

**UNLAWFUL VERSUS UNFAIR:
A COMPARATIVE ANALYSIS OF OREGON'S AND
CONNECTICUT'S STATUTES ENCOURAGING PRIVATE
ATTORNEYS GENERAL TO PROTECT CONSUMERS**

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INTRODUCTION

Motivated by a desire to protect consumers, states enact statutes prohibiting unfair or deceptive business practices.¹ These statutes, known generically as consumer protection laws, allow for both public and private enforcement.² Prohibited practices range from false advertising and misstatements about the nature or quality of a product to disclosures in telephone solicitations and the creation of trusts.³ The prohibited practices may not amount to fraud, but nonetheless are unfair to the consumer, whom the state has chosen to protect.

Many states, including Oregon, have enlisted citizens as private attorneys general by enacting consumer protection laws that create a private cause of action for unfair trade practices.⁴ In order to encourage private enforcement of states' consumer protection laws, state statutes provide for attorney fees,⁵ costs, minimum damages awards, and punitive damages in addition to actual damages or equitable relief.⁶ Such provisions prove particularly effective when

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1. Jean R. Uranga, *Idaho and Oregon Consumer Protection Acts: Administrative Powers of the Attorneys General*, 13 WILLAMETTE L. REV. 455, 456 n.7 (1977).

2. MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 2:9 (2009).

3. *See, e.g.*, OR. REV. STAT. § 646.608 (2009).

4. PRIDGEN, *supra* note 2, § 2:9; Ralph J. Mooney, *The Attorney General As Counsel for the Consumer: The Oregon Experience*, 54 OR. L. REV. 117, 127-28 (1975).

5. OR UTPA provides for "attorney fees," not 'attorneys' fees,' so that is the terminology used in this paper. *See* OR. REV. STAT. § 646.608(3) (2009).

6. PRIDGEN, *supra* note 2, § 2:9; *see, e.g.*, OR. REV. STAT. § 646.608 (2009).

small actual damages would not ordinarily lead a consumer to file a lawsuit.⁷

Unfortunately, some provisions in Oregon's consumer protection law function as obstacles to consumers seeking relief. A similar statute in Connecticut, a state with substantially the same population as Oregon,⁸ contains simpler provisions that offer more hope to consumers.⁹ Minor changes in Oregon's statute would create a more powerful cause of action that would increase private enforcement of the law and therefore better protect consumers.

In this paper, I compare the structure of the private cause of action under Oregon's Unlawful Trade Practices Act (OR UTPA) with the structure of the private cause of action under the Connecticut Unfair Trade Practices Act (CUTPA). I analyze the impact of the different structures, suggest what advantages OR UTPA has over CUTPA, and explain why CUTPA is in some ways superior to OR UTPA. The suggestions in this paper are intended to increase protection for consumers, which is the primary purpose of a private cause of action for unlawful trade practices.

Essentially, a few adjustments to Oregon's consumer protection law would provide more protection for consumers. First, empowering courts to determine which practices support a cause of action would provide the flexibility necessary to help more consumers vindicate their rights. Second, eliminating the possibility of attorney fee awards for defendants in an unlawful trade practices action would increase the incentive for plaintiffs to seek redress and would deter more potential defendants from engaging in deceptive behavior. Third, increasing the statute of limitations would provide a more reasonable period for Oregon claimants to pursue their rights. Finally, increasing

7. See, e.g., Debra Pogrud Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 493-94 (2008) (offering examples where the attorney fee expenses greatly exceeded the expected recovery amount).

8. See U.S. Census Bureau American Fact Finder, <http://factfinder.census.gov> (follow "POPULATION FINDER" hyperlink, then follow "ranked" hyperlink under "View more results") (last visited May 3, 2011). Based on 2009 estimates, Oregon is the 27th largest state with a population of approximately 3.8 million people. Connecticut ranks 29th with approximately 3.5 million citizens.

9. A Westlaw search of state dockets in Oregon and Connecticut (and related federal dockets) for the year 2009 produced 319 Connecticut Unfair Trade Practices Act docket entries and 204 Oregon Unlawful Trade Practices Act docket entries. These figures reflect a decreasing trend in number of suits each year in Oregon (down from a high of 424 docket entries in the year 2004) and an increasing trend in number of suits each year in Connecticut (up from 168 docket entries in 2004).

the minimum statutory damages award will better deter deceptive practices while also encouraging more citizens to enforce the law.

BACKGROUND

All fifty states and the District of Columbia enacted consumer protection legislation in the 1960's and 1970's.¹⁰ Realizing that government resources are insufficient to allow publicly funded investigations and remedies for all consumers,¹¹ and at the urging of the Federal Trade Commission, many states strengthened enforcement of their consumer protection statutes by creating private causes of action.¹² As of 2009, every state has authorized a private cause of action to help enforce its consumer protection statutes.¹³

Consumer protection legislation varies among the states. Some states simply outlaw unfair or deceptive practices¹⁴ and leave the interpretation of their statutes to the courts.¹⁵ Other states specifically prohibit certain enumerated trade practices.¹⁶ States also vary in the extent to which they encourage enforcement of their statutes by private attorneys general. States have tools at their disposal to encourage private causes of action. Arguably, the most effective tool

10. Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 OR. L. REV. 639, 641 (1994). See generally Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984).

11. See Stark & Choplin, *supra* note 7, at 490–91; Steven A. Shaw, *The Private Cause of Action Under Maine's Unfair Trade Practices Act*, 35 ME. L. REV. 223, 223 (1983).

12. Bender, *supra* note 10, at 640. The private cause of action under a state's unfair trade practices act is distinct from common law causes of action, such as fraud and misrepresentation, available to wronged consumers because it eliminates the consumer's burden of proving intent to deceive and reliance on a misrepresentation. *Associated Inv. Co. v. Williams Assoc.*, 645 A.2d 505, 510 (Conn. 1994).

13. 12 ROBERT M. LANGER, JOHN T. MORGAN & DAVID L. BELT, UNFAIR TRADE PRACTICES - CONNECTICUT PRACTICE SERIES App. L (2003 & Supp. 2009). Iowa was the last state to enact a private cause of action; it became effective July 1, 2009. *Consumer "Private Right of Action": What Consumers Need to Know*, http://www.state.ia.us/government/ag/latest_news/releases/july_2009/private_right_of_action.html (last visited May 3, 2011); see IOWA CODE 714H.5 (2009). Oregon authorized a private cause of action in 1971. 1971 Or. Laws 2009, now codified as OR. REV. STAT. § 646.638; see also J. Britton Conroy, Comment, *The Private Remedy Under Oregon's Unlawful Trade Practices Act*, 56 OR. L. REV. 490, 495 (1977).

14. See, e.g., CONN. GEN. STAT. § 42-110b (2011); WASH. REV. CODE § 19.86.020 (2010); ME. REV. STAT. tit. 5, § 207 (2010).

15. See *Murphy v. McNamara*, 416 A.2d 170, 174 (Conn. Super. Ct. 1979); Shaw, *supra* note 11, at 223.

16. See, e.g., OR. REV. STAT. § 646.608 (2009).

is attorney fee awards for prevailing consumers. Nearly all states allow attorney fee awards for successful prosecution of unfair trade practices claims.¹⁷ Some states give trial courts the discretion to award attorney fees to prevailing plaintiffs whereas others award attorney fees automatically to prevailing plaintiffs.¹⁸ Some states allow courts to award attorney fees to prevailing defendants, and in some states, courts may award attorney fees to defendants even when the claims against them are not frivolous.¹⁹

I. OREGON'S UNLAWFUL TRADE PRACTICES ACT

Oregon first enacted consumer protection legislation in 1965.²⁰ In 1971, the legislature replaced this initial statute with a new statute, OR UTPA.²¹ OR UTPA is modeled after legislation recommended by the Federal Trade Commission.²² OR UTPA created a private cause of action that has remained largely unchanged since it was enacted.²³

OR UTPA encompasses only consumer transactions; it does not reach commercial transactions.²⁴ In order to win a private cause of action under OR UTPA, a claimant must prove “an ascertainable loss of money or property” caused by willful behavior prohibited by an Oregon statute or administrative rule.²⁵ Oregon courts have followed Connecticut’s broad interpretation of “ascertainable loss” by allowing recovery when the claimant shows any determinable loss even when the amount cannot be precisely measured.²⁶

17. Stark & Choplin, *supra* note 7, at 484 (At the time of the Stark & Choplin article, forty-five states provided attorney fee awards. Iowa’s statute added one more state that provided attorney fees when it became effective in 2009. *See supra* note 13).

18. Twenty-one states mandated attorney fee awards to prevailing consumers as of 2008. Stark & Choplin, *supra* note 7, at 485, 515 n.104.

19. *Id.* at 485.

20. 1965 Or. Laws 952–53.

21. 1971 Or. Laws 2005–11, now codified as OR. REV. STAT. §§ 646.605–.656.

22. Gross-Haentjens v. Leckenby, 589 P.2d 1209, 1210 (Or. Ct. App. 1979).

23. Compare 1971 Or. Laws 2009 with OR. REV. STAT. § 646.638(1) (2009).

24. Investigators, Inc. v. Harvey, 633 P.2d 6, 8 (Or. Ct. App. 1981) (OR UTPA allows redress where someone “provid[ed] services or goods for that consumer’s use.”).

25. OR. REV. STAT. § 646.638(1) (2009); OR. REV. STAT. § 646.608(4) (2009).

26. Weigel v. Ron Tonkin Chevrolet Co., 690 P.2d 488, 494 (Or. 1984) (citing Hinchliffe v. Am. Motors Corp., 440 A.2d 810, 814 (Conn. 1981) (In *Hinchliffe*, plaintiffs did not need to prove actual damages; showing that the car they purchased did not conform to advertised specifications sufficed to satisfy the requirement of proving an ascertainable loss. The court noted that ascertainable loss is broader than damages. Although a car maintains the

OR UTPA contains a long list of specific unlawful trade practices, as well as numerous references to other Oregon statutes that also describe unlawful trade practices.²⁷ In addition, a catch-all provision grants a cause of action for “any other” unfair trade practices.²⁸ However, a later subsection qualifies this catch-all by explaining that in order to sue for any practice not specifically mentioned or referenced in OR UTPA, the Attorney General must first establish an administrative rule labeling the practice “unfair or deceptive in trade or commerce.”²⁹ In effect, only the legislature or the Attorney General decides which specific practices justify a private cause of action. Courts may not expand the list of unlawful practices.³⁰

Claimants who prevail on OR UTPA claims may recover the larger of \$200 or actual damages as well as punitive damages and equitable relief.³¹ Either judges or juries may determine the amount of punitive damages to award, if any.³² Courts may also award reasonable attorney fees to prevailing parties.³³ Prevailing defendants can receive attorney fees only if “the court finds there was no objectively reasonable basis for bringing the action or asserting the ground for appeal.”³⁴ Defendants may not receive attorney fees in a class action suit.³⁵ The statute of limitations for a private cause of action under OR UTPA requires claimants to sue within one year of the discovery of an unlawful trade practice.³⁶

same value in the general market if not as represented, it is worth less to the consumer who purchased it expecting it to be as represented.).

27. OR. REV. STAT. § 646.608 (2009).

28. OR. REV. STAT. § 646.608(1)(u) (2009).

29. OR. REV. STAT. § 646.608(4) (2009).

30. *Raudebaugh v. Action Pest Control, Inc.*, 650 P.2d 1006, 1009 (Or. Ct. App. 1982).

31. OR. REV. STAT. § 646.638(1) (2009).

32. *Id.*

33. OR. REV. STAT. § 646.638(3) (2009).

34. *Id.* Interestingly, at the time I began research for this paper, the statute did not impose any standards for determining when to award attorney fees to defendants. See discussion *infra* Part III.B.

35. OR. REV. STAT. § 646.638(4) (2009).

36. OR. REV. STAT. § 646.638(6) (2009); *McCulloch v. Price Waterhouse LLP*, 971 P.2d 414, 420 (Or. Ct. App. 1998) (The discovery of an unlawful trade practice occurs when a consumer knows or reasonably should have discovered that a violation has occurred.).

II. CONNECTICUT'S UNFAIR TRADE PRACTICES ACT

A private cause of action under CUTPA requires an “ascertainable loss of money or property” due to unfair trade practices.³⁷ CUTPA applies to consumer transactions as well as to commercial transactions and even encompasses actions that damage a competitor.³⁸ Connecticut’s statute contains a simple sentence prohibiting “unfair or deceptive acts or practices in the conduct of any trade or commerce” followed by another simple sentence instructing courts to construe this prohibition in accordance with interpretations by the Federal Trade Commission and federal courts.³⁹ The Federal Trade Commission Act prohibits unfair trade practices in interstate commerce and provides for government enforcement of this provision; the Commission has authority to decide which practices are unfair.⁴⁰ In Connecticut, state officials may enumerate specific behaviors that violate CUTPA,⁴¹ but causes of action need not be limited to acts labeled as such.⁴² Courts may determine what practices justify recovery.⁴³

If practices justify recovery, courts may award actual damages, punitive damages, equitable relief, costs, and reasonable attorney fees to prevailing plaintiffs in a CUTPA action.⁴⁴ CUTPA expressly instructs courts to determine attorney fee awards based on the amount of work performed, not based on the amount of recovery.⁴⁵ Claimants have three years after the unfair trade practice occurs to commence a cause of action.⁴⁶ CUTPA allows claimants to have their case decided by a jury, but the jury may not determine punitive damages, costs, attorney fees, or equitable relief.⁴⁷ Judges determine the amount of punitive damages to award, if any, as well as costs,

37. CONN. GEN. STAT. § 42-110g(a) (2011).

38. *A-G Foods, Inc. v. Pepperidge Farm, Inc.*, 579 A.2d 69, 77 (Conn. 1990).

39. CONN. GEN. STAT. § 42-110b(a), (b) (2011).

40. *Fed. Trade Comm’n v. Brown Shoe Co.*, 384 U.S. 316, 317, 320–21 (1966).

41. CONN. GEN. STAT. § 42-110b(c) (2011).

42. *Murphy v. McNamara*, 416 A.2d 170, 174 n.4 (Conn. Super. Ct. 1979).

43. *Id.*

44. CONN. GEN. STAT. § 42-110g(a), (d) (2011).

45. CONN. GEN. STAT. § 42-110g(d) (2011); *Bristol Tech., Inc. v. Microsoft Corp.*, 127 F. Supp. 2d 64, 66 (D. Conn. 2000).

46. CONN. GEN. STAT. § 42-110g(f) (2011).

47. CONN. GEN. STAT. § 42-110g(a), (d), (g) (2011).

attorney fees, or equitable relief.⁴⁸ CUTPA does not include a statutory minimum damages award.

III. COMPARING OR UTPA WITH CUTPA

This section compares the private causes of action under OR UTPA and CUTPA. The most significant difference is that OR UTPA lists unlawful behaviors that will support a cause of action, whereas CUTPA allows courts to decide which behaviors justify recovery. Another significant difference is the availability of attorney fee awards for prevailing defendants. Further, the statutes of limitations for the private causes of action under OR UTPA and CUTPA differ. Finally, these two consumer protection statutes contain minor differences in remedies available to prevailing plaintiffs.

A. *Unlawful versus Unfair*

Consumer protection laws vary greatly among the states, but the basic formats of the statutes fall into two types: those statutes that list specific unlawful trade practices and those statutes that generally prohibit unfair trade practices.⁴⁹ Statutes that list specific unlawful behaviors, sometimes called the “laundry list” approach,⁵⁰ limit enforcement of their consumer protection laws to enumerated behaviors.⁵¹ For example, a statute may prohibit performing a service on goods when not authorized by the owner of the goods,⁵² making false representations of fact concerning the reasons for price reductions,⁵³ or organizing or inducing membership in a pyramid club.⁵⁴ Many of these laundry list consumer protection laws also include a catch-all provision to encompass behaviors not listed;⁵⁵ a statute’s list of unlawful behaviors may include a phrase such as “any

48. CONN. GEN. STAT. § 42-110g(a), (d) (2011); *Microsoft Corp. v. Bristol Tech., Inc.*, 250 F.3d 152, 155 (2d Cir. 2001).

49. PRIDGEN, *supra* note 2, § 2:10.

50. *Id.*

51. *Id.*

52. *See, e.g.*, OR. REV. STAT. § 646.608(1)(m) (2009).

53. *See, e.g.*, OR. REV. STAT. § 646.608(1)(j) (2009).

54. *See, e.g.*, OR. REV. STAT. § 646.608(1)(r) (2009).

55. PRIDGEN, *supra* note 2, § 2:10.

other unfair or deceptive conduct in trade or commerce.”⁵⁶ However, some of these catch-all provisions can be misleading.⁵⁷

The other type of consumer protection law does not list specific unlawful behaviors but instead consists of a general statement outlawing unfair trade practices.⁵⁸ Both the range of deceptive practices covered and the wording of the statutes vary among the states.⁵⁹ These consumer protection laws outlaw fraud, deceptive behavior, misleading practices, unfair competition, unfair or deceptive acts or practices, deceptive or unconscionable acts or practices, or any combination of these.⁶⁰

Many states that choose this type of consumer protection law model their statute after the Federal Trade Commission Act.⁶¹ Often called “Little FTC Acts,” these consumer protection laws broadly outlaw unfair competition and unfair and deceptive practices.⁶² States with “Little FTC Acts” can declare certain behaviors unlawful,⁶³ but they do not restrict enforcement of their consumer protection laws to listed behaviors like the laundry list states do. Little FTC states empower courts to respond to practices in the marketplace on a case-by-case basis.⁶⁴

Accordingly, the ‘U’ in OR UTPA and CUTPA is the most significant letter when comparing the two statutes. In Oregon, the ‘U’ stands for unlawful, which means that a consumer may only bring a claim for behavior already declared unlawful by statute or administrative rule.⁶⁵ Essentially, this requires a consumer to wade through a list of unlawful practices to find a description that matches the behavior at issue. In Connecticut, the ‘U’ stands for unfair. If the practice is unfair, a consumer can prevail on a private cause of action. “The Connecticut General Assembly deliberately chose not to define the scope of unfair or deceptive acts proscribed by CUTPA so that

56. See OR. REV. STAT. § 646.608(1)(u) (2009).

57. See discussion *infra* Part V.A. discussing Oregon’s misleading catch-all provision.

58. See PRIDGEN, *supra* note 2, § 2:10.

59. See *id.*

60. *Id.*

61. *Id.*

62. *Id.*; see also Uranga, *supra* note 1, at 456 n.7; see, e.g., CONN. GEN. STAT. § 42-110b(a) (2011).

63. See, e.g., CONN. GEN. STAT. § 42-110b(c) (2011); ME. REV. STAT. tit. 5, § 207(2) (2010).

64. See *Sportsmen’s Boating Corp. v. Hensley*, 474 A.2d 780, 786 (Conn. 1984).

65. OR. REV. STAT. § 646.638(1) (2009).

courts might develop a body of law responsive to the marketplace practices that actually generate such complaints.”⁶⁶

1. OR UTPA’s “Laundry List”

Oregon only allows lawsuits for specifically enumerated unlawful trade practices.⁶⁷ OR UTPA contains a long, complicated list of unlawful behaviors and is replete with references to statutes throughout the Oregon Revised Statutes.⁶⁸ If wronged consumers do not find the specific behaviors they experienced in the statutes, they must search administrative rules to find the unlawful behaviors.⁶⁹ If the behaviors are not yet prohibited by statute or administrative rule,⁷⁰ someone must attempt to convince the Attorney General to promulgate a rule declaring the conduct unlawful or else convince the legislature to revise the statute. Most lay people would probably balk at such an intimidating task. Even if a consumer succeeds in adding his or her wrong to the list, that victory will provide no relief for this particular consumer because the conduct was not yet unlawful at the time it happened to the consumer. Thus, if the seemingly unfair conduct is not declared unlawful by statute or administrative rule at the time the misconduct occurs, the consumer does not have a basis for a private cause of action.

Oregon’s current statutory set-up undermines the purpose of its consumer protection law because it prevents many wronged consumers from seeking relief, and it offers no incentive to those unprotected consumers to try to help protect other consumers from suffering the same wrongs. Further, creative wrongdoers can continue to misbehave as long as they stay one step ahead of the legislature or administrative process.

On the other hand, OR UTPA’s laundry list does provide certainty. As long as behaviors clearly fit within a prohibited practice on the list, businesses know which behaviors to avoid and plaintiffs know when wrongful behavior is actionable. Yet, this structure does not provide flexibility when behaviors do not fit neatly into the list of

66. *Sportsmen’s Boating Corp.*, 474 A.2d at 786.

67. See OR. REV. STAT. § 646.608(1), (4) (2009).

68. See OR. REV. STAT. § 646.608 (2009).

69. See OR. REV. STAT. § 646.608(1), (4) (2009).

70. See generally OR. ADMIN. R. 137-20-0010 – 137-20-0713. Administrative rules declaring conduct unlawful under OR UTPA can be found in Chapter 137, Division 20 of the Oregon Administrative Rules.

specifically prohibited actions. Requiring an unfair practice to fit neatly into one of many enumerated unlawful practices may lead to an unjust result. Instead of allowing a jury to determine if a practice is unfair, a jury must determine if the defendant committed the outlawed behavior. Even if a plaintiff suffered a loss due to unfair trade practices, if the loss is not traceable to a specific outlawed behavior, the plaintiff loses.⁷¹

2. CUTPA's "Little FTC"

CUTPA is a "Little FTC Act."⁷² Its wording is almost identical to the Federal Trade Commission Act legislators patterned it after.⁷³ It prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."⁷⁴ The Connecticut Commissioner of Consumer Protection may declare, through regulations, that specific behaviors violate CUTPA.⁷⁵ However, causes of action need not be limited to behaviors already declared unlawful.⁷⁶ Courts may determine what other practices justify recovery;⁷⁷ they construe CUTPA liberally in order to meet its public policy goals.⁷⁸ In fact, CUTPA covers all possible methods of unfair or deceptive trade practices.⁷⁹

71. See, e.g., *Gemignani v. Pete*, 71 P.3d 87, 91 (Or. Ct. App. 2003) (Defendant clearly wronged plaintiff, but the court of appeals overturned a jury verdict in favor of plaintiff reasoning that the jury was only instructed on one subsection of OR UTPA and the violation of that subsection did not cause the plaintiff to suffer a loss.).

72. See CONN. GEN. STAT. § 42-110b (2011); Gary Oberst, Note, *Shysters, Sharks, and Ambulance Chasers Beware Attorney Liability Under CUTPA*, 11 U. BRIDGEPORT L. REV. 97, 101 (1990).

73. Compare CONN. GEN. STAT. § 42-110b(a) (2011) ("No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.") with 15 U.S.C. § 45(a)(1)(2006) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

74. CONN. GEN. STAT. § 42-110b(a) (2011).

75. CONN. GEN. STAT. § 42-110b(c) (2011); see also CONN. GEN. STAT. § 42-110g(c) (2011).

76. *Murphy v. McNamara*, 416 A.2d 170, 174 n.4 (Conn. Super. Ct. 1979).

77. *Id.* CUTPA instructs the commissioner and courts to use Federal Trade Commission and federal courts' interpretations of the Federal Trade Commission Act as guidance. CONN. GEN. STAT. § 42-110b(b) (2011).

78. *Sportsmen's Boating Corp. v. Hensley*, 474 A.2d 780, 786 (Conn. 1984).

79. *Associated Inv. Co. v. Williams Assoc.*, 645 A.2d 505, 510 (Conn. 1994) (quoting Conn. Joint Standing Committee Hearings, General Law, Pt. 2, 1973 Sess., p. 705, remarks of Attorney Robert Sills, Dept. of Consumer Protection).

B. Attorney Fee Awards

In an OR UTPA action, the court can award attorney fees to either prevailing party.⁸⁰ Early in the statute's life, scholars questioned whether the text of the statute allowed defendants to receive attorney fees.⁸¹ Nevertheless, courts held that defendants could receive attorney fees for unsuccessful OR UTPA actions,⁸² and the legislature amended the wording of the statute to support awarding attorney fees to prevailing defendants.⁸³ At first, the statute only allowed attorney fee awards to prevailing defendants for frivolous lawsuits.⁸⁴ Later, the legislature again amended the statute and removed the requirement that the lawsuit be frivolous in order for a defendant to obtain an award of attorney fees.⁸⁵

For nearly fifteen years, Oregon was one of only eight states to allow an award of attorney fees to a prevailing defendant in the court's discretion without some additional statutory requirement such as bad faith or frivolousness.⁸⁶ An Oregon CLE cautioned practicing lawyers to "advise their clients that the possible disadvantage of not prevailing in a UTPA claim is a judgment to pay the defendant's attorney fees."⁸⁷ Recently, the legislature changed OR UTPA to allow an award of attorney fees to a prevailing defendant only "if the court finds there was no objectively reasonable basis for bringing the action or asserting the ground for appeal."⁸⁸ Thus, OR UTPA currently requires more than simply prevailing in order for a defendant to receive an award of attorney fees.

80. OR. REV. STAT. § 646.638(3) (2009).

81. See Conroy, *supra* note 13, at 504–05. The original statute read "In any action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney fees and costs." 1971 Or. Laws 2009 (codified at OR. REV. STAT. § 646.638(3) (2009)). Considering the words "in addition to," it seems a fair assessment that the legislature intended attorney fees to go to prevailing plaintiffs.

82. Conroy, *supra* note 13, at 504.

83. 1977 Or. Laws 133 (codified at OR. REV. STAT. § 646.638(3) (2009)).

84. *Id.* ("If the defendant prevails, the court may award reasonable attorney fees and costs if it finds the action to be frivolous.")

85. 1995 Or. Laws 2121 (codified at OR. REV. STAT. § 646.638(3) (2009)) ("[T]he court may award reasonable attorney fees to the prevailing party in an action under this section" but not to a defendant if the suit was a class action.).

86. Stark & Choplin, *supra* note 7, at 497–98.

87. Oregon State Bar, Edward J. Bennett, Consumer Law in Oregon, Chapter 4, Unlawful Trade Practices, §4.66 (1996 ed. with 2005 cum. supp.).

88. OR. REV. STAT. § 646.638(3) (2009).

Alternatively, under a CUTPA action, courts may only award attorney fees to prevailing plaintiffs and not to defendants under any circumstances.⁸⁹ Attorney fee awards can drastically affect unfair trade practice litigation. For example, in *Bristol Technology Inc., v. Microsoft Corp.*, a jury awarded Bristol \$1.00 in nominal damages when it found that Microsoft had committed a deceptive act or practice under CUTPA that caused Bristol to suffer an ascertainable loss.⁹⁰ The court then awarded Bristol nearly three million dollars in attorney fees as well as three quarters of a million dollars in costs.⁹¹ After stating that the ability to award attorney fees lies exclusively in the discretion of the court, the court confirmed that the attorney fees were reasonable.⁹² One reason the court offered for Bristol's high fees was Microsoft's vigorous defense.⁹³ Additionally, the award was justified because Bristol's claim furthered a public interest, which was the purpose of "CUTPA's private attorney general provisions."⁹⁴ Because of the tremendous influence attorney fee awards can have on private causes of action brought under states' consumer protection laws, states should carefully consider who should receive attorney fee awards.

C. Statute of Limitations

A claimant suing under OR UTPA must commence a cause of action within one year of the discovery of the unlawful behavior.⁹⁵ For purposes of OR UTPA, discovery occurs when a claimant knows or should have known of the unlawful behavior.⁹⁶ In Connecticut, claimants have three years from the violation to sue under CUTPA.⁹⁷ CUTPA suits must be commenced within three years of the unfair

89. CONN. GEN. STAT. § 42-110g(d) (2011); *See Bristol Tech., Inc. v. Microsoft, Corp.*, 127 F. Supp. 2d 64, 67 (D. Conn. 2000) (CUTPA provides for attorney fees for a prevailing plaintiff, not a prevailing party as provided for in other statutes.).

90. *Bristol*, 127 F. Supp. 2d at 66.

91. *Id.* at 85. Bristol also received punitive damages and injunctive relief in an order that was later vacated by an unopposed motion by Microsoft as part of a settlement agreement between the parties. *Bristol Tech., Inc. v. Microsoft, Corp.*, 114 F. Supp. 2d 59, 100 (D. Conn. 2000), *vacated*, 250 F.3d 152 (2d Cir. 2001).

92. *Bristol*, 127 F. Supp. 2d at 67, 78.

93. *Id.* at 78.

94. *Id.*

95. OR. REV. STAT. § 646.638(6) (2009).

96. *McCulloch v. Price Waterhouse LLP*, 971 P.2d 414, 420 (Or. Ct. App. 1998).

97. CONN. GEN. STAT. § 42-110g(f) (2011).

conduct even if the claimant could not reasonably have discovered the unfair trade practice within that period.⁹⁸

D. Remedies

OR UTPA provides for a minimum damages award of \$200 if the court finds that the defendant engaged in unlawful trade practices.⁹⁹ This means that a successful claimant will receive a \$200 damages award if the amount of actual damages is less than \$200.¹⁰⁰ Connecticut has no minimum damages award.¹⁰¹ Both states allow for punitive damages.¹⁰² The court has sole discretion over punitive damages awards in a CUTPA action,¹⁰³ but juries may determine punitive damages awards in an OR UTPA suit.¹⁰⁴ Both OR UTPA and CUTPA authorize equitable relief at the discretion of the trial court.¹⁰⁵

IV. WHAT IS RIGHT WITH OR UTPA?

OR UTPA contains numerous provisions to help achieve its goal of protecting Oregon consumers. Oregon's private cause of action helps remedy problems with government-only enforcement. Oregon has a very successful self-sustaining Financial Fraud/Consumer Protection Section at the Department of Justice,¹⁰⁶ but this is not enough to truly protect consumers. Oregon's Consumer Protection Section educates consumers and attempts to informally resolve disputes.¹⁰⁷ It pursues legal action for the most serious violations but puts emphasis on overall market safety rather than redress for individual consumers.¹⁰⁸ Insufficient government resources lead to

98. *Fichera v. Mine Hill Corp.*, 541 A.2d 472, 476 (Conn. 1988).

99. OR. REV. STAT. § 646.638(1) (2009).

100. *Id.*

101. CONN. GEN. STAT. § 42-110g(a) (2011).

102. *Id.*; OR. REV. STAT. § 646.638(1) (2009).

103. CONN. GEN. STAT. § 42-110g(a) (2011).

104. *Crooks v. Pay Less Drug Stores Nw., Inc.*, 592 P.2d 196, 200 (Or. 1979).

105. OR. REV. STAT. § 646.638(1) (2009); CONN. GEN. STAT. § 42-110g(a) (2011).

106. *See, e.g.*, Media Release, Oregon Department of Justice, Attorney General John Kroger Announces \$650,000 in Fines Against Tigard Auto Dealership for Violating Consumer Protection Laws (May 10, 2010), <http://www.doj.state.or.us/releases/2010/rel051010.shtml>.

107. Oregon Department of Justice Financial Fraud/Consumer Protection, <http://www.doj.state.or.us/finfraud/> (last visited Mar. 31, 2011).

108. *Id.*

under-enforcement of consumer-protection legislation.¹⁰⁹ Additionally, remedies obtained through public prosecution do not adequately compensate injured consumers.¹¹⁰ The private cause of action under OR UTPA allows consumers to seek the relief they need.

Allowing attorney fees for prevailing consumers is an excellent way to encourage private prosecution of unlawful trade practices. OR UTPA's discovery rule, which tolls the statute of limitations, creates a just result for consumers who do not realize they were wronged until some time after the unlawful transaction. Oregon's minimum statutory damages award provides at least some compensation for consumers who cannot quantify the ascertainable loss they suffered. Punitive damages awards encourage claimants to bring actions for small amounts of money when defendants behave egregiously.¹¹¹ They also encourage settlement and deter wrongful conduct.¹¹² Oregon has a good statute that has helped many consumers and will continue to help consumers in the future. However, OR UTPA can be improved in order to provide more assistance to consumers and to more effectively prevent unfair tactics in Oregon's marketplace.

V. WHAT IS WRONG WITH OR UTPA?

As good as OR UTPA is now, it can be even better. First, courts should have discretion to expand OR UTPA's list of unlawful behaviors. Second, OR UTPA should never allow an award of attorney fees to defendants. Third, OR UTPA's statute of limitations needs to be lengthened. Finally, the legislature should increase the statutory minimum damages award to reflect the value of today's dollar.

A. Give Courts Discretion

OR UTPA should be amended to allow courts to expand the list of unlawful behaviors on a case-by-case basis rather than requiring a preexisting administrative rule in order for the court to apply the catch-all provision. One proposed reason for a decline in private suits under OR UTPA is the courts' narrow reading of the enumerated

109. Conroy, *supra* note 13, at 494.

110. *Id.*

111. Bender, *supra* note 10, at 671.

112. *Id.* at 671-72.

unlawful trade practices.¹¹³ Soon after the statute's enactment in the early seventies, critics touted the inefficiency of the catch-all provision because it requires promulgation of an administrative rule to expand the scope of the statute.¹¹⁴ When another scholar renewed this argument fifteen years ago, he advocated for revising the statute to give courts more discretion, and therefore, give claimants more liberty to pursue a cause of action.¹¹⁵ Then the scholar resignedly advocated for more rulemaking to expand the scope of OR UTPA as long as the catch-all still requires an administrative rule.¹¹⁶ Since that time, OR UTPA's list of unlawful behaviors has continued to grow, but typically it grows through legislative amendments rather than the exhausting rulemaking process.¹¹⁷

Allowing the courts discretion to expand the list of unlawful behaviors will ensure that OR UTPA protects consumers against all forms of unfair trade practices. Covering more behaviors will encourage private causes of action, which will consequently improve behavior toward consumers.¹¹⁸ Further, changing the catch-all provision to allow claimants to pursue unfair behaviors at the discretion of the courts would make the process simpler for both consumers and attorneys trying to enforce consumer protection legislation.

Oregon's statute can be confusing. At least one claimant has erroneously sued under Oregon's catch-all provision apparently unaware of the requirement of an administrative rule outlawing the unfair trade practice.¹¹⁹ In this particular case, after the defendant pointed out the error in its brief in support of summary judgment, the claimant amended his complaint to attempt to fit within another provision of OR UTPA.¹²⁰ Defendant's reply brief correctly concluded that the other provision did not apply to the situation

113. Conroy, *supra* note 13, at 502–03.

114. Mooney, *supra* note 4, at 122–23.

115. Bender, *supra* note 10 at 647, 687.

116. *Id.* at 687.

117. OR. REV. STAT. § 646.608 has been amended nearly every legislative session since its enactment to expand the list of unlawful behaviors. OR. ADMIN. R. 137-20-0010–137-20-0713 (2010) contains a far shorter list of unlawful behaviors than the statute itself. *See also* Mooney, *supra* note 4, at 133 (stating the Consumer Protection Department's preference for expanding OR UTPA through the legislature instead of promulgating rules).

118. Bender, *supra* note 10 at 687.

119. Allen v. Delrich Props., Inc., No. Civ. 05-462 JE, 2006 WL 1050536, at *1 (D. Or. Mar. 30, 2006).

120. *Id.*

either.¹²¹ The claimant moved to drop its OR UTPA claim entirely.¹²² The court allowed the claimant to dismiss the claim, but required dismissal with prejudice.¹²³ The defendant then sought attorney fees because it prevailed on the OR UTPA claim.¹²⁴ The court required the claimant to pay \$5,000 of the defendant's attorney fees and costs for the time and expense of defending the erroneous OR UTPA claim.¹²⁵

This claimant is not the only one confused by Oregon's approach. At least one scholar has made the same mistake by categorizing Oregon among states with a provision that generally prohibits unfair or deceptive practices, and not grouping Oregon in the list of "states that take a pure 'laundry list' approach."¹²⁶ If the legislature amended Oregon's catch-all to truly cover all other unfair practices without requiring administrative rules, OR UTPA would be much less confusing.

The difference between "unlawful" and "unfair" trade practices is significant. In contrast to OR UTPA's list of unlawful behaviors, CUTPA's prohibition of unfair trade practices encompasses a wider range of lawsuit possibilities and affords consumers greater protection. Claimants in Oregon must wade through an exhausting list to find an action that fits their complaint. Consumers may be discouraged from pursuing a claim because the statute is long and confusing. On the other hand, plaintiffs in Connecticut have much more freedom to pursue a cause of action. If behavior is unfair, CUTPA authorizes a private cause of action. CUTPA allows for good faith extensions of the law. In fact, CUTPA may authorize a private cause of action for violations of statutes that do not themselves allow for private enforcement¹²⁷ as long as the other elements of a CUTPA claim are satisfied.

Proponents of the laundry list method contend that a list of unlawful practices provides certainty for plaintiffs.¹²⁸ Yet, claimants

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at *3.

126. See PRIDGEN, *supra* note 2, § 2:10.

127. Eder Bros., Inc. v. Wine Merchs. of Conn., Inc., 880 A.2d 138, 150 (Conn. 2005) (A wronged party can bring a CUTPA claim for violations of the public policy embedded in the Liquor Control Act even though that act does not offer a private cause of action.).

128. See PRIDGEN, *supra* note 2, § 3:1.

in Connecticut can find certainty by reviewing the behaviors already declared unlawful by the commissioner or the courts. Further, CUTPA provides flexibility by allowing claimants to prevail over methods of unfair trade practices not yet declared unlawful. Wronged consumers in both Oregon and Connecticut must conduct research to determine the results in similar cases and if the suit is worth the time and expense it will require. However, courts cannot provide relief for claimants in Oregon for any unfair practice not specifically outlawed even if it is strikingly similar to an unlawful practice. Courts may not exercise independent judgment in declaring behaviors unlawful under OR UTPA. OR UTPA's structure provides more certainty for those who wish to avoid liability,¹²⁹ but it does not provide flexibility for victims of creative wrongdoers.

Claimants in Connecticut can sue for any unfair trade practices. Prior cases and Federal Trade Commission guidelines and their interpretation in federal courts guide courts deciding CUTPA claims. This means that CUTPA claimants can sue over unfair practices recognized in prior suits or can sue for behaviors condemned by the Federal Trade Commission. Additionally, CUTPA claimants can sue for any other forms of unfair trade practices. This structure provides flexibility for courts to assist wronged consumers regardless of the precise format of the improper behavior.¹³⁰

It is true that Connecticut experiences its fair share of litigation concerning the meaning of "unfair."¹³¹ Allowing consumers to sue over all unfair trade practices can potentially subject businesses to spend more time—and therefore, more money—in court defending their actions. Further, as with any type of litigation, expanding a plaintiff's avenues for bringing suit can lead to abuse by plaintiffs. However, this does not appear to be a problem in Connecticut. Further, Oregon's confusing structure can also lead to wasted time and resources when parties argue that a claim fits or does not fit a specified practice. Such time and resources would be better spent determining whether the behavior justifies recovery rather than spent determining whether the behavior fits within the statute. Ultimately, the fact finder in Connecticut decides whether a practice justifies recovery. Courts are likely to dispense with frivolous claims quickly.

129. *Id.*

130. *Id.*

131. Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and its Impact on State Law*, 46 WAYNE L. REV. 1869, 1915 (2000).

Therefore, the time and money spent defending such claims should be minimal. The risk of borderline suits does not justify denying relief to injured consumers.

In Oregon, consumers must either appeal to the legislature or navigate administrative processes to expand the list of unlawful trade practices. Even then, a law passed after a claimant's injury will provide no relief to that particular claimant. Oregon claimants do not have the opportunity to pursue a good faith expansion of the law in court. Thus, OR UTPA should be amended to include a true catch-all provision that covers all other unfair trade practices. The statute should not require an administrative rule to support a cause of action for practices not prohibited by the statute.

B. Only Award Attorney Fees to Prevailing Plaintiffs

“Statutes awarding attorneys’ fees to prevailing defendants are undoubtedly among those most likely to discourage a consumer from bringing an action.”¹³² Early in OR UTPA’s history, Oregon courts chose to award attorney fees to prevailing defendants as well as prevailing plaintiffs.¹³³ The purpose of awarding attorney fees to prevailing defendants is quite different from the purpose of awarding attorney fees to prevailing plaintiffs. Courts award attorney fees to prevailing defendants to deter plaintiffs from bringing claims in bad faith and to compensate defendants when plaintiffs do bring claims in bad faith.¹³⁴ OR UTPA’s provision for attorney fee awards to prevailing defendants is intended as an additional safeguard to protect businesses from frivolous lawsuits.

However, allowing attorney fees for defendants provides unnecessary additional protection. Ordinary safeguards against frivolous lawsuits, such as summary judgment, will protect defendants. Further, attorneys working on a contingent fee basis, as most plaintiffs’ attorneys do, are unlikely to bring a claim without a reasonable basis; they typically are paid only when their clients prevail. Additionally, OR UTPA claimants must show that defendants acted willfully;¹³⁵ this requirement protects businesses

132. Dunbar, *supra* note 10, at 462.

133. *See* Conroy, *supra* note 13, at 504 (Courts awarded attorney fees to prevailing defendants in Lane County in 1975.).

134. Stark & Choplin, *supra* note 7, at 501–02.

135. OR. REV. STAT. § 646.638(1) (2009).

from suits for innocent misrepresentations or mistakes in advertising.¹³⁶

The legislature authorized a private cause of action to encourage consumers to help the state enforce consumer protection statutes.¹³⁷ Allowing attorney fees for prevailing defendants discourages citizens from pursuing a private cause of action.¹³⁸ That may be why only twenty states permit a court to award attorney fees to prevailing defendants on unfair trade practices claims.¹³⁹ It is not worth deterring valid claims for those rare instances where claimants might pursue a cause of action in bad faith.

On the other hand, awarding attorney fees to prevailing plaintiffs serves several important functions.¹⁴⁰ It allows plaintiffs who could not otherwise afford to pay attorney fees to bring a cause of action and encourages attorneys to accept their cases.¹⁴¹ Attorney fee awards also encourage claimants to pursue claims that may not otherwise be financially worth the trouble because doing so furthers social goals beyond simply a remedy for that particular plaintiff.¹⁴² Awarding attorney fees to prevailing plaintiffs penalizes wrongdoers, deters future unfair trade practices, and helps fully compensate wronged parties.¹⁴³

The cautionary instruction in the Oregon CLE warning attorneys to consider the possibility of having to pay the defendant's attorney fees before pursuing an OR UTPA cause of action supports the notion that the threat of paying a defendant's attorney fees is truly a deterrent to vigorously pursuing consumer claims.¹⁴⁴ Perhaps this warning will change now that Oregon's law only allows an award of attorney fees to a prevailing defendant when there is no objectively reasonable basis for bringing the claim. However, the possibility of paying a defendant's attorney fees will surely continue to deter some claimants.

Further, awarding attorney fees to defendants punishes consumers who can least afford attorney fees and are in less of a

136. *Id.*; Bender, *supra* note 10, at 659.

137. *See* Weigel v. Ron Tonkin Chevrolet Co., 690 P.2d 488, 494 (Or. 1984).

138. Mooney, *supra* note 4, at 128 n.63.

139. Stark & Choplin, *supra* note 7, at 505.

140. *Id.* at 496.

141. *Id.*

142. *Id.* at 494.

143. *Id.* at 496.

144. *See* discussion *supra*, Part III.B.

position to prevent unfair trade practices. In Oregon, only consumers can sue under OR UTPA. Consumers who sue on a contingent fee basis plan to pay no attorney fees unless they prevail. The possibility of being ordered to pay attorney fees for the opposing party will be a strong deterrent to pursuing a cause of action. If the defendant prevails, the plaintiff's attorney will receive nothing and the plaintiff may be stuck with a bill he or she cannot pay.

On the other hand, awarding attorney fees only to prevailing plaintiffs will force all OR UTPA defendants to pay their own expenses in defending against OR UTPA claims. At first this policy may seem unjust, but defendants are in a better position than plaintiffs to avoid OR UTPA suits by diligently dealing fairly with consumers. If business persons know they will never be able to recover attorney fees under unlawful trade practices suits, the fear of OR UTPA suits will deter them from engaging in even borderline unfair and deceptive behaviors. CUTPA achieves this larger social benefit of encouraging private suits and discouraging unfair trade practices by offering an award of attorney fees only to prevailing plaintiffs. Wronged consumers may more freely seek redress without fear of having to pay the opposing party's attorney fees.

Requiring all defendants to pay their own attorney fees may seem unjust in some circumstances, but procedural safeguards such as summary judgment should keep frivolous claims from going very far; therefore, costs would be minimal. Further, this policy would encourage all persons to deal fairly with others in order to avoid unlawful trade practices lawsuits. Conversely, the fear of having to pay a prevailing defendant's attorney fees in Oregon discourages consumers from suing. If the purpose of including an attorney fee award is truly to encourage consumers to help enforce OR UTPA, the legislature should amend the statute to award attorney fees only to prevailing plaintiffs and never to prevailing defendants.

C. Increase Statute of Limitations

The statute of limitations for a private cause of action under OR UTPA should be lengthened to at least two years. Most states have at least a two-year statute of limitations on a private cause of action for unlawful trade practices.¹⁴⁵ The statute of limitations in Oregon delineates a relatively brief period; individuals must sue within one

145. Bender, *supra* note 10, at 665.

year of the discovery of an unlawful trade practice.¹⁴⁶ CUTPA's statute of limitations extends three years from commission of the unfair practice.¹⁴⁷

Apparently, the reason for OR UTPA's short statute of limitations is to encourage claimants to sue immediately so that the state may investigate the behavior and take action to stop ongoing violations, if any exist.¹⁴⁸ However, the state simply does not have the resources to pursue all, or even most, unlawful trade practices.¹⁴⁹ The state may be able to stop a few ongoing violations, but the one year statute of limitations is more likely to cut off valid consumer claims than it is to help alert the state to large-scale violations.

Fortunately, OR UTPA follows the discovery rule for its statute of limitations. A claimant must file a complaint within one year of the day the claimant discovers or should have discovered the unlawful trade practice.¹⁵⁰ Claimants are not time barred one year after suffering injury; rather they have a year after the time they know or should have known about the deceptive behavior that led to the injury.¹⁵¹ Unfortunately, this simply is not enough time. Even though this could potentially afford more time than Connecticut's three year statute of limitations, too much room for argument remains. Defendants can all too easily argue that a claimant should have known enough to sue as early as when the injury occurred. Further, claimants may suspect a deceptive trade practice before they realize they have been deceived. Evidence of a suspicious claimant may lead a fact-finder to erroneously cut off a timely claim.

Additionally, many plaintiffs do not know their rights. They may not know that they can bring a private cause of action until it is too late. Once they realize their rights, they still must find an attorney willing to take their case. Moreover, most civil actions in Oregon allow a period longer than one year for plaintiffs to file a complaint.¹⁵² In Oregon, claimants have two years to prosecute fraud claims, which are the closest kind of claims to an OR UTPA action.¹⁵³ Claimants can prevail on an OR UTPA claim where the evidence is

146. OR. REV. STAT. § 646.638(6) (2009).

147. CONN. GEN. STAT. § 42-110g(f) (2011).

148. *Weigel v. Ron Tonkin Chevrolet Co.*, 690 P.2d 488, 494 (Or. 1984).

149. *See* discussion *supra* Part V.B.

150. *McCulloch v. Price Waterhouse LLP*, 971 P.2d 414, 420 (Or. Ct. App. 1998).

151. *Id.* at 971 P.2d at 420.

152. *Weigel*, 690 P.2d at 494.

153. OR. REV. STAT. § 12.110(1) (2009). *Bender*, *supra* note 10, at 665.

insufficient to support a fraud claim;¹⁵⁴ however, one year is simply not long enough to allow consumers to seek the justice they deserve. The statute of limitations for a private cause of action under OR UTPA should run two years or more after the consumer discovers the unlawful conduct.

D. Increase Statutory Minimum Damages Award

The statutory minimum damages award should be increased to reflect the value of today's dollar. OR UTPA allows a claimant to recover the greater of \$200 or actual damages;¹⁵⁵ the statutory minimum damages award remains the same as when the statute was first enacted in 1971.¹⁵⁶ One scholar has suggested that in order to keep up with inflation, the legislature should have increased the amount to approximately \$720 fifteen years ago.¹⁵⁷ The comparative amount in today's dollars is approximately \$1100.¹⁵⁸

In 2009, House Bill 3111 proposed increasing the minimum statutory damages award to \$500, but that portion of the bill did not make it into the final version that passed.¹⁵⁹ House Bill 3169, introduced in the same legislative session, would have completely removed the statutory damages award and required a claimant to prove actual damages.¹⁶⁰ Fortunately for consumers, this bill died in committee. These bills indicate that the legislature has been thinking about consumer protection legislation and realizes that an increase in the statutory minimum damages award is a possibility. It is noteworthy that several other states have increased their minimum damages awards while Oregon retains its original figure.¹⁶¹ For

154. *See* Weigel v. Ron Tonkin Chevrolet Co., 673 P.2d 574, 576 (Or. Ct. App. 1983), *aff'd*, 690 P.2d 488 (Or. 1984) (affirming a plaintiff's successful prosecution of an Unlawful Trade Practices claim while acknowledging a directed verdict on plaintiff's fraud claim).

155. OR. REV. STAT. § 646.638(1) (2009).

156. 1971 Or. Laws 2009; *see also* Gross-Haentjens v. Leckenby, 589 P.2d 1209, 1210 (Or. Ct. App. 1979) (citing the original statute); Bender, *supra* note 10, at 667.

157. Bender, *supra* note 10, at 667.

158. *What is a dollar worth?*, THE FEDERAL RESERVE BANK OF MINNEAPOLIS, <http://www.minneapolisfed.org> (last visited May 28, 2011).

159. H.B. 3111, 75th Leg. Assemb., Reg. Sess. (Or. 2009). The portion of HB 3111 (2009) that passed modified the statute to require no objectively reasonable basis for bringing a claim in order for a defendant to receive attorney fees under an OR UTPA claim. *See* discussion *supra* Part III.B.

160. H.B. 3169 75th Leg. Assemb., Reg. Sess. (Or. 2009).

161. Bender, *supra* note 10, at 667–68.

example, Idaho increased its award from \$500 to \$1000 in 1990.¹⁶² Although that figure has not changed in the last twenty years, it represents a far more generous figure than Oregon's \$200 award.

One justification offered for maintaining the original \$200 figure was to prevent defendants from exercising their right to a jury trial in district court for claims brought in small claims court for over \$200.¹⁶³ However, now defendants can request a jury trial only for claims over \$750 – an amount nearly four times the current statutory damages award under OR UTPA.¹⁶⁴ Preventing defendants from exercising their right to a jury trial may be a valid concern. Yet, unless plaintiffs' claims are clearly frivolous, defendants may be unwise to subject themselves to consumer-friendly juries.¹⁶⁵

Additionally, only the claimed value, rather than the actual value of the claim, must exceed \$750,¹⁶⁶ so preventing defendants from exercising their right to a jury trial probably protects only a few claimants who may prefer to have a judge decide their claim. Thus, keeping defendants from exercising their right to a jury trial is not a very good reason to preserve a grossly outdated figure for compensating consumers who cannot prove actual damages. Therefore, the minimum damages award should be increased to realistically compensate today's consumers and to more effectively fulfill its purpose of encouraging fair dealing with consumers.

CONCLUSION

The purposes of the private cause of action under OR UTPA—to compensate a wronged consumer and deter unfair trade practices—serve both the consumer and the state.¹⁶⁷ Enlisting private attorneys general encourages private enforcement to advance public interests.¹⁶⁸ A private cause of action allows citizens to pursue their rights when state resources will not provide redress.¹⁶⁹ Consumers receive

162. *Id.* at 668; IDAHO CODE ANN. § 48-608 (2010).

163. Bender, *supra* note 10, at 669.

164. OR. REV. STAT. § 46.455(2)(c) (2009).

165. Bender, *supra* note 10, at 669.

166. *See* OR. REV. STAT. § 46.455(2)(c) (2009).

167. *Raudebaugh v. Action Pest Control, Inc.*, 650 P.2d 1006, 1009 (Or. Ct. App. 1982); *Weigel v. Ron Tonkin Chevrolet Co.*, 690 P.2d 488, 493–94 (Or. 1984).

168. Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 517 (2001).

169. The Oregon Department of Justice Consumer Protection webpage reads, "It is not practical for us to take legal action on every complaint and we must focus our efforts on

compensation for injuries resulting from unlawful trade practices. The state benefits from a just result that punishes wrongdoers and deters other businesses from committing the same behaviors.

OR UTPA is a useful statute that has helped countless consumers since its enactment forty years ago. OR UTPA has several consumer-friendly provisions that help make it effective: it authorizes a private cause of action, allows attorney fees to prevailing consumers, adheres to the discovery rule for its statute of limitations, provides for punitive damages and equitable relief, and contains a minimum statutory damages award.¹⁷⁰ OR UTPA has certain advantages CUTPA lacks. OR UTPA's list of unlawful trade practices provides some measure of certainty to plaintiffs and defendants, the discovery rule for the statute of limitations helps consumers who suffer latent unlawful practices, and a statutory minimum damages award furthers the goal of compensating wronged consumers. However, greater consumer protection could be achieved at little cost if OR UTPA functioned like CUTPA by allowing courts to expand the list of unlawful trade practices, by liberally awarding attorney fees only to prevailing plaintiffs, and by incorporating a longer statute of limitations. Additionally, Oregon should increase its statutory minimum damages award in order to fully utilize OR UTPA's potential to protect Oregon's consumers.

making the market safer for all." Oregon Department of Justice Financial Fraud/Consumer Protection, <http://www.doj.state.or.us/finfraud/index.shtml> (last visited Mar. 31, 2011).

170. OR. REV. STAT. § 646.638 (2009).