IN THE SUPREME COURT OF THE STATE OF OREGON

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| THE STATE OF OREGON by and through the Oregon State Treasurer and the Oregon Public Employee Retirement Board on behalf of the Oregon Public Employee Retirement Fund,<br><br>Petitioner on Review,<br><br>and<br><br>MARSH & McLENNAN COMPANIES, INC.; MARSH, INC.,<br><br>Respondent on Review,<br><br>and<br><br>JEFFREY GREENBERG; and RAY GROVES,<br><br>Defendants. | Multnomah County Circuit Court Case No. 0508-08454<br><br>Oregon Court of Appeals No. A139453<br><br>Oregon Supreme Court No. S059386 |

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**BRIEF OF *AMICUS CURIAE***
**NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.**
**IN SUPPORT OF PETITIONER THE STATE OF OREGON**

Review of the Decision of the Court of Appeals
On an Appeal from the Judgment
of the Circuit Court for Multnomah County
Honorable Frank L. Bearden, Judge

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| Opinion Filed: | February 23, 2011 |
| Author of Opinion: | Schuman, P. J. |
| Concurring Judges: | Hon. Robert Wollheim; Hon. Ellen F. Rosenblum |

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## STATEMENT OF IDENTITY

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

The members of NASAA include the state agencies that are responsible for regulating securities transactions under state securities statutes, commonly referred to as "Blue Sky" laws. Their fundamental mission is protecting investors, and their principal activities include registering certain securities; licensing the firms and agents who offer and sell securities and offer investment advice; investigating violations of state law; and, where appropriate, pursuing enforcement actions for violations of state law. State securities regulators also educate the public about investment fraud and advocate for the adoption of strong, fair, and uniform securities laws and regulations at both the state and federal level.

NASAA supports the work of its members by coordinating multi-state enforcement actions, conducting training programs, publishing investor education materials, and presenting the views of its members in testimony before Congress

on matters of securities regulation. Another core function of the association is to represent the membership's position, as *amicus curiae*, in significant cases involving the interpretation of securities laws and the rights of investors.

## INTEREST OF *AMICUS CURIAE*

NASAA is particularly interested in the instant case because the Court of Appeals' decision will severely weaken investor protection laws not only in the State of Oregon, but potentially nationwide. Specifically, NASAA is concerned with the adverse consequences for investors and regulators that will flow from the Court of Appeals' holding that: (1) Blue Sky claims under ORS 59.137 require proof of reliance; and (2) reliance cannot be presumed under the "fraud on the market" doctrine based on the general investment market's reliance on the misstatements. *State v. Marsh & McLennan Cos., Inc.*, 241 Or. App. 107, 123, 120, 250 P.3d 371 (Or. Ct. App. 2011).

At stake in this litigation is the right of a claimant to pursue a remedy for a serious violation of state law. If this Court allows the Court of Appeals' decision to stand, Oregon will join a small minority of states that require a plaintiff to personally rely upon a defendant's materially false statement or omission.[1] The Court of Appeals' holding severely jeopardizes investor protection in the State of Oregon by significantly weakening the deterrent effect of the statute and by

[1] *See infra* Section B.

imposing road blocks that will prevent countless defrauded Oregonians from seeking restitution. Finally, the Court of Appeals' decision will place Oregon well outside the mainstream of Blue Sky jurisprudence, potentially inviting other courts to erode similar investor protections nationwide.

## SHORT STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

For purposes of this *amicus* brief, the relevant background facts and procedural history are sufficiently set forth in the Court of Appeals' decision and incorporated into the Petitioner's Brief on the Merits.

## QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

For purposes of this *amicus* brief, NASAA incorporates the questions presented and proposed rules of law proffered by the State of Oregon in the Petitioner's Brief on the Merits.

## ARGUMENT

### The Court of Appeals' Decision Threatens the Enforcement Powers of the Oregon Division of Finance and Corporate Securities.

As a part of the Oregon Department of Consumer and Business Services and a member of NASAA, the Oregon Division of Finance and Corporate Securities ("ODFCS") faithfully and efficiently carries out its mission "[t]o encourage a wide range of financial services, products, and information for Oregonians, delivered in a safe, sound, equitable, and fraud-free manner."[2] However, the Court of Appeals' decision threatens to severely frustrate the ODFCS's ability to fight securities fraud by adding an unnecessary and onerous requirement to its primary anti-fraud statute, ORS 59.135

The ODFCS "bring hundreds of administrative cases each year premised on violations of the antifraud statutes."[3] Moreover, the ODFCS Administrator has noted that "[t]he anti-fraud provisions in ORS 59.135 are the cornerstone of [the Division's] enforcement actions and … the additional requirement of having to prove reliance will hamper our ability to enforce Oregon securities laws." *Id.* It is also the official position of the ODFCS, the agency entrusted with the enforcement

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[2] *See* ODFCS Mission Statement, *available at*, http://www.cbs.state.or.us/dfcs/administration/about_dfcs/mission_history.html.

[3] Letter from David Tatman, Administrator, Oregon Division of Finance & Corporate Securities, to Joe Opron, Counsel, North American Securities Administrators Association, Inc. (Aug. 29, 2011) Attached as Appendix.

of the Oregon Securities Laws, that ORS 59.135 does **not** require a showing of reliance. *Id.*

The Petitioners in the instant case brought a private cause of action under ORS 59.137 for a violation of ORS 59.135. Unlike common law fraud, securities law claims under ORS 59.135 have been held to not require reliance. Nonetheless, the Court of Appeals concluded that the "reliance-laden language of ORS 59.135" implicitly required the state to plead actual reliance on Respondent's violations of ORS 59.135. *State v. Marsh & McLennan Cos*., 241 Or. App. 107, 116, 122-23 (Or. Ct. App. 2011). Although the instant case does not involve an enforcement action brought by ODFCS, the Court of Appeals' holding interpreted the very same language of ORS 59.135 that the ODFCS uses to bring enforcement actions. Thus, if this Court does not correct the Court of Appeals' erroneous interpretation, Oregon courts in future cases could be forced to find that ODFCS must prove reliance to succeed in an enforcement action based on ORS 59.135. This would be an unprecedented, unwarranted and harmful development as NASAA is aware of no other state or federal securities regulator that is required to plead reliance in actions brought for violations of analogous statutes.[4]

[4] See, e.g., *In Matter of Engleman*, 52 S.E.C. 271 (1995)("reliance need not be demonstrated in Commission proceedings to enforce the antifraud provisions"); *SEC v. Credit Bancorp, Ltd*, 195 F. Supp. 2d 475, 490-491 (S.D.N.Y. 2002)( "[t]he SEC does not need to prove investor reliance, loss causation, or damages in an

**The Court of Appeals' Decision is Contrary to the Requirements of the Uniform Securities Act upon which Oregon Law is Based.**

Petitioner's claim alleges that Respondent's conduct violated ORS 59.135(2) which prohibits misstatements and omissions of material fact in connection with the purchase or sale of securities. Violations of ORS 59.135 give rise to Petitioner's claim under ORS 59.137.

The ORS 59.135(2) prohibition against misstatements and omissions of material fact is identical to the prohibition in Section 101 of the Uniform Securities Act ("USA") of 1956,[5] the general antifraud provisions of the USA, and closely analogous to the civil liability provisions of the Act, Section 410. From the initial drafting of those provisions in 1956 to the most recent 2002 amendments, the USA civil liability provisions have never included a reliance requirement. The 1956 version of the USA provides in pertinent part:

> Sec. 410. [CIVIL LIABILITIES.] (a) Any person who … (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading

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action under Section 10(b) of the Exchange Act, Rule 10b-5, or Section 17(a) of the Securities Act.").

[5] Section 101 provides in pertinent part that "It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly … (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading."

> (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him . . .

UNIF. SEC. ACT 1956 § 410.

Professor Louis Loss, a drafter of the 1956 USA, commented that "[t]he `by means of' clause ... is not intended as a requirement that the buyer prove *reliance* on the untrue statement or the omission." *Dunn v. Borta*, 369 F.3d 421, 432 (4th Cir. 2004) quoting Louis Loss, *Commentary on the Uniform Securities Act* 148 (1976).

The deliberate omission of reliance as an element has remained a mainstay of the USA for more than fifty years. The adoption of the 2002 Uniform Securities Act, which was the last time the USA was amended, still includes a civil liability provision prohibiting material misstatements and omissions, and still says nothing about reliance. It provides in pertinent part:

> SECTION 509. CIVIL LIABILITY . . . (b) [Liability of seller to purchaser.] A person is liable to the purchaser if the person sells a security in violation of Section 301 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission.

UNIF. SEC. ACT 2002 § 509

The Official Comment to Section 509 also makes clear that reliance has never been a part of the USA:

> 4. Unlike the current standards on implied rights of action under Rule 10b-5, neither causation nor reliance has been held to be an element of a private cause of action under the precursor to Section 509(b). *See* Gerhard W. Gohler, IRA v. Wood, 919 P.2d 561 (Utah 1996); Ritch v. Robinson-Humprhey Co., 748 So. 2d 861 (Ala. 1999); Kaufman v. I-Stat Corp., 754 A.2d 1188 (N.J. 2000).

Therefore, in finding that ORS 59.135 requires reliance, the Court of Appeals inserted a requirement that was never intended to be a part of the uniform act on which it is based.

**Courts Interpreting Liability Provisions of Other State Securities Acts Routinely Find that Reliance Is Not an Element.**

Courts have found that almost all state securities antifraud statutes prohibiting misrepresentations and omissions do not require a plaintiff to prove reliance.[6] Courts have directly and indirectly held that a plaintiff need not prove reliance in the following jurisdictions:

Alabama. *Ritch v. Robinson-Humphrey Co*., 748 So.2d 861, 862 (Ala. 1999)(following the plain language of the statute, the court held that "[f]or the buyer to recover, the statute requires only that the buyer prove that the seller

[6] *See* 12A JOSEPH C. LONG, BLUE SKY LAW § 9:117.19 (2010)("The overwhelming weight of authority in … Uniform Act states … have … held reliance not to be an element"); *See also* 12A JOSEPH C. LONG, BLUE SKY LAW § 9:117.31 (2010)(several non-Uniform Act states, including Arizona, California, Colorado, and Texas … have [also] held that reliance should not be required").

violated the rule when the buyer purchased a security from the seller … because "it 'is our job to say what the law is, not what the law should be.'").

Arizona. *Rose v. Dobras,* 128 Ariz. 209, 214, 624, P.2d 887, 892 (1981)("we are persuaded by the general rule that unlike common law fraud, reliance upon a misrepresentation is not an element of this antifraud provision of our securities laws."); *see also "Aaron v. Fromkin,* 196 Ariz. 224, 994 P.2d 1039 (2000).

California. *Bowden v. Robinson* 67 Cal.App.3d 705 (1977) (in a claim brought under Cal. Corp. Code § 25401 "(1) proof of reliance is not required, (2) although the fact misrepresented must be 'material,' no proof of causation is required, and (3) plaintiff need not plead defendant's negligence").

Colorado. *Rosenthal v. Dean Witter Reynolds, Inc*., 908 P.2d 1095, Blue Sky L. Rep. ¶74,087 (Colo. 1995)( "we note that neither section 125(2) nor 123(1) explicitly requires purchasers to claim that they relied on a defendant's "untrue statement" or omission of "material fact" to be entitled to relief. In the absence of such express language, we are unwilling to read into our statute such a pleading requirement. Hence, we conclude that a claim under section 11-51-125(2) is not lost where a plaintiff fails to allege direct reliance but sufficiently pleads causation.").

Connecticut. *Connecticut Nat. Bank v. Giacomi,* 242 Conn. 17, 50 n.37, 699 A.2d 101 (1997)(" reliance is not a required element in an action under § 36-498(a)(2)).

District of Columbia. *Forrestal Village, Inc. v. Graham,* 551 F.2d 411, 414 (D.C.Cir.1977)("neither Section 10(b) nor the D.C. Act requires reliance where material omissions are alleged.")

Hawaii. *American Sav. Bank, F.S.B. v. UBS PaineWebber, Inc*., 250 F.Supp.2d 1254 (D.Hawaii 2003)("reliance is not an element in actions under HRS Chapter 485.").

Indiana. *Arnold v. Dirrim,* 398 N.E.2d 426, 435( Ind.Ct.App.1979) ("reliance was not an element to be proven under IC 1971, 23-2-1-19(a).").

Kansas. *Comeau v. Rupp,* 810 F.Supp. 1127, 1158-59 (D.Kan.1992)("in order to establish liability under K.S.A. § 17-1268(a), the court finds it irrelevant

whether the Comeaus actually, reasonably, or justifiably relied upon the misrepresentations or omissions of the Rupps").

Kentucky. *Carothers v. Rice*, 633 F.2d 7, 14-15 (6th Cir.1980) *cert. denied*, 450 U.S. 998, 101 S.Ct. 1702, 68 L.Ed.2d 199 (1981)("The [Kentucky] blue sky act does not require the plaintiff to prove scienter rather the defendant must prove he did not know or could not have reasonably known of the untruth or omission… nor does it require proof of reliance upon the misrepresentation.").

Maine. *Emmi v. First-Manufacturers Nat'l Bank*, 336 F. Supp. 629, 638 (D.Me. 1971)("Section 881(1)(B) … is an "express liability" provision. Therefore, allegations of material omissions or misstatements are sufficient for a prima facie case").

Massachusetts. *Adams v. Hyannis Harborview, Inc.,* 838 F.Supp. 676, 688 (D.Mass.1993) , aff'd sub nom.(a plaintiff need not prove scienter or reliance to recover under Section 12(2) of the federal law or Section 410(a)(2) of the Massachusetts law).

Missouri. *Alton Box Bd. Co. v. Goldman, Sachs & Co*., 560 F.2d 916, 924 (8th Cir. 1977) (recognizing that the Missouri state act should be construed in conformity with section 12(2) of the Securities Act of 1933, which has no reliance requirement).

Montana – construe statute according to plain language. *Knowles v. State ex rel. Lindeen*, 353 Mont. 507, 222 P.3d 505 (2009) (state securities statute was to be interpreted in accord with its plain language, and did not require a showing of damages for a finding of fraud).

Nevada. *Secretary of State v. Tretiak*, 117 Nev. 299, 309 (2001)(reliance and scienter are not required elements of securities fraud in state enforcement actions initiated under NRS 90.570(2) and (3)).

New Mexico. *State v. Shade*, 726 P.2d 864, 873 (1986) ("A specific inclusion of the element of reliance, therefore, is not required [under state securities fraud statute].").

Ohio. *Wilson v. Ward*, 183 Ohio App.3d 494, 917 N.E.2d 821 (2009) (unlike a claim for common-law fraud, Plaintiffs did not have to prove justifiable reliance under R.C. 1707.44).

Oklahoma. *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express Inc*., 886 F.2d 1249, 1254-57 (10th Cir.1989)("the plain meaning of both section 12(2) and section 408(a)(2) requires only that purchasers of securities show a lack of actual knowledge of a material omission in order to prevail).

Texas. *Aegis Ins. Holding Co. v. Gaiser*, 2007 WL 906328, *22 (Tex. App. San Antonio, Mar. 28, 2007) ("The investor has no duty of due diligence, and is not required to prove he would have acted differently "but for" the omission or misrepresentation; in other words, there is no reliance element").

Utah. *Gohler v. Wood*, 919 P.2d 561 (Utah 1996)(reliance is not an element of a private cause of action under sections 61-1-1(2) and -22 of the Utah Securities Code).

Virginia. *Dunn v. Borta*, 369 F.3d 421 (4th Cir. 2004) (declining to read the element of reliance into the Virginia Securities Act).

Wisconsin. *Cuene v. Hilliard*, 312 Wis. 506, 754 NW2d 509, 516 (Wis. Ct. App. 2008) (reliance is presumed in omission cases where the seller had allegedly failed to disclose pertinent information).

Wyoming. *Ravenswood Inv. Co., L.P. v. Bishop Capital Corp*., 374 F.Supp.2d 1055, 1065-66 (D. Wyo. 2005)(holding that Wyo. Stat. § 17-4-101, "which is very similar to Rule 10b-5 and Section 10 of the Securities Exchange Act, does not appear to require actual reliance. Thus, reliance can be presumed.").

Other than the Court of Appeals decision in *Marsh*, NASAA is aware of only two jurisdictions, Georgia[7] and Washington,[8] where courts have held that a state securities antifraud statute prohibiting misrepresentations and omissions

[7] *Keogler v. Krasnoff*, 268 Ga.App. 250, 601 S.E.2d 788 (Ga. Ct. App. 2004), *cert. denied* (Jan. 24, 2005)

[8] *Go2Net, Inc. v. Freeyellow.com, Inc.*, 109 P.3d 875 (Wash. Ct. App. Div. 1 2005) (the reliance discussion is in the unreported portion of the case which can be found on Westlaw); *Ogdon v. Byron Nelson Co., Inc.*, 123 Wash. App. 1009, 2004 WL 1932661 (Wash. Ct. App. Div. 3 2004), *appeal pending*; *Guarino v. Interactive Objects, Inc.*, 122 Wash.App. 95, 86 P.2d 1175 (Wash. Ct. App. 2004).

contains an implied reliance requirement.[9] [10] NASAA is concerned that if this Court does not correct the error of the Court of Appeals, the decision will be cited by other state courts as persuasive authority to further compound the errors of the misguided minority, resulting in an erosion of investor protections. Accordingly, NASAA urges this Court to overturn the Court of Appeals' decision.

**The Two Uniform Act States that Require Reliance Erroneously Read an Implicit Element into a Statute with an Express Cause of Action.**

The reasoning of the two outlier state courts that have created a reliance requirement has been fiercely criticized by two leading Blue Sky treatises as "misplaced" and "fallac[ious]." *See* 12A JOSEPH C. LONG, BLUE SKY LAW § 9:117.29 (2010); ROBERT N. RAPP, 2-13 BLUE SKY REGULATION § 13.02 (2011); *See also* David O. Blood, *There Should Be No Reliance In The "Blue Sky"* BYU L.

[9] Federal courts have also found some states' Rule 10b-5 analogs to contain a reliance requirement where the state has no other guidance. The Iowa Supreme Court has not yet ruled on this issue. However, the Eighth Circuit Court of Appeals interpreted the Iowa Securities Act to require reliance. *See Dunning v. Bush*, 536 F.3d 879 (8th Cir. 2008). Similarly, the Mississippi Supreme Court has not yet ruled on this issue but the Federal District Court for the Southern District of Mississippi held that "reasonable reliance" is an element. *Geisenberger v. John Hancock Dist.*, 774 F. Supp. 1045, 1051 (S.D. Miss. 1991). The Federal Court for the Eastern District of Pennsylvania also held that § 1-401 requires the same elements of proof as Rule 10b-5. *Leder v. Shinfeld*, 609 F. Supp. 2d 386, 395 (E.D. Pa. 2009).

[10] Illinois, a non-uniform state, appears to require reliance although the Illinois Supreme Court has not yet ruled on this issue. *See Tirapelli v. Advanced Equities, Inc.*, 351 Ill.App.3d 450, 813 N.E.2d 1138 (Ill.App. 1 Dist. 2004).

REV. 1998(1):177, 178. In each case, the court erred by confusing an implicit and an express remedy.

The antifraud provisions of the federal securities law as codified at SEC Rule 10b-5, 17 C.F.R. § 240.10b-5,[11] require reliance because there is no express claim for relief under Rule 10b-5. Thus, courts have been forced to flesh out the contours of the statute using tort law principles. *See* 12A JOSEPH C. LONG, BLUE SKY LAW § 9:117.29 (2010). Conversely, state "Blue Sky" statutes contain an express cause of action within the text of the statute. *See* ORS 59.115. Therefore, as Professor Joseph C. Long concludes, "**the language of the statutes, not a comparable common law tort should provide the elements necessary for recovery** ... [because w]ithout statutory language supporting the imposition of a reliance requirement … there should not be a reliance requirement." *Id.* (emphasis added). As the plain language of the statute demonstrates,[12] the text of the statute contains absolutely no reference to a reliance requirement. Accordingly, as other

[11] Rule 10b-5 states that "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

[12] *See* Petitioner's Brief on the Merits.

states have recognized,[13] the Oregon Court of Appeals committed error by imposing an implicit element into a statute containing an express cause of action with no such requirement.

In *Green v. Green*, 293 S.W.3d 493, Blue Sky L. Rep. ¶ 74,788 (Tenn. Aug 26, 2009) the Tennessee Supreme Court recently overruled a Tennessee Court of Appeals decision, *Constantine v. Miller Inds., Inc.*, 33 S.W.3d 809, Blue Sky L. Rep. ¶74,212 (Tenn. Ct. App. 2000), that followed the minority view by holding that the Tennessee statute based on USA§101 required reliance because the language is analogous to Rule 10b-5. In overruling *Constantine v. Miller*, the Tennessee Supreme court noted that the *Constantine* court erred by "los[ing] sight

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[13] *Gohler v. Wood*, 919 P.2d 561, 565 (Utah 1996) (discussing the difference between the implied cause of action in Rule 10b-5 and the express elements in the Utah Securities Act's antifraud provisions and concluding that "[c]onsequently, this court has no need to define these elements. Indeed, it would be inappropriate to do so when the legislature has already done so"); *E.F. Hutton & Co., Inc. v. Rousseff*, 537 So.2d 978, 981 (Fla. 1989) ("Because no federal statute exists that allows private parties to obtain civil relief for many of the offenses embraced by Rule 10b-5, the federal courts have created such a right. Under Florida law, no court-made implied civil right has been created under section 517.301 because companion section 517.211 contains an express civil liability provision. Hutton's attempt to analogize Rule 10b-5 and section 517.301 breaks down under scrutiny"); *Dunn v. Borta*, 369 F.3d 421, 433 ("[i]ndeed, the Defendants do not contend on appeal that the statute explicitly contains these elements; rather, they urge that these elements should be implied by the judiciary, asserting, "[i]n the absence of legal precedent, Appellees submit that both of these requirements should be implied into the Virginia Securities Act." Because the Act fails to mention reliance or causation, however, it would be inappropriate for a court to imply them."); *Green v. Green*, 293 S.W.3d 493, Blue Sky L. Rep. P 74,788 (Tenn. Aug 26, 2009).

of the fact that the Tennessee General Assembly had already included the elements of the statutory claims in Tenn.Code Ann. § 48–2–122 and, thus, that they did not need to look to federal law or the common law for guidance." *Green*, at 508. The court noted that this interpretation was consistent with "the overwhelming weight of authority" in states with statutes similar to USA §101 and 410. *Id.* at 509.

**The Plain Language of ORS 59.135 Clearly Does Not Require Reliance**

In interpreting ORS 59.135, the Court of Appeals noted that each of the three subsections contained words that would tend to imply reliance, such as "defraud," "misleading," and "deceit." The court concluded that the presence of these words combined with their common-law definitions necessitates a showing of reliance. However, the Court of Appeals confused the usage of these words as unlawful acts when, in fact, the words, as used in ORS 59.135, were simply used as adjectives to characterize the violative statement, omission, or act. Thus, the Court of Appeals erred by inferring a reliance requirement.

The Court of Appeals erred by not recognizing that the word "misleading" in ORS 59.135 simply describes the nature of the omitted statement.[14] The Court of Appeals decision states, in part, that:

> to mislead is "to lead in a wrong direction or into a mistaken action or belief." Webster's Third New Int'l Dictionary 1444 (unabridged ed 2002).

[14] NASAA's brief focuses on ORS 59.135(2), but incorporates the arguments set for in the Petitioner's Brief on the Merits with respect to ORS 59.135(1)&(3).

> One cannot "lead" without "leading" something or somebody else. Thus, although the statutory text does not contain the word "reliance," it nonetheless implies [the requirement.]

*State v. Marsh & McLennan Cos., Inc*., 241 Or. App 107, 123, 120, 250 P.3d 371 (2011). The court erred by citing to the verb "mislead" when the statute actually used the adjective "**misleading**." The very same dictionary cited by the Court of Appeals defines the adjective form of misleading as "**tending to** mislead." Webster's Third New Int'l Dictionary 1444 (unabridged ed 2002).[15] This Court has previously recognized that an action or object can certainly have an objectively misleading character without someone actually relying on it.[16] Thus, the Court of Appeals erred by writing a reliance element into ORS 59.135 where none exists.

Furthermore, in concluding that the words "defraud" and "deceit" in ORS 59.135 implied reliance, the Court of Appeals did not consider the definitional section for Chapter 59. ORS 59.015(6) provides that*"'Fraud,' 'deceit' and 'defraud' are <u>not</u> limited to common-law deceit."* (emphasis added.) At common

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[15] *See also* Black's Law Dictionary (9th ed. 2009) (defining the adjective form of the word "misleading" as "delusive").

[16] This Court recognized the difference between the verb "mislead" and the adjective "misleading" in *U.S. Soil, Inc. v. Oregon State Dept. of Agriculture*, 276 Or. 377 (1976). This court held that an Oregon statute stating that "No person shall use any misleading or deceptive brand" was violated by advertising simply because it would "tend to mislead." *Id.* at 381. Nowhere in that opinion did this Court discuss reliance. The Court properly recognized that something can be misleading without ever having actually misled anyone. Therefore, consistent with the proper identification of the terms of the statute, this Court should reject the Court of Appeals' inference and decline to read a reliance requirement into a section devoid of such a requirement on its face.

law, an action for deceit requires proof of an intent to mislead. U. S. Nat. Bank of Oregon v. Fought, 291 Or. 201, 225, 630 P.2d 337, 351 (1981). The only reason for the legislature to include that definition was to ensure that claims for fraud or deceit did not require proof of the elements of common law claims.

**The Court of Appeals' Decision Failed to Incorporate a "Fraud on the Market" Presumption of Reliance in Light of its Erroneous Decision to Require Reliance as an Element of Recovery.**

Although a reliance requirement should not be read into ORS 59.137, even if the Court ratifies the Court of Appeals' decision to incorporate such a requirement, the Court should correct the Court of Appeals' failure to recognize the long-standing "fraud-on-the-market" securities law doctrine. This doctrine presumes reliance where there is a large and efficient market of investors relying upon the available information in the market to set the price for a security. *See Basic v. Levinson*, 485 U.S. 224, 247 (1988); *Blackie v. Barrack*, 524 F2d 891, 908 (9th Cir. 1975).

The Court of Appeals' decision asserted that Oregon, unlike the United States Supreme Court, does not subscribe to the "efficient market theory," thus, the fundamentals of *Basic* should also not be adopted. However, one does not have to subscribe to market fundamentalism to admit that markets do exist, and prices are, in fact, dependent upon the basket of information available to consumers. Even if

markets do not assimilate all potential information into a perfectly pegged price, it is undeniable that the price of the securities in the instant case would have been materially different had the true nature of the Respondent's business been exposed to the public, as evidenced by the precipitous drop after the information did, in fact, become public.

The disclosure-based securities regulatory scheme in the United States and the even more stringent merit and disclosure-based system in Oregon are built upon the notion that markets cannot operate without full and fair disclosure. When, as in the instant case, a company hides a criminal enterprise, its investors are deprived of a fair opportunity to assess the value of their investment. The Court of Appeals' decision would discount Oregon's commitment to this fundamental notion by allowing issuers to avoid punishment for hiding a criminal enterprise or other material facts from investors. Accordingly, the Court of Appeals was incorrect to ignore this well-settled doctrine of securities law, and the Court should correct this mistake if it chooses to add a reliance requirement to ORS 59.137.

## CONCLUSION

For the reasons stated above, NASAA respectfully requests that the Court reverse the decisions of the Court of Appeals by finding that reliance is not an element of a claim under ORS 59.137 for a violation of ORS 59.135 or, alternatively, that reliance can by implied through the fraud on the market doctrine.

Respectfully submitted August 31, 2011.

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North American Securities Administrators Association, Inc.

and

**BANKS LAW OFFICE, P.C.**

**/s Robert S. Banks, Jr.**

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## CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(d) and ORAP 9.05(3)(a) and (2) the word count of this brief is 4,944 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes a required in ORAP 5.05(4)(f).

**/s Robert S. Banks, Jr.**

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Robert S. Banks, Jr.
Attorney for Amicus Curiae
North American Securities Administrators Association

## CERTIFICATE OF SERVICE AND FILING

I certify that on August 31, 2011, I served this **BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. IN SUPPORT OF PETITIONER THE STATE OF OREGON** by emailing an electronic copy of the same and mailing one copy to each recipient by first class mail to each of the following recipients at their last known addresses as follows:

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I also certify that on August 31, 2011, I filed the original of this Brief of Amicus Curiae with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

DATED August 31, 2011

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August 29, 2011

Joe Opron
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Re: Oregon Securities Antifraud Law

Dear Mr. Opron:

I am writing to express the Department's concern about a recent Oregon Court of Appeals case and the potential precedential harm the case could have for Oregon investors and the Department's ability to enforce Oregon's antifraud provisions. Pursuant to our discussions on August 13 and August 25, I understand that NASAA is preparing an *amicus curiae* brief for the Oregon Supreme Court as it considers an appeal from the decision in *Oregon v. Marsh & McLennan Companies, Inc.*, 241 Or App 107, 250 P3d 371 (2011). The Department supports NASAA in this regard and believes that the case was wrongly decided for the reasons set forth below.

In *Marsh & McLennan*, the court held, among other things, that an aggrieved plaintiff must prove that she relied upon a material misrepresentation or material omissions to successfully bring an action for damages in connection with the purchase of securities pursuant to ORS 59.137.[i] The Oregon Supreme Court has subsequently granted a petition for review.

The interpretation that the Court of Appeals adopted in *Marsh & McLennan* creates a new standard in Oregon and one that does not exist on the face of the statute. The court, by requiring an element of reliance, undermines the investor protections that make up the Oregon Securities Law, ORS 59.005 to 59.451, and runs contrary to the prophylactic intent of the Oregon Securities Laws to protect investors. The Court of Appeals' decision moves in a direction that is directly at odds with the Oregon Supreme Court's stated purpose "to construe the broad terms of the Oregon Securities Law "liberally", so as to afford the greatest possible protection to the public". *Marshall v. Harris*, 276 Or 447 (1976) at 456.

The two statutes that create private rights of action for securities fraud, ORS 59.137 and ORS 59.115 are both premised upon the antifraud language of ORS 59.135.[ii] While the elements to establish recovery under the two private rights of action are slightly different, neither of the statutes nor 59.135 require reliance as an element. The Court of Appeals decision limits recovery for securities fraud to cases in which the investor expressly relied upon a misrepresentation or omission. The basis for this requirement was the doctrine of common law fraud, which requires an element of reliance and scienter; two elements expressly eliminated in

the Oregon statutory scheme and the uniform state securities laws, (Uniform Securities Act (1956)) which was the basis for the Oregon Securities Law.

In fact, the Court of Appeals ignored the legislature's clear intent to move away from common law fraud to a per se requirement with respect to material misrepresentations and omissions. In the definitional section of the Oregon Securities Law, the legislature plainly says that fraud and deceit are not limited to common law fraud.[iii] When that expansive language is read in conjunction with the Supreme Court's imprimatur of liberal construction of the Securities Law, the Court of Appeal's reliance element is neither required nor consistent with the legislature's intent in adopting the Oregon Securities Law.

I know that most states' securities codes are based upon the Uniform Securities Act of 1956 or its successor of 2002. Further it is my understanding that the vast majority of state securities acts have no reliance element in establishing securities fraud. To include an element of reliance would make Oregon one of a handful of states that have this requirement for investors in bringing lawsuits for securities fraud. In addition to raising the burden for investors to prevail, it would also serve to introduce an element of uncertainty and inconsistency for national organizations doing business in Oregon. Historically, under Oregon's scheme the per se nature of the securities antifraud law meant that it was the responsibility of seller to ensure the validity of all material representations made to the buyer. However, with the requirement of establishing reliance on the part of the buyer, this introduces an eroding of investor protection and reintroduction of some element of caveat emptor to securities sales. From a policy standpoint that is neither good public policy nor what the legislature intended.

Finally, the introduction of a reliance element for enforcement of the antifraud statute in 59.135 could have an erosive effect on the Director's ability to enforce the securities laws. Although *Marsh & McLennan* addresses a civil suit under 59.137, the court focuses its analysis on 59.135, the antifraud statute that the Director uses in his enforcement cases. If the reasoning in *Marsh & McLennan* was applied to agency enforcement cases that could serve to curtail state actions designed to protect investors in general and enjoin or prosecute wrong-doers and fraudsters. If taken to its ultimate conclusion, criminal prosecutions would focus on the victim's knowledge and understanding as much as the perpetrator's state of mind at the time of the sales. In those cases, a reasonable doubt as to whether an investor did or did not rely upon a misrepresentation could result in an acquittal of someone that deliberately lied about specific aspects of an investment.

Our Division is the lead prosecutor in most of the state criminal prosecutions for securities violations and we bring hundreds of administrative cases each year premised on violations of the antifraud statutes. If the *Marsh & McLennan* case was to stand as decided by the Court of Appeals, the change could have serious negative consequences on our ability to protect Oregonians and stop wrong-doers. The antifraud provisions in ORS 59.135 are the cornerstone of our enforcement actions and as mentioned above, the additional requirement of having to prove reliance will hamper our ability to enforce Oregon securities laws.

The Court of Appeals, essentially out of whole cloth, has re-ordered the Oregon securities laws and with the introduction of a reliance element has established a bad precedent. It is important that state securities regulators, who are charged with protecting investors and ensuring fair and

orderly securities transactions, weigh in on this issue and help the Oregon Supreme Court to understand the potential harm and misdirection of the Court of Appeals' decision.

I would greatly appreciate NASAA working with us to file a brief with the Oregon Supreme Court in the case of *State of Oregon v. Marsh & McLennan.*

Sincerely,

David Tatman
Administrator
Division of Finance and Corporate Securities

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[i] **59.137 Liability in connection with violation of ORS 59.135; damages; defense; attorney fees; limitations on proceeding.** (1) Any person who violates or materially aids in a violation of ORS 59.135 (1), (2) or (3) is liable to any purchaser or seller of the security for the actual damages caused by the violation, including the amount of any commission, fee or other remuneration paid, together with interest at the rate specified in ORS 82.010 for judgments for the payment of money, unless the person who materially aids in the violation sustains the burden of proof that the person did not know and, in the exercise of reasonable care, could not have known of the existence of the facts on which the liability is based.

[ii] **59.135 Fraud and deceit with respect to securities or securities business.** It is unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security or the conduct of a securities business or for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:

(1) To employ any device, scheme or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;

(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or

(4) To make or file, or cause to be made or filed, to or with the Director of the Department of Consumer and Business Services any statement, report or document which is known to be false in any material respect or matter.

[iii] **59.015 Definitions for Oregon Securities Law.** As used in the Oregon Securities Law, unless the context otherwise requires:

(6) "Fraud," "deceit" and "defraud" are not limited to common-law deceit.