repeatedly represented an entitlement to collect (and did collect) attorney fees, interest, or other charges when they allegedly did not prove or demonstrate the legal right to collect those moneys." Defendants also contend that *Porter* and *Pro Car Care, Inc. v. Johnson,* 201 Or.App. 250, 258, 118 P.3d 815 (2005), do not hold otherwise.

In *Pro Car Care,* the plaintiff, an automotive repair shop, brought an action against the defendant, a customer, after she stopped payment on a check to the plaintiff for completed work; the plaintiff's attorney had sent a letter demanding payment, fees, and damages to the defendant. 201 Or.App. at 252, 118 P.3d 815. The defendant counterclaimed, alleging that the plaintiff had violated the UDCPA, specifically, ORS 646.639(2)(k), (2)(m), and (2)(n). *Id.* The court held that "[t]he demand letter amounted to a threat to file a civil action"; thus, under *Porter* and *Hedrick* the plaintiff did not violate ORS 646.639(2)(k) and (2)(n). *Id.* at 258, 118 P.3d 815. The court did not reach the issue involving ORS 646.639(2)(m) because another statute allowed the plaintiff to include the fees. *Id.* at 258-59, 118 P.3d 815.

Defendants argue that, because *Pro Car Care* declined to resolve whether the rationale from *Porter* would extend to claims under ORS 646.639(2)(m), we "should not extend the rationale in *Porter* to exempt plaintiffs from ORS 646.639(2)(m) given that plaintiffs' alleged debt collection practices, if proven, fall squarely within the prohibition * * * and also constitute abusive debt collection practices that the UDCPA was designed to remedy." Plaintiffs respond that "there is no reason that the logic articulated in *Porter* and later applied in *Steele* and *Hedrick* would not apply equally to paragraph (2)(m)." We agree with plaintiffs because we are persuaded that filing a civil action to collect alleged attorney fees on an alleged existing debt is not an abusive debt collection practice under the reasoning discussed in that case law. Accordingly, we also apply that reasoning to ORS 646.639(2)(m) and conclude that plaintiffs' debt collection litigation is not prohibited by that statutory subsection.

In sum, the trial court did not err in declaring that ORS 646.639(2)(m) did not apply to plaintiffs' debt collection litigation.

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*864 C. *Permanent Injunction*

As part of the general judgment, the trial court permanently enjoined defendants from bringing future enforcement actions under the UTPA against plaintiffs relating to litigation activities taken on behalf of their clients against third parties. For the reasons discussed above, because the UTPA can apply to plaintiffs' challenged conduct, we reverse the trial court's grant of the permanent injunction.

III. CONCLUSION

In sum, the trial court erred in granting summary judgment on plaintiffs' UTPA claim. On remand, the trial court is instructed to enter judgment declaring that ORS 646.607(1) and ORS 646.608(1)(b) of the UTPA can apply to plaintiffs' debt collection litigation taken on behalf of their clients against third parties. Consequently, the trial court also erred in entering a permanent injunction in favor of plaintiffs enjoining defendants from bringing future enforcement actions under the UTPA against plaintiffs. Thus the permanent injunction is reversed. The trial court did not err in concluding that the UDCPA did not apply to plaintiffs' debt collection litigation.

Declaratory judgment reversed in part and remanded with instructions to enter judgment declaring the rights of the parties in accordance with this opinion; permanent injunction reversed; otherwise affirmed.

[*] Hadlock, C.J., *vice* Nakamoto, J. pro tempore.

[1] ORS 646.607(1) and ORS 646.608(1)(b) are quoted below, 276 Or.App. at 804, 370 P.3d at 854

[2] ORS 646.639 is quoted below, 276 Or.App. at 819, 370 P.3d at 862.

[3] For simplicity we refer to the Financial Fraud/Consumer Protection Section of the Civil Enforcement Division of DOJ as DOJ throughout the remainder of this opinion.

[4] ORS 646.618(1) provides, as relevant:

"Except as provided in ORS 646.633, when it appears to the prosecuting attorney that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by ORS 646.607 or ORS 646.608, the prosecuting attorney may execute in writing and cause to be served an investigative demand upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation."

[5] ORS 646.632(2) provides, as relevant:

"Except as provided in subsections (5) and (6) of this section, before filing a suit under subsection (1) of this section, the prosecuting attorney shall in writing notify the person charged of the alleged unlawful trade practice and the relief to be sought. Such notice shall be served in the manner set forth in ORS 646.622 for the service of investigative demands."

[6] We note that the trial court failed to enter a declaration on Counts 2 and 4 in defendants' favor, however, its failure to do so does not affect our inquiry.

[7] Plaintiff Gordon responded separately from plaintiff, the Gordon firm. As part of his argument, he contended that "[t]he Attorney General and the [DOJ] have no authority to regulate the practice of law, including prescribing rules of procedure," and that "[a]ny attempt by DOJ to mandate judicial procedures would be a separation-of-powers violation" established in Article III, section 1. We reject those contentions as unreviewable because Gordon failed to cross-appeal the trial court's grant of summary judgment to defendants on Counts 2 and 4. *See Murray v. State of Oregon,* 203 Or.App. 377, 388, 124 P.3d 1261 (2005), *rev. den.,* 340 Or. 672, 136 P.3d 742 (2006) (cross-assignment of error was not sufficient to raise argument because "[plaintiffs] are seeking modification and reversal of that part of the judgment dismissing plaintiffs' separate claim for inverse condemnation. A cross-appeal is required under those circumstances.").

[8] Plaintiffs also rely on federal District of Oregon cases for the proposition that ORS 646.607(1) does not apply to plaintiffs because that statute is limited to consumer transactions. *See CollegeNet, Inc. v. Embark.Com, Inc.,* 230 F.Supp.2d 1167, 1173 (D.Or.2001) ("Courts interpreting the UTPA have almost uniformly recognized that it is first and foremost a consumer protection statute."). We agree that the UTPA is a consumer-protection statute; however, plaintiffs' argument is inapposite because the cited cases did not determine whether ORS 646.607(1) requires a consumer transaction between the plaintiff and the debtor defendant. Therefore, we reject plaintiffs' argument.

[9] Plaintiffs provide the following example to illustrate that such a construction of the statute would lead to absurd results: "[A] law firm representing a car dealership in litigation about a defective car would be subject to the UTPA liability for representations made during the litigation about the car's standard quality or grade." That example is distinguishable from this case because, as defendants point out, that example illustrates a completed consumer transaction — the car dealership makes a false misrepresentation to the buyer's detriment and the law firm represents the dealership after the transaction is complete. In contrast, in this case plaintiffs' alleged misconduct relates to a lawyer's conduct before the consumer transaction is complete — plaintiffs represent to debt collectors' clients (debtors) that they have outstanding debt, interest on the debt, and attorney fees owed, and debtors rely directly on that representation by plaintiffs. That difference is significant because plaintiffs are the ones making the allegedly misleading representations to the debtor's detriment. Thus, plaintiffs' example is inapposite.

[10] ORS 646.607(6) of the UTPA incorporates the UDCPA into the UTPA; it states:

"A person engages in an unlawful trade practice if in the course of the person's business, vocation or occupation the person:

"(6) Employs a collection practice that is unlawful under ORS 646.639[.]"

[11] ORS 646.639(1)(g) provides the definition of a "debt collector":

"`Debt collector' means any person who by any direct or indirect action, conduct or practice, enforces or attempts to enforce an obligation that is owed or due to any commercial creditor, or alleged to be owed or due to any commercial creditor, by a consumer as a result of a consumer transaction."

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