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Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead

DESPITE decades of legislative and judicial effort to eradicate unfair and deceptive trade practices, they continue to thrive in Oregon's consumer marketplace. The legal response to such practices has resulted in a struggle to honor the equally important, but sometimes conflicting, goals of encouraging legitimate consumer claims and safeguarding "honest business[es] acting in good faith"¹ from abusive litigation. Thus far, the balance has tilted toward merchants and has denied consumers unchecked private weapons against market unfairness and deception.

Traditionally, marketplace misdeeds prompted common law fraud actions.² Recently, the unconscionability doctrine has joined fraud in the common law's consumer protection arsenal.³ In practice, however, these common law doctrines have proved inadequate to make exploited consumers whole; fraud poses a

* B.S., University of Oregon, 1982; J.D., University of Oregon School of Law, 1985. The author would like to thank Patricia Ferrell-French, Phil Goldsmith, Maury Holland, Laird Kirkpatrick, and Jim Mooney for their comments on earlier drafts, and Caroline Gerloch for her research assistance. My research was also supported by a summer research grant from the University of Oregon School of Law. The views expressed in this Article are those of the author, not necessarily those of the Oregon Consumer Advisory Council, of which the author is a member.

¹ William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 744 (1972) (footnote omitted).

² See generally DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW ch. 2 (1994).

³ See generally Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 HOUS. L. REV. 721, 735 (1994) (discussing the historical development of unconscionability).

rigorous gauntlet of proof⁴ which many consumers are unable to run, and unconscionability provides inadequate remedies.⁵ As a result, consumer complaints are often unredressed, and abuses undeterred.

Legislative action against merchant overreaching began in 1938 when Congress amended the Federal Trade Commission Act (FTCA) to prohibit "unfair or deceptive acts or practices" in interstate commerce.⁶ However, the FTCA did not create a private cause of action;⁷ it only empowered the Federal Trade Commission (FTC) to obtain relief.⁸ By the late 1960s, the height of the consumer movement, the FTC was urging the states to join in its battle against consumer abuse by enacting state counterparts to the FTCA.⁹ At the same time, the FTC urged the states to complement public enforcement with a private cause of action for wronged consumers.¹⁰

The states responded with a rush of legislation. During the

⁴ See PRIDGEN, *supra* note 2, § 2.02, at 2-4.

⁵ Cf. Bender, *supra* note 3, at 757-60 (discussing the inadequacies of the remedies for unconscionable conduct under Section 2-302 of the Uniform Commercial Code, which has been construed to grant the same narrow equitable remedies as when equity courts applied the doctrine).

⁶ See generally J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347 (1992); Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 524-31 (1980). Some specialized federal and state consumer regulation predated the FTCA amendment. For example, several states had enacted so-called "printer's ink" statutes criminalizing false advertising. In the early 1900s, food and drug regulation was enacted by both Congress and a few states. See Lovett, *supra* note 1, at 728.

⁷ Without significant exception, federal courts have rebuffed consumer litigants' efforts to fashion a private action under the FTCA. *E.g.*, *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973) (class action sought to challenge alleged deceptive advertising of pain reliever); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973) (dismissing class action which only alleged FTCA violations). One federal district court did allow aggrieved consumers a private action to enforce a cease and desist order issued by the FTC against conduct the FTC had declared unlawful. *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976). Congress has since rejected efforts to provide a private action under the FTCA. See Leaffer & Lipson, *supra* note 6, at 524 n.17. Moreover, the *Guernsey* result is an anomaly not followed in other jurisdictions. *Id.* at n.16; see also PRIDGEN, *supra* note 2, § 12.09, at 12-80 to 12-84.

⁸ Since 1975, the FTCA has authorized the FTC, in certain circumstances, to seek restitution and other equitable remedies on behalf of consumers. 15 U.S.C. § 57b-1(b) (1988).

⁹ See Franke & Ballam, *supra* note 6, at 355-58; Leaffer & Lipson, *supra* note 6, at 521-22.

¹⁰ See Franke & Ballam, *supra* note 6, at 357.

1960s and 1970s,¹¹ all fifty states and the District of Columbia enacted statutes¹² addressing deceptive market practices. Although some of these statutes as initially enacted did not provide for private actions, all but two states (Arkansas and Iowa) now expressly or impliedly authorize private enforcement to augment public enforcement by state agencies.¹³

Oregon's statutory response to market deception began in 1965 with the prohibition of certain specified "deceptive trade practices."¹⁴ Enforcement was vested exclusively in the state's district attorneys,¹⁵ but the efforts of their "understaffed or indifferent"¹⁶ offices prompted one commentator to label Oregon the "weak link in the west coast [enforcement] chain."¹⁷ The 1971 Unlawful Trade Practices Act (UTPA) bolstered enforcement in Oregon by vesting concurrent public enforcement authority in the state Attorney General¹⁸ and by authorizing private enforcement.¹⁹

¹¹ In 1957, New York and Rhode Island were the first states to regulate deceptive practices. They were joined in 1961 by Washington and Alaska, and thereafter by the remaining states. See Lovett, *supra* note 1, at 729 n.13.

¹² The two most comprehensive guides to these statutes are Professor Pridgen's treatise, *supra* note 2, and the National Consumer Law Center's practice manual, *Unfair and Deceptive Acts and Practices* by Jonathan Sheldon and Carolyn L. Carter (3d ed. 1991).

¹³ See PRIDGEN, *supra* note 2, § 6.02, at 6-4 to 6-8; SHELDON & CARTER, *supra* note 12, § 7.2, at 375-78. North Dakota, the most recent state to adopt a private action, did so in 1991. N.D. CENT. CODE § 51-15-09 (Supp. 1993). The states' adoption of private rights of action in the 1960s and 1970s has effectively mooted the effort to secure a private remedy under the FTCA. PRIDGEN, *supra* note 2, § 12.09[5], at 12-84.

¹⁴ Act of May 24, 1965, ch. 490, 1965 Or. Laws 952. For a comprehensive discussion of the history of Oregon's deceptive practice legislation from 1965 through its 1973 amendment, see Ralph James Mooney, *The Attorney General As Counsel for the Consumer: The Oregon Experience*, 54 OR. L. REV. 117 (1975).

¹⁵ Act of May 24, 1965, ch. 490, § 4, 1965 Or. Laws 952, 953.

¹⁶ Mooney, *supra* note 14, at 119.

¹⁷ Sherry Smith, Comment, *The Consumer Fraud Information Gap*, 49 OR. L. REV. 421, 433 (1970).

¹⁸ See Mooney, *supra* note 14, at 118-27.

¹⁹ OR. REV. STAT. § 646.638 (1993). Oregon's adoption of private enforcement was consistent with the urgings of national scholars. Professor Lovett articulated the classic argument for such private actions as:

The availability of private consumer actions for deceptive trade practices and the consequent improved bargaining power for consumers would have the . . . effect of greatly assisting and complementing the task of law enforcement for state attorneys general and their consumer protection staffs. State officials cannot possibly investigate or prosecute every single claim of deceptive acts or practices; they must inevitably concentrate their work on the most blatant and frequent offenders But in a great many areas it is

This UTPA private cause of action has effectively displaced common law fraud as the remedy of choice for deceptive practices. UTPA claimants need prove only the specified statutory elements of their claims rather than the more rigorous elements of fraud.²⁰ The UTPA claimant's burden of proof is also less than that of the fraud plaintiff.²¹ Finally, UTPA remedies are an improvement over those available under the common law; claimants can recover minimum damages of \$200 on proof of any "ascertainable loss"²² and are likely to be awarded reasonable attorneys' fees.²³

Oregon's statutory enhancement of common law fraud briefly captured the attention of students, academics, and practitioners.²⁴ But, by the 1980s, the consumer movement had stalled and

the consumer . . . who can most cheaply and quickly remedy [the consumer's] injustices

Lovett, *supra* note 1, at 749; *see also* Mooney, *supra* note 14, at 128 n.61 ("All commentators agree that a private right of suit is an essential component of any worthwhile system of consumer fraud redress.")

Some commentators have argued further that private enforcement of deceptive practices legislation is inherently superior to public enforcement. *E.g.*, PRIDGEN, *supra* note 2, § 6.02, at 6-4 (Private actions are "less subject to politicization than a government enforcement approach."); Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 4 (1985) (Private enforcement is "faster" and its "substantive outcomes reflect public concerns."); Leaffer & Lipson, *supra* note 6, at 555 ("Effective private enforcement . . . offers the best deterrent against wrongdoing in the marketplace.")

²⁰ *See* Richard A. Slottee, *Oregon Unlawful Trade Practices Act*, in CONSUMER RIGHTS AND REMEDIES § 5.1 (Oregon State Bar 1983 & Supp. 1988). For example, unlike fraud, the plaintiff in a UTPA action may not have to show reliance on the representation, depending on the requirements of the particular statutory deception alleged to have been committed. *See Sanders v. Francis*, 277 Or. 593, 598, 561 P.2d 1003, 1006 (1977) (necessity of reliance as an element of causation depends on particular unlawful practice alleged). In addition, although the common law required the fraudulent statement to be made directly to the claimant or with intent that it be transmitted to the claimant, the Oregon Court of Appeals found no such requirement in the UTPA. *See Raudebaugh v. Action Pest Control, Inc.*, 59 Or. App. 166, 650 P.2d 1006 (1982) (action by home buyers on false pest and fungus report obtained by sellers).

²¹ Proof of fraud under the UTPA must satisfy the preponderance of the evidence standard rather than the more rigorous common law standard of clear and convincing proof. *State ex rel. Redden v. Discount Fabrics, Inc.*, 289 Or. 375, 615 P.2d 1034 (1980).

²² OR. REV. STAT. § 646.638(1); *see also* discussion *infra* part III.B.

²³ OR. REV. STAT. § 646.638(3); *see also* discussion *infra* part III.D. In contrast, common law fraud claimants generally cannot recover their attorneys' fees. *See* Jeff Govern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 440 (1991).

²⁴ For commentary on Oregon's UTPA, *see* Slottee, *supra* note 20; J. Britton Con-

the spotlight was off the UTPA. Now, however, two factors compel reexamination of the UTPA's private action: consumer fraud is on the increase and the Measure 5 property tax limitation²⁵ threatens to erode the state's ability to fight it.

Since the adoption of the UTPA in 1971, Oregon consumer complaints have grown more than tenfold. In 1972, the Attorney General received 2440 complaints.²⁶ The number reached nearly 5000 per year from 1974-76.²⁷ From October 1993 to October 1994, the number of written complaints was 7841 while telephone complaints soared to over 2000 per month.²⁸

In the face of this explosion of complaints, government enforcement resources are in crisis. The FTC reserves its scarce resources for flagrant nationwide deception.²⁹ In Oregon, where state and local government share UTPA enforcement authority, every district attorney's office has eliminated its consumer protection division in response to funding reductions.³⁰ Public en-

roy, Comment, *The Private Remedy Under Oregon's Unlawful Trade Practices Act*, 56 OR. L. REV. 490 (1977); Mooney, *supra* note 14; Jean R. Uranga, *Idaho and Oregon Consumer Protection Acts: Administrative Powers of the Attorneys General*, 13 WILLAMETTE L.J. 455 (1977).

²⁵ OR. CONST. art. XI, § 11b (adopted by public initiative Nov. 6, 1990). Measure 5 imposes separate property tax limitations for funding Oregon's public school system and for other government operations. The limit imposed for other government operations (\$10 per each \$1000 of assessed value) has been in effect since the 1991-92 fiscal year.

²⁶ Conroy, *supra* note 24, at 492 n.18.

²⁷ *Id.* (4730 complaints in 1974, 4736 complaints in 1975, and 4699 complaints in 1976).

²⁸ Letter from Peter D. Shepherd, Attorney in Charge of Financial Fraud Section, Oregon Department of Justice, to Steven W. Bender (Nov. 30, 1994) (on file with the author) [hereinafter DOJ letter] (reporting that the DOJ received 25,626 telephone complaints during the same time period). This astounding figure reflects only those consumers who employed the Attorney General's "consumer hotline" — a toll-call except in Salem and Portland and available only four hours a day. A recent national study by the ABA concluded that only 29% of low-income households sought legal help to resolve their various legal problems such as consumer credit and insurance abuses. See Mark Hansen, *A Shunned Justice System*, A.B.A. J., Apr. 1994, at 18. As such, the number of consumers with trade practice complaints is likely much greater than the statistics from the "hotline" reflect.

²⁹ See Leaffer & Lipson, *supra* note 6, at 554 (noting the scarce budgetary resources of the FTC); Sovern, *supra* note 23, at 442 (observing that the 1990 FTC budget of less than 55 million dollars was "obviously a small sum for regulating the many transactions and businesses within the FTC's purview").

³⁰ From 1965 to 1971, district attorneys had exclusive authority to enforce Oregon's deceptive practice regulation. By 1977, only Lane County retained a consumer protection division in its district attorney office. See Conroy, *supra* note 24, at 500 n.65. Lane County has since eliminated its consumer protection division, thereby completing the demise of enforcement of the UTPA by district attorneys.

forcement of the UTPA now falls solely on the Department of Justice (DOJ), a state agency feeling the pinch of Measure 5. In 1975, when the state had only three attorneys, six investigators, and three secretaries to enforce the UTPA, Professor Mooney suggested that these resources were inadequate.³¹ Today, despite the dramatic swell of consumer complaints, the DOJ's UTPA enforcement section³² is staffed by three more attorneys, two fewer investigators, and overall only two more personnel.³³ Increases in enforcement staff and resources are not forthcoming; the UTPA enforcement section receives 11% of its budget from Oregon's General Fund, a source of funding facing a 20% across-the-board cut in 1995.³⁴

In the 1990s, the combined pressures of increasing consumer abuse and budget reductions are placing more enforcement responsibility on consumer litigants and the private bar. Oregon's statutory private cause of action, however, leaves consumers ill-equipped to meet this new challenge. Despite the huge number of consumer complaints each year, few private UTPA actions are initiated. In 1975, for example, consumers lodged 4736 complaints with the DOJ, but filed only 128 private actions.³⁵ From October 1993 to October 1994, there were 25,626 telephone complaints but only 163 private lawsuits.³⁶ Some of these complaints were remedied by the DOJ or settled out of court by the consumer.³⁷ The vast majority, however, probably went un-

³¹ See Mooney, *supra* note 14, at 131.

³² The Financial Fraud Section of the DOJ Civil Enforcement Division enforces the UTPA.

³³ DOJ Letter, *supra* note 28 (reporting that 1994 staffing consists of 5.75 FTE attorneys, 4 investigators, 3 "consumer enforcement officers," and 1 "consumer education coordinator").

³⁴ Wrought by Measure 5, the 1995-97 Oregon budget shortfall was predicted to be approximately \$1.15 billion. See Brent Walth, *Candidates Find Budget Issues Won't Go Away*, REGISTER GUARD, Apr. 24, 1994, at C1. More recently, the budget shortfall has been forecast at \$847 million. Eric Mortenson, *Forecast: A Speedy Session*, REGISTER GUARD, Nov. 21, 1994, at A1.

³⁵ Conroy, *supra* note 24, at 492 n.18, 517.

³⁶ DOJ Letter, *supra* note 28 (also reporting that 138 private lawsuits had been filed in the first 7 months of 1994). The statistics for the 1993-94 UTPA actions are derived from the number of complaints received by the Attorney General pursuant to the notification procedure in OR. REV. STAT. § 646.638(2).

³⁷ Some of the complaints may also have resulted in small claims court proceedings. The Attorney General would not be notified of these proceedings because most consumers in small claims court do not plead their claims under the UTPA. See *infra* note 178. It is also possible that a few complaints were resolved through arbitration. See *infra* part III.H. for a discussion of arbitration of UTPA claims.

redressed, in large part, because attorneys are often unwilling to pursue otherwise valid small-dollar consumer claims.³⁸

Unless reforms are adopted to strengthen Oregon's private action, the decline in public enforcement resources will combine with the inadequacy of the current private remedy to make Oregon a favored destination for vagabond purveyors of fraud and deception.³⁹ The state will once again be the "weak link in the west coast chain" of consumer protection.⁴⁰ This Article examines Oregon's UTPA with an eye toward legislative and judicial reforms that will strengthen its private cause of action and thereby facilitate private enforcement. First, the scope of the UTPA is examined. Next, private remedies authorized by the UTPA are critiqued. Finally, the role of the DOJ is reformulated in response to declining public resources and increased reliance on private enforcement.

I

OREGON UTPA SCOPE REFORMS

A. *Removing the Rulemaking Condition From the Deceptive Practices "Catchall"*

The Unfair Trade Practices and Consumer Protection Law proposed in 1970 by the FTC and the Council of State Governments (the 1970 UTPCPL) offered states three alternative means of defining deceptive practices.⁴¹ The first two prohibited deceptive

³⁸ Cf. Letter from Edward J. Bennett, attorney in Portland, Or., to Steven W. Bender (Mar. 25, 1994) (on file with the author) ("Personal injury attorneys fall all over each other for work — soliciting clients from hospital and police records and advertising on television — while referring away consumer cases . . .").

³⁹ Cf. Leaffer & Lipson, *supra* note 6, at 554 ("[T]he best solution to the serious limitations on public enforcement of unfair trade practices law is the expansion of private enforcement under state UDAP [unfair and deceptive acts and practices] statutes.").

⁴⁰ See Smith, *supra* note 17, at 433. Oregon consumer lawyers and the Attorney General agree on the need to encourage private enforcement. One Oregon attorney opines that inducing the private sector to enforce the UTPA is consistent with "the public mood" that supported Measure 5: "[t]axpayers don't want additional government agencies, . . . but taxpayers are not opposed to forcing . . . perpetrators to pay for private attorney general regulation." Letter from John J. Cosgrave, attorney in Portland, Or., to Steven W. Bender (Apr. 13, 1994) (on file with the author).

Testimony submitted to a House subcommittee in 1993 expressed the commitment of the Attorney General to "exploring new ways to allow individuals to shoulder the ever increasing work load placed on government." *Hearings on H.B. 2386 Before the House Judiciary Comm. Subcomm. on Civil Law and Judicial Administration*, 67th Sess. (Feb. 2, 1993)(statement of Timothy Wood, Assistant Attorney General.)

⁴¹ See generally Anthony P. Dunbar, Comment, *Consumer Protection: The Practi-*

practices generally, while the third incorporated both a list of the twelve practices outlawed by the 1966 Uniform Deceptive Trade Practices Act (the 1966 UDTPA)⁴² and a catchall for “engaging in any act or practice which is unfair or deceptive to the consumer.”⁴³

Oregon adopted the third alternative, but without its expansive “catchall.”⁴⁴ Instead, Oregon’s catchall was a narrower prohibition of “any other conduct which similarly creates a likelihood of confusion.”⁴⁵ Moreover, no private action was authorized under the Oregon catchall unless the Attorney General had already issued a rule declaring the particular conduct to be confusing.⁴⁶ Neither the 1966 UDTPA nor the 1970 UTPCPL had suggested that states so restrict their catchall. In 1973, Oregon replaced its narrow catchall with broader language: “any other unfair or deceptive conduct in trade or commerce.”⁴⁷ Un-

cal Effectiveness of State Deceptive Trade Practices Legislation, 59 TUL. L. REV. 427 (1984).

⁴² Proposed by the National Conference of Commissioners on Uniform State Laws, the UDTPA is found at 7A U.L.A. 265 (1966).

⁴³ See Council of State Governments, *Unfair Trade Practices and Consumer Protection Law*, in 1970 SUGGESTED STATE LEGISLATION 141 (1969) [hereinafter SUGGESTED STATE LEGISLATION].

⁴⁴ See Mooney, *supra* note 14, at 122. For a discussion of the scope of Oregon’s 1965 deceptive practices legislation and the 1967 amendments thereto, see *id.* at 118-19. This legislation was replaced entirely by the UTPA in 1971.

Oregon commentators attribute the UTPA to the 1970 UTPCPL. *E.g., id.* at 119. Most commentators elsewhere, however, categorize Oregon as having adopted the 1966 UDTPA. *E.g.,* SHELDON & CARTER, *supra* note 12, § 3.4.1.2.3, at 96 n.120; Dunbar, *supra* note 41, at 429 n.16; David B. Lee, Note, *The Colorado Consumer Protection Act: Panacea or Pandora’s Box?*, 70 DENV. U. L. REV. 141, 143 n.12 (1992); Donna S. Shapiro, Note, *The Georgia Fair Business Practices Act: Business as Usual*, 9 GA. ST. U. L. REV. 453, 455 n.18 (1993). The UDTPA lists Oregon as among eight states that have adopted the 1966 Act and is likely the source of national commentators’ misinformation. See UNIF. DECEPTIVE TRADE PRACTICES ACT, 7A U.L.A. 265 (1966). Though Oregon did employ the third scope alternative of the 1970 UTPCPL which was borrowed from the 1966 UDTPA, Oregon’s definitions and public and private remedies provisions follow those of the 1970 UTPCPL. Oregon is thus correctly classified as a 1970 UTPCPL jurisdiction.

⁴⁵ Act of July 2, 1971, ch. 744, § 7(1)(r), 1971 Or. Laws 2003, 2007. This was based on the twelfth practice enumerated in the 1966 UDTPA which reads, “any other conduct which similarly creates a likelihood of confusion or of *misunderstanding*.” 7A U.L.A. 280 (1966) (emphasis added). Although the third alternative of the 1970 UTPCPL recommended this wording, Oregon left off the last three words.

⁴⁶ Act of July 2, 1971, ch. 744, § 7(4), 1971 Or. Laws 2003, 2007.

⁴⁷ Act of July 6, 1973, ch. 235, § 2(1)(r), 1973 Or. Laws 401, 403. This language employs the broader catchall from the third alternative to the 1970 UTPCPL which Oregon had refused to adopt two years earlier.

changed since then,⁴⁸ the scope of Oregon's catchall is still dependent on Attorney General rulemaking.⁴⁹

In 1975, Professor Mooney blamed Oregon's reliance on rulemaking for rendering its new catchall "meaningless;" at that time, the Attorney General had adopted only one rule.⁵⁰ The Attorney General's rulemaking record has since improved,⁵¹ but the legislature has added more specific violations to the UTPA by amendment than the Attorney General has by rule.⁵² The Attorney General's passive approach to rulemaking has forced the legislature to play catch-up every two years to keep pace with new schemes of consumer fraud. Because Measure 5 may impede more active rulemaking, the UTPA must be amended to eliminate the rulemaking condition. Oregon courts should be free to dispense consumer justice under the catchall regardless of whether a particular kind of misconduct has been sufficiently egregious or prevalent to prompt rulemaking.

Some merchants may argue that fleshing out the catchall on a case-by-case basis will not provide honest businesses with sufficient notice of what conduct will be considered unfair or deceptive.⁵³ This objection can easily be overcome.

First, in other jurisdictions almost all conduct held to be actionable within an "unfair or deceptive" catchall was already actionable under the common law or was in violation of some other statute.⁵⁴ Thus, the "unfair surprise" these merchants fear is not

⁴⁸ See OR. REV. STAT. § 646.608(1)(u) (1993).

⁴⁹ See OR. REV. STAT. § 646.608(4) (1993). A majority of other states broadly prohibit all "unfair or deceptive" practices without the restrictive condition of prior administrative rulemaking. See PRIDGEN, *supra* note 2, § 3.02[2][c], at 3-6 to 3-7. Seven states adopting the 1970 UTPCPL did omit the "unfair or deceptive" catchall. *Id.* at 3-7 & n.9.

⁵⁰ Mooney, *supra* note 14, at 123 & n.30 (an anti-tying restriction issued as a temporary rule during the 1974 gasoline shortage).

⁵¹ Since 1975, over a dozen permanent and temporary rules have been promulgated. See OR. ADMIN. R. ch. 137, div. 20 (1993).

⁵² See OR. REV. STAT. § 646.608(1)(r)-(t), (v)-(nn) (1993).

⁵³ Professor Mooney reported that the 1965 Oregon legislature had so concluded when it adopted Oregon's first consumer fraud protection. See Mooney, *supra* note 14, at 160 n.153.

⁵⁴ For example, a repair shop committed an "unfair" practice by vandalizing the aircraft of a customer who disputed the repair bill. *State v. Grogan*, 628 P.2d 570 (Alaska 1981). Its conduct would be actionable by the aggrieved consumer under various common law tort theories. Another example is an Oregon case in which an auto repair shop allegedly misrepresented both the repair price and the extent of repairs it would perform. See *Denson v. Ron Tonkin Gran Turismo, Inc.*, 297 Or. 85, 566 P.2d 1177 (1977). The court held these allegations did not implicate the two

that practices previously thought legitimate will be declared improper. Rather, their fear stems primarily from the availability of UTPA remedies stronger than those available under the common law⁵⁵ and the possibility of private enforcement which other statutes may deny.⁵⁶

Second, a catchall freed from the rulemaking condition need not be standardless.⁵⁷ Over half the states look to the federal standard of unfairness and deception for help in construing their catchalls.⁵⁸ The "venerable history of interpretation and definition by the Federal courts"⁵⁹ of the federal standard provides sufficient notice to honest merchants as to what conduct is unacceptable in the marketplace. Oregon's elimination of the rulemaking condition should thus be coupled with express adoption of the federal standard as a guide to interpreting the UTPA catchall.

In adopting the federal standard as a guide to interpretation, the legislature must resolve two questions: first, which of the several sources of federal law should Oregon courts look to, and

provisions of the UTPA pleaded by the plaintiff — § 646.608(1)(g) (false representations of standard, quality, or grade) and (1)(j) (price reduction representations). *Id.* These representations should have been actionable as common law fraud or at least as a breach of contract. It is unclear why the plaintiff did not plead the statute's more general prohibition of false statements concerning "the nature of the transaction or obligation incurred." OR. REV. STAT. § 646.608(1)(k).

⁵⁵ For example, unconscionable contract terms have been held "unfair or deceptive." *E.g.*, *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971). Unlike relief available under most state deceptive practice statutes, remedies for common law unconscionability typically do not include restitutionary recovery or attorneys' fees. For a discussion of the similar shortcomings of unconscionability remedies under Section 2-302 of the UCC, see *Bender*, *supra* note 3, at 757-60.

⁵⁶ For example, the FTC Used Car Rule requires the auto dealer to place a window sticker on each used car to indicate, among other things, the existence of any warranty. The sticker must be given in Spanish when the sale is conducted in that language. 16 C.F.R. § 455.5 (1993). There is no private action, however, for FTCA violations or rules promulgated thereunder. *See supra* note 7. Courts, however, should treat a violation of the Used Car Rule as actionable under a state's "unfair or deceptive" catchall. *See generally* *SHELDON & CARTER*, *supra* note 12, § 5.4.3.1, at 220-22, § 3.2.4.3, at 86-89. Oregon's Attorney General has been considering for over a year whether to make a dealer's failure to disclose in Spanish actionable under the Oregon catchall. Oregon consumers in the meantime have no private means to enforce that FTC Rule obligation.

⁵⁷ For example, courts have uniformly rejected constitutional challenges to deceptive trade practice catchalls as overbroad and vague. *E.g.*, *Scott v. Association for Childbirth at Home, Int'l*, 430 N.E.2d 1012 (Ill. 1981).

⁵⁸ *See* Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 379 (1990).

⁵⁹ *Scott*, 430 N.E.2d at 1018.

second, what degree of deference should the courts give federal law? Federal guidance can be derived from several distinct sources.⁶⁰ For instance, several years ago the FTC announced standards of “unfairness”⁶¹ and “deception”⁶² for purposes of the FTCA. In deferring to the federal standard, Oregon could look to the standards of the FTC, the federal courts, or both. As to the degree of deference to be accorded the federal source chosen, some states authorize mere “consideration” or “guidance”⁶³ while others call for giving “great weight” to the federal standard.⁶⁴ Oregon should invoke the “venerable history” of the federal standard, but it should not bind its courts by requiring them to give “great weight” to such analogous interpretations.⁶⁵ Instead, courts should, in their own discretion, “consider” any one or more of the potential federal sources for “guidance.”

Even after the abolition of the rulemaking condition, the Attorney General should be allowed to give additional, but not exclusive, content to the catchall through rulemaking. Attorney General rulemaking would best serve consumers not as a gatekeeper to the UTPA catchall but instead as a facilitator to help consumers prove “unfair or deceptive” practices under the catch-

⁶⁰ Other state statutes refer variously to FTC interpretations, FTC rulemaking, and FTCA jurisprudence in general. See Lee, *supra* note 44, at 150 n.61.

⁶¹ See PRIDGEN, *supra* note 2, § 3.04[1], at 3-28.5 to 3-30 (describing the FTC’s standard as focusing solely on substantial consumer injury); SHELDON & CARTER, *supra* note 12, § 4.3.2, at 129-30. Congress codified the FTC standard of unfairness in its 1994 reauthorization of the FTC. See Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9 (codified at 15 U.S.C. § 45(n)).

⁶² See Shapiro, *supra* note 44, at 457-58. These FTC standards have been read to be narrower than those of then existing federal case law interpreting the Act.

⁶³ E.g., WASH. REV. CODE § 19.86.920 (1989).

⁶⁴ E.g., IDAHO CODE § 48-604 (1977). The 1970 UTPCPL had suggested states give “due consideration and great weight” to the interpretations of the FTC and the federal courts under the FTCA. See SUGGESTED STATE LEGISLATION, *supra* note 43, at 141, 147. The 1970 UTPCPL intended that federal authorities would thus provide the substantive content to consumer protection and that state authorities would enforce that content. See Franke & Ballam, *supra* note 6, at 357.

⁶⁵ See Elizabeth A. Dalberth, Comment, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards*, 97 DICK. L. REV. 153, 161 (1992) (“If the FTC and the federal court rulings are given ‘great weight and due consideration,’ the state courts may be limited in interpreting the state UDAP statute. Conversely, if the state courts are only ‘guided’ . . . it shows the legislative intent to provide for flexibility in interpretation . . .”) (footnote omitted); see also Leaffer & Lipson, *supra* note 6, at 533-34 n.82. Senate Bill 224 being considered by the 1995 Oregon legislature would abolish the rulemaking condition and direct that courts be “guided” by the federal standard when construing the UTPA.

all. More than half of the states authorize a state agency to adopt regulations to construe their deceptive trade statutes.⁶⁶ Although some states defer to these regulations only as guides, most give the regulations effect as *per se* violations.⁶⁷ Oregon should adopt the latter approach. Accordingly, the combined policymaking of Congress, the FTC, the federal courts, the Oregon Attorney General, and the Oregon courts will determine what constitutes actionable misconduct under the UTPA catchall.

B. The Need for a Private Remedy Under the UTPA for Unconscionable Trade Practices

Courts in other states have held unconscionable conduct actionable under unfair and deceptive practice catchalls.⁶⁸ Claimants in Oregon, however, cannot expect this liberal construction because specific legislative intent denies a UTPA private remedy for unconscionable conduct.⁶⁹ Oregon's 1977 prohibition against "unconscionable tactics" was added to the UTPA as ORS 646.607, but this section does not trigger the UTPA's private remedy.⁷⁰ The result is that only the Attorney General can challenge unconscionable tactics under the UTPA. Regardless of whether Oregon reforms its catchall, Oregon should amend the UTPA to provide a statutory private remedy for unconscionability.

Redressing unconscionable conduct under the UTPA would improve on the common law which denies recovery of affirmative damages for unconscionability.⁷¹ For example, the purchaser of excessively priced goods who has already paid the excessive price is denied restitution. State deceptive trade practice reme-

⁶⁶ See SHELDON & CARTER, *supra* note 12, § 3.2.3, at 84-86.

⁶⁷ *Id.*

⁶⁸ See, e.g., *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979) (excessively priced television rent-to-own transaction); *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971) (excessively priced educational books violate "deceptive" practices catchall). See generally SHELDON & CARTER, *supra* note 12, § 4.4.1, at 136-37. A few states expressly reference unconscionable conduct in their state deceptive practice act. In 1990, Idaho joined these states. See IDAHO CODE § 48-603C (Supp. 1994).

⁶⁹ Of course, the existing rulemaking condition would also prevent Oregon claimants from seeking judicial interpretation and expansion of the catchall.

⁷⁰ See OR. REV. STAT. § 646.638(1) (private action for any method, act, or practice declared unlawful by § 646.608 only).

⁷¹ E.g., *Best v. United States Nat'l Bank*, 780 Or. App. 1, 714 P.2d 1049 (1986) (action for recovery of alleged excessive NSF charges), *aff'd on other grounds*, 303 Or. 557, 739 P.2d 554 (1987).

dies, however, make both restitution⁷² and attorneys' fees available to victims of unconscionability.⁷³ Oregon's Attorney General can seek restitution on behalf of consumer victims of unconscionable tactics,⁷⁴ but it is unrealistic to rely on the underfunded government to seek such relief. The current increase in unconscionable practices⁷⁵ will leave consumers without a UTPA remedy unless they are allowed to assert their rights in a private action when the Attorney General is unable to pursue their claims.

Despite these compelling arguments for a private UTPA remedy for unconscionable trade practices, unconscionability has been a tough sell to Oregon's legislature. Examples of Oregon's mistrust of the doctrine abound. In 1977, Oregon derived its definition of "unconscionable tactics" from the Uniform Consumer Sales Practices Act (the Uniform Act),⁷⁶ but did not adopt the Uniform Act's private remedy for unconscionability. The legislature also omitted the Uniform Act's reference to grossly excessive price as a relevant factor in determining unconscionability.⁷⁷ It may have feared the result if it authorized Oregon courts to

⁷² *E.g.*, *Fleet v. United States Consumer Council, Inc. (In re Fleet)*, 95 B.R. 319 (Bankr. E.D. Pa. 1989) (New Jersey unfair practices statute entitled consumers of grossly overpriced lawyer referral service to refund); *Wernly v. Anapol (In re Wernly)*, 91 B.R. 702 (Bankr. E.D. Pa. 1988) (returning excessive check cashing charges under Pennsylvania's unfair practices regulation).

⁷³ *E.g.*, UNIF. CONSUMER SALES PRACTICES ACT § 11(e), 7A U.L.A. 255 (1971).

⁷⁴ See OR. REV. STAT. § 646.636 (1993).

⁷⁵ For example, the Oregon State Public Interest Research Group announced in March, 1994, its findings of the abusive cost of Oregon rent-to-own transactions. See Julie Tripp, *Rent-to-Own Spurs Campaign*, OREGONIAN, Mar. 3, 1994, at F1. In 1993, Oregon passed disclosure legislation to regulate the rent-to-own industry, making violations an unfair practice actionable by consumers. See OR. REV. STAT. § 646.608(1)(LL) (1993). Urged by the rent-to-own industry, this mild legislation did not address abuses in the actual price charged.

Abuse of Hispanic consumers by some Oregon automobile dealers has prompted the Attorney General to consider rulemaking to declare as an unfair practice dealer exploitation of consumers' inability to understand contracts in English. Such rulemaking, however, might be inconsistent with the legislative intent to deny consumers a UTPA private remedy for unconscionability. The solution to avoid that challenge is to amend the UTPA to make any unconscionable tactic in the marketplace actionable in a private action.

⁷⁶ See UNIF. CONSUMER SALES PRACTICES ACT § 4, 7A U.L.A. 241 (1971).

⁷⁷ *Id.* at § 4(c)(2) (referring to a price that "grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers"). Oregon's definition of "unconscionable tactics" borrows from the Uniform Act those factors in subsections 4(c)(1), (3), and (4), but not those in (c)(2) (gross price), (c)(5) (excessively one-sided transaction), and (c)(6) (misleading opinions). See OR. REV. STAT. § 646.605(9) (1993).

regulate prices; courts in other states, however, have shown restraint in striking down excessive prices as unconscionable.⁷⁸ In proscribing "unconscionable tactics," Oregon also rejected the Uniform Act's "knew or had reason to know" standard in favor of the more lenient standard of "knowingly" taking advantage of the consumer.⁷⁹ Finally, instead of using the Uniform Act's prohibition of an unconscionable "act or practice," Oregon's UTPA refers to an unconscionable "tactic."⁸⁰ This language arguably implicates only procedural unfairness in the bargaining process to the exclusion of the "substantive" unfairness of one-sided contract terms.

Oregon's less than warm welcome of the unconscionability standard into the UTPA is mirrored by its refusal to adopt the remedial enhancements to common law unconscionability in Article 2A of the Uniform Commercial Code. Oregon's adoption of that Article omits the UCC allowance of "appropriate relief"⁸¹ and attorneys' fees⁸² to successful consumer lessees. The legislature may thus be reluctant to reform the UTPA to allow a private remedy for unconscionability that would give the Oregon consumer those same remedies for leases of goods and the other consumer transactions subject to the UTPA. Nevertheless, because compelling reasons for this reform make its potential for adoption more than academic, this Article examines in later sections the impact of providing a UTPA private remedy for unconscionability on such existing private action conditions as ascertainable loss⁸³ and willfulness,⁸⁴ as well as the prospect of

⁷⁸ See generally Bender, *supra* note 3, at 756 n.178 (observing that successful claims of price unconscionability typically involve a price disparity in excess of 2/1 over the market price or other measure of fairness employed). Moreover, since Oregon no longer imposes fixed usury limits on most transactions, there is a compelling need to make unfair pricing actionable under the UTPA. See generally Richard A. Slottee, *Interest and Usury*, in CONSUMER RIGHTS AND REMEDIES ch. 4 (Oregon State Bar 1983).

⁷⁹ Compare UNIF. CONSUMER SALES PRACTICES ACT § 4(c), 7A U.L.A. 241 (1971) with OR. REV. STAT. § 646.605(9)(a) (1993) ("[k]nowingly takes advantage of a customer's physical infirmity, ignorance") and § 646.605(9)(b) (1993) ("[k]nowingly permits a customer to enter into a transaction . . . [without] material benefit").

⁸⁰ OR. REV. STAT. §§ 646.605(9), .607(1) (1993).

⁸¹ U.C.C. § 2A-108 (1990). The UCC drafters presumably intended by that reference to give courts authority to grant restitutionary relief.

⁸² See OR. REV. STAT. § 72A.1080 (1993). A few other states also omitted the UCC remedial enhancements for unconscionability claims. *E.g.*, FLA. STAT. ANN. § 680.1081 (West Supp. 1994).

⁸³ See *infra* part II.B.

recovering punitive damages under the UTPA.⁸⁵

In summary, the legislature should reform the UTPA's treatment of unconscionability in the following manner: (1) the prohibition of unconscionable tactics in § 646.607(1) should be moved into the "laundry list" of violations in § 646.608 so as to trigger the UTPA private remedy,⁸⁶ (2) references to an unconscionable "tactic" should be changed to an unconscionable "method, act, or practice,"⁸⁷ (3) the definition of unconscionability in § 646.605(9) should be amended to include the Uniform Act's reference to grossly excessive pricing, thereby eliminating the implication that such conduct is not actionable under the UTPA,⁸⁸ and (4) the definition of unconscionability should be amended to delete any reference to "knowingly," so that unconscionable conduct will be treated as any other unfair or deceptive conduct for which the consumer need only prove the lesser UTPA standard of willfulness.⁸⁹

C. Other UTPA Scope Reforms

Although unrelated to the need to shift the enforcement burden from the DOJ to private litigants, other reforms to the scope

⁸⁴ See *infra* part II.C.

⁸⁵ See *infra* note 196 and accompanying text.

⁸⁶ Senate Bill 224 introduced in the 1995 Oregon legislature aims to accomplish the same result by referencing § 646.607 in the UTPA private remedy statute.

One issue typically overlooked when states add unconscionability to their deceptive practice statute is the tradition in common law and UCC 2-302 that unconscionability is decided by the judge, not the jury. In 1981, one commentator argued persuasively against legislatures' fear of letting juries decide that issue. See Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743 (1981) (questioning how that issue differs from such amorphous issues as negligence which are routinely entrusted to juries). Because states have with few exceptions codified unconscionability as a question of law for the court (e.g., UNIF. CONSUMER SALES PRACTICES ACT § 4(b), 7A U.L.A. 241 (1971)), and because Oregon has historically distrusted unconscionability, it should be made subject to the UTPA private remedy with the statutory caveat that the issue is one for the court.

⁸⁷ The latter phrasing is derived from § 646.638(1) which provides a private remedy for "a method, act or practice declared unlawful by ORS 646.608." Idaho's new unconscionability statute also uses this phrasing. See IDAHO CODE § 48-603C (Supp. 1994).

⁸⁸ See *supra* text accompanying note 77. For a discussion advocating a net profit comparison standard in the place of the Uniform Act's market standard, see Bender, *supra* note 3, at 754-57. For a discussion of courts employing deceptive practice statutes to redress excessive pricing, see generally PRIDGEN, *supra* note 2, § 3.04[2], at 3-42 to 3-46.

⁸⁹ See *infra* part II.C. (discussing the UTPA willfulness requirement).

of the UTPA should be considered the next time the legislature examines the UTPA.⁹⁰ Areas in need of review include the application of the UTPA to professionals, the judicial exclusion of loans of money, and the statutory exclusion of landlord misconduct.

1. *UTPA Application to Professionals*

Professionals such as doctors and lawyers are not expressly or impliedly excluded from the UTPA.⁹¹ The Oregon Court of Appeals has confirmed this in holding that dentists are subject to the UTPA even though dentistry is "closely regulated" by the Board of Dental Examiners.⁹² Lawyers too are apparently liable under the UTPA.⁹³ Removing the rulemaking condition from Oregon's

⁹⁰ One commentator has urged states to reform their deceptive practice statutes to protect small business plaintiffs. See Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621 (1983) [hereinafter *Toward Greater Equality*] (arguing small businesses are typically as unsophisticated as consumers and usually lack the financial resources to litigate disputes effectively). The UTPA governs business transactions if they involve "franchises, distributorships and other similar business opportunities." OR. REV. STAT. § 646.605(7) (1993); see also OR. REV. STAT. § 650.020 (1993) (private action for deception in sale of franchise); cf. *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc.*, 129 Or. App. 206, 879 P.2d 193 (1994) (UTPA permits private action by one corporation against another for covered business transaction). It may be reasonable to extend the UTPA to protect small business plaintiffs generally if they can demonstrate significant abuses exist in the marketplace that cannot practically be pursued under the common law or the existing UTPA coverage of business opportunity transactions. In any such reform, the legislature should adopt a realistic definition of those small businesses to be protected. The Texas deceptive practice statute protects any business with assets under \$25 million. TEX. BUS. & COM. CODE ANN. § 17.45(4) (West 1987). The Texas approach is overbroad if it intends to protect the unsophisticated and financially neccessitous small business.

⁹¹ Some states do expressly exempt professionals from their deceptive practice statutes. See PRIDGEN, *supra* note 2, § 4.05[3], at 4-60. Some states have construed their legislation to exclude professionals as not engaged in "trade or commerce" or on other grounds. *Id.*

⁹² *Investigators, Inc. v. Harvey*, 53 Or. App. 586, 633 P.2d 6 (1981); see also *State v. Freeman*, 131 Or. App. 336, 345, 884 P.2d 878, 883 (1994) (the UTPA applies to chiropractors and other health professionals when they commit a violation "in the course of providing professional services"). This result is consistent with the FTC's position that the legal and other state-regulated professions are not exempt from the FTCA. See Franke & Ballam, *supra* note 6, at 374.

⁹³ Cf. *Porter v. Hill*, 314 Or. 86, 94, 838 P.2d 45, 50 (1992) (including dictum that § 646.608(k) and (s) would apply to a lawyer who filed an action to collect fees not in fact owed); *Roach v. Mead*, 301 Or. 383, 392, 722 P.2d 1229, 1234 (1986) (plaintiff had no UTPA claim when unable to prove whether legal services concerning investment were obtained for the requisite consumer purpose).

catchall⁹⁴ might subject lawyers and doctors to UTPA remedies for their legal or medical malpractice if it were held an “unfair” practice. Although the refusal by Oregon courts to compensate personal injury claims under the UTPA⁹⁵ would keep the floodgates closed for medical malpractice claims, lawyers might not be so fortunate. Perhaps the best solution would be to borrow the approach employed by the Washington courts and apply the UTPA to claims relating to attorneys’ entrepreneurial activities such as advertising and billing but not to claims relating to legal competence.⁹⁶

2. UTPA Application to Loans of Money

Oregon courts construe the UTPA restrictively to exclude loans of money from its scope because the money lent is not a “good” and lending is not a “service.”⁹⁷ Nationally, most courts have construed the same statutory language to encompass loan transactions.⁹⁸ One court observed that “[o]nly an artificially

⁹⁴ See discussion *supra* part I.A.

⁹⁵ See *infra* note 141 and accompanying text.

⁹⁶ See *Haberman v. Washington Pub. Power Supply Sys.*, 744 P.2d 1032 (Wash. 1987), *amended by* 750 P.2d 254 (Wash.), *appeal dismissed*, 488 U.S. 805 (1988). The Oregon legislature or courts might further distinguish between fraud in legal competence and pure negligence without any misrepresentation, excluding only the latter from the UTPA.

⁹⁷ See *Lamm v. Amfac Mortgage Corp.*, 44 Or. App. 203, 605 P.2d 730 (1980) (alleged misrepresentation by lender not actionable under UTPA which does not apply to “loans or extensions of credit”); *Haeger v. Johnson*, 25 Or. App. 131, 548 P.2d 532 (1976). Certain loan transactions or lender conduct may nonetheless be governed by the UTPA. Sellers of real estate, goods or services who finance their own sales transactions should be subject to the UTPA. See *Slottee*, *supra* note 78, § 5.5, at 5-4. The provision of services by a lender apart from the lending of money might be actionable under the UTPA. Cf. *Roach v. Mead*, 76 Or. App. 83, 88 n.5, 709 P.2d 246, 249 n.5 (1985) (“We do not consider the issue of a person who . . . open[s] a checking or other account. Such accounts normally involve the purchase of various financial services for personal use, and the [application of the UTPA] . . . may therefore be different [than for loans of money].”), *aff’d*, 301 Or. 383, 722 P.2d 1229 (1986). Finally, a lender’s misconduct in collecting its loan is actionable under Oregon’s unlawful debt collection statutes. OR. REV. STAT. §§ 646.639-.643 (1993). Though not discussed in the UTPA cases involving loans of money, § 646.639(1)(b) defines a consumer transaction for purposes of debt collection to involve a person who “sells, leases or provides property, services or credit to consumers.” (emphasis added). In specifically referring to “credit” when it enacted the debt collection statutes in 1977, the legislature was apparently aware of the 1976 *Haeger* decision under the UTPA, but did not amend the UTPA to include a similar reference.

⁹⁸ See cases cited in *SHeldon & Carter*, *supra* note 12, § 2.2.1.2, at 43 n.93. *But see Barber v. National Bank*, 815 P.2d 857 (Alaska 1991) (loan is not a good or service).

narrow construction would hold that the [deceptive trade] statute applies broadly to practices utilized to effect a sale, but cannot reach the practices utilized in its financing."⁹⁹ This rationale is compelling; state deceptive practice legislation, as a rule, should encompass all consumer transactions unless the common law provides adequate remedies for a particular type of transaction or other state or federal regulation sufficiently "occupies the field" to deter and remedy deceptive practices. Neither is the case for loans of money.

Common law remedies for unconscionability and fraud perpetrated by lenders do not provide sufficient monetary incentive to encourage enforcement by consumers or their attorneys.¹⁰⁰ The more difficult question is whether existing regulation of loans "occupies the field" and therefore preempts UTPA coverage. In 1977, the DOJ abandoned its attempt to amend the UTPA to include loans of money because it determined the Banking Commissioner had jurisdiction over lending institutions.¹⁰¹ Despite this determination, unfair and deceptive practices in lending are not comprehensively regulated by other law and should be made

⁹⁹ *Garland v. Mobil Oil Corp.*, 340 F. Supp. 1095, 1099 (N.D. Ill. 1972).

¹⁰⁰ See *supra* notes 2-5, 20-23 and accompanying text. Lenders need not fear unfair expansion of "lender liability" if the UTPA scope is expanded to encompass credit as that result would generally not create new standards of liability for lenders. Rather, remedies for the existing common law obligations to avoid unfairness (unconscionability) and deception (fraud) would be fortified.

¹⁰¹ See *Lamm*, 44 Or. App. at 205, 605 P.2d at 731. The lender in *Haeger* argued federal and state regulation of lenders preempts application of the UTPA to lenders. 25 Or. App. at 134-35, 548 P.2d at 534. Because the court concluded that the UTPA did not apply to loans, it avoided the preemption issue. *Id.* at 135, 548 P.2d at 534-35.

Insurance was expressly excluded from the UTPA presumably because unfair insurance practices were already regulated by Oregon's Department of Commerce (now the Department of Insurance and Finance). OR. REV. STAT. §§ 646.605(7), 746.005-.991 (1993). Oregon's regulation of insurance fixes a private remedy for specific unfair or deceptive insurance practices, such as an insurer's mandate that a claimant engage a particular vehicle repair shop, § 746.300, but not for deception or unfairness generally. One commentator observed that the potential for misrepresentation in insurance is great and that states should therefore exempt insurance from the state's deceptive practice act only if "the regulatory tradition and practice of its insurance commissioners reflect a vigorous representation of consumer interests." Lovett, *supra* note 1, at 734. Congress has exempted the insurance industry from the FTCA, see PRIDGEN, *supra* note 2, § 8.05[2], at 8-19 to 8-20, and the impact of Measure 5 on state agencies may place the burden of deterring deceptive insurance practices on common law remedies ill-suited for that purpose. If insurance abuses reported to the Department of Insurance or the DOJ increase in frequency, Oregon should amend its separate regulation of insurance practices to provide a comprehensive private remedy based on that of the UTPA.

subject to the UTPA. For example, there is no private cause of action under Oregon's regulation of the unfair practices of consumer finance licensees.¹⁰² The Federal Truth in Lending Act imposes technical loan disclosure requirements but neither prohibits nor remedies deceptive practices generally.¹⁰³ Though the FTC and other federal agencies regulate most lenders in some way, the same is true for other businesses governed by the UTPA. Moreover, Oregon courts have applied the UTPA to professions (such as dentistry and law) that are already subject to separate intense state regulation.¹⁰⁴ For these reasons, Oregon should amend its UTPA definition of "real estate, goods or services" in section 646.605(7) to expressly include credit obtained for consumer purposes.

3. UTPA Application to Residential Tenancies

The UTPA excludes "conduct covered by" Oregon's Residential Landlord and Tenant Act (the ORLTA).¹⁰⁵ The propriety of this exemption depends on the sufficiency of other Oregon remedies for unfair and deceptive landlord practices. The ORLTA regulates some but not all such practices. For example, it provides a private remedy for unconscionable rental agreements¹⁰⁶

¹⁰² See *Serles v. Beneficial Oregon, Inc.*, 91 Or. App. 697, 756 P.2d 1266 (1988) (no private action for violations of an Oregon statute that prohibits false statements by consumer finance licensees). Oregon's new regulation of mortgage bankers and mortgage brokers, OR. REV. STAT. §§ 59.840-960 (1993), does create a private action to redress any fraudulent conduct engaged in by these businesses. See OR. REV. STAT. § 59.925. This new regulation covers some transactions already covered by the UTPA; for example, transactions involving a mortgage broker paid for her services in locating a willing lender. On the other hand, it also covers some transactions heretofore excluded from the UTPA, such as a home equity loan from a mortgage banker. Reform of the UTPA to reach loan transactions generally is still necessary, however, because this new regulation applies only to realty loan transactions and excludes many types of lenders from its scope. See OR. REV. STAT. § 59.840(4), (6) (definitions of "mortgage banker" and "mortgage broker").

¹⁰³ Cf. *State v. Brotherhood Bank & Trust Co.*, 649 P.2d 419 (Kan. Ct. App. 1982) (Truth in Lending does not preempt the application of the Kansas deceptive trade practice statute). Oregon's Attorney General has promulgated a regulation making violations of Truth in Lending a UTPA violation when related to the purchase of real estate, goods, or services. OR. ADMIN. R. § 137-20-040 (1993).

¹⁰⁴ See *supra* part I.C.1.

¹⁰⁵ See OR. REV. STAT. § 646.605(7) (1993). This exclusion was added in 1977, Act of June 15, 1977, ch. 195, 1977 Or. Laws 132, four years after the UTPA had added real estate transactions to its scope. Act of July 6, 1973, ch. 235, § 1, 1973 Or. Laws 402.

¹⁰⁶ OR. REV. STAT. § 90.135 (1993).

and those with certain enumerated unfair provisions,¹⁰⁷ for unlawful removals¹⁰⁸ and entries,¹⁰⁹ and for dwellings that pose an imminent threat to health or safety.¹¹⁰ The ORLTA remedies for these practices sometimes go beyond those of the UTPA,¹¹¹ but in other cases they are weaker.¹¹² There is no prohibition in the ORLTA against fraud in general, such as a landlord misrepresenting to the tenant that the rental unit is well insulated and quiet.¹¹³ Arguably, such fraud is actionable under the UTPA as conduct that is "not covered by ORS 90.100 to 90.940 [ORLTA],"¹¹⁴ and thus not excluded. Courts should so construe the UTPA to provide a remedy for any landlord misconduct otherwise a violation of the UTPA that is not remedied under the ORLTA.¹¹⁵ The legislature should also strengthen those remedies in the ORLTA that are weaker than those under the UTPA¹¹⁶ to give consumer tenants as much protection as they receive in their other transactions.

¹⁰⁷ OR. REV. STAT. § 90.245 (1993).

¹⁰⁸ OR. REV. STAT. § 90.375 (1993).

¹⁰⁹ OR. REV. STAT. § 90.920(2) (1993).

¹¹⁰ OR. REV. STAT. § 90.380(5) (1993).

¹¹¹ Most notable is the tenant's right to recover actual damages and up to three months' rent if the landlord attempts to enforce a provision prohibited under § 90.245.

¹¹² For example, § 90.255 authorizes attorneys' fees to the prevailing party in ORLTA actions. In contrast, the UTPA allows an award of fees to the prevailing merchant only if the UTPA action was frivolous. See discussion *infra* part III.E. The UTPA authorizes punitive damages, see discussion *infra* part III.C., but the ORLTA does not. See *Brewer v. Erwin*, 287 Or. 435, 442, 600 P.2d 398, 403-04 (1979) (refusing to superimpose the remedy of punitive damages onto the noncompensatory damage measures in the ORLTA).

¹¹³ Some provisions of the ORLTA address specific disclosure obligations. *E.g.*, OR. REV. STAT. § 90.310 (1993) (disclosure of pendency of foreclosure proceeding on rental unit).

¹¹⁴ OR. REV. STAT. § 646.605(7) (1993).

¹¹⁵ The Oregon Court of Appeals has adopted this approach in permitting a residential tenant to assert a UTPA counterclaim for false advertising against the landlord in a forcible entry and detainer action. See *Hoffer v. Szumski*, 129 Or. App. 7, 877 P.2d 128 (1994).

¹¹⁶ For example, § 90.255 of the ORLTA should be amended to allow the successful landlord to recover attorneys' fees only if the tenant's claim is frivolous, at least for such deceptive-trade-practice-like claims as unconscionability and breaches of the landlord's statutory obligation of good faith in § 90.130.

II

UTPA CONDITIONS FOR PRIVATE ACTIONS

A. *Summary of Conditions*

The UTPA private remedy for redressing practices declared unlawful in section 646.608 imposes three primary conditions on private relief: (1) the claimant must have suffered some “ascertainable loss of money or property” as a result of the unlawful practice, (2) the unlawful practice must have been committed willfully, and (3) the UTPA action must be commenced within the specified limitation period. This Article examines each of these conditions to determine if they keep meritorious consumer claims from being pursued or otherwise add unnecessary hurdles to consumer redress of marketplace deception.

B. *The Ascertainable Loss Condition*

Derived from the 1970 UTPCPL,¹¹⁷ Oregon’s condition of an “ascertainable loss of money or property”¹¹⁸ is most relevant when a claimant seeks the statutory minimum damage award of \$200.¹¹⁹ Many other states require “loss” as a condition to private relief either expressly or impliedly by judicial construction.¹²⁰ The loss condition is said “to guard against vicarious suits by self-constituted private attorneys general when they spot an apparently deceiving advertisement in the newspaper, on television or in a store window.”¹²¹ Oregon’s additional requirement that a violation be willful,¹²² however, assures that the merchant held liable will have intentionally or negligently engaged in the particular unlawful conduct. Thus, innocent advertising errors will not expose merchants to opportunistic claimants seeking statutory damages. If the loss condition is eliminated or changed, the innocent merchant remains protected by the willful

¹¹⁷ See SUGGESTED STATE LEGISLATION, *supra* note 43, § 8, at 148-49.

¹¹⁸ OR. REV. STAT. § 646.638(1) (1993).

¹¹⁹ Oregon’s allowance of statutory minimum damages is discussed *infra* part III.B. The loss condition may also be relevant if the claimant seeks injunctive or other equitable relief in lieu of damages, see PRIDGEN, *supra* note 2, § 5.04[1], at 5-20, or punitive damages.

¹²⁰ *Id.*

¹²¹ Weigel v. Ron Tonkin Chevrolet Co., 298 Or. 127, 136 n.6, 690 P.2d 488, 494 n.6 (1984) (quoting David A. Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L.Q. 307, 314 (1969)).

¹²² See discussion *infra* part II.C.

condition.¹²³

The expansion of the scope of Oregon's UTPA since its enactment and the potential for future expansion compel reform of the ascertainable loss condition. Oregon cases construing the loss condition typically involve fraud in the sale of realty, goods, or services. In those circumstances courts have excused proof of any specific amount of loss, as long as some loss is "capable of being discovered, observed or established."¹²⁴ Even a nominal loss will satisfy the loss condition.¹²⁵ These liberal cases, however, belie the serious limitation on private relief posed by the

¹²³ The effect of Oregon's dual conditions of loss and willfulness is illustrated by the facts of *Crooks v. Pay Less Drug Stores Northwest, Inc.*, 285 Or. 481, 592 P.2d 196 (1979). The defendant merchant intended to advertise razor cartridges at the sale price of 89¢, but mistakenly advertised that price for the razor itself, normally sold for \$3.29. The plaintiff was allowed to purchase that razor at \$2.89 but not for 89¢. He recovered the \$200 minimum damages apparently based on his ascertainable loss of \$2. The advertising mistake was not a blameless one. Apparently, the merchant had detected the error but decided the cost of reprinting the newspaper insert was prohibitive. The merchant instead published a correction in small print in a different part of the same newspaper. The jury apparently concluded that the merchant's deception was willful. One commentator concerned about the liability of innocent advertisers under state deceptive practice statutes agrees with the outcome in *Crooks* because the merchant "had reasonable opportunity to avoid the deception," albeit at great cost, but instead "permitted the dissemination of information which it knew to be deceptive." See *Sovern, supra* note 23, at 464.

Query whether the merchant could have relied on the loss condition to elude liability by simply declining to sell the misadvertised razor to the customer at any price. Oregon courts have not yet decided whether a frustration of a buyer's expectation constitutes "loss." See *Weigel*, 298 Or. at 136-37, 690 P.2d at 495 (considering but not deciding the issue). Those courts that have held the consumer's cost in traveling to the store is a sufficient "loss" of money have effectively eliminated the loss condition. *E.g.*, *Rein v. Koons Ford, Inc.*, 567 A.2d 101, 108 (Md. Ct. App. 1989).

¹²⁴ *Scott v. Western Int'l Surplus Sales, Inc.*, 267 Or. 512, 515, 517 P.2d 661, 663 (1973) (footnote omitted) (ascertainable loss established where tent purchased did not have a window with a closing flap as depicted on the wrapper); see also *Weigel*, 298 Or. at 137, 690 P.2d at 495 (testimony that used car represented as new was worth less used than new supported award of statutory \$200 damages); *Martin v. Cahill*, 90 Or. App. 332, 752 P.2d 857 (1988) (evidence that city owned part of yard represented as owned by seller supported finding of ascertainable loss); *Tri-West Constr. Co. v. Hernandez*, 43 Or. App. 961, 972, 607 P.2d 1375, 1382 (1979) (loss condition satisfied by evidence that homeowner would have had recourse to bond for negligent construction had contractor been licensed as represented), *review denied*, 288 Or. 677 (1980).

¹²⁵ *E.g.*, *Crooks*, 285 Or. at 487, 592 P.2d at 199 (difference between razor purchase price of \$2.89 and advertised price of 89¢ apparently justified \$200 minimum damages); cf. *Riviera Motors, Inc. v. Higbee*, 45 Or. App. 545, 609 P.2d 369 (declining to decide if \$1.50 stop payment charge satisfies loss condition because consumer incurred more substantial expenses in borrowing money to pay charges for unauthorized car repair), *review denied*, 289 Or. 275 (1980).

loss condition in circumstances not involving fraud. Both legislative amendment and Attorney General regulation have expanded the UTPA beyond fraud to such unfair practices as transmitting unwanted advertisements by fax,¹²⁶ unwanted telephone solicitations,¹²⁷ and failing to provide certain disclosures in health spa service contracts.¹²⁸ These and other violations are meaningless to private litigants if they must prove some loss of "money or property" to obtain UTPA relief. Only a law professor's hypothetical could overcome the loss condition for such violations. The Attorney General does not need to prove an ascertainable loss to seek injunctive or other relief. Oregon's regulatory scheme therefore burdens the Attorney General with enforcing these new UTPA requirements for which consumers privately have no effective remedy. This allocation of enforcement duty is clearly untenable with the prospect of decreasing government resources.

Moreover, permitting private UTPA actions for unconscionable practices¹²⁹ will be meaningless, in substantial measure, unless the loss condition is reformed. Although an unconscionably excessive price would satisfy the loss requirement, unfair terms not involving price, such as a waiver of some statutory protection, might be unconscionable but nonetheless fail to satisfy the loss condition until actually enforced.¹³⁰

At least three possible reforms would address these concerns. First, the loss condition could be abolished and the willful condition relied on to protect innocent merchants.¹³¹ But, this option arguably goes too far because it may result in mass minimum damages recovery against a merely negligent merchant.¹³² A better approach would bifurcate the loss condition depending on the remedy sought: a claimant seeking the UTPA \$200 minimum

¹²⁶ OR. REV. STAT. §§ 646.608(1)(ff), 646.872 (1993).

¹²⁷ OR. REV. STAT. §§ 646.608(1)(hh), 646.563 (1993).

¹²⁸ OR. REV. STAT. §§ 646.608(1)(y), 646.671 (1993).

¹²⁹ This reform is advocated *supra* part I.B.

¹³⁰ See *Orlando v. Finance One of West Virginia, Inc.*, 369 S.E.2d 882 (W. Va. 1988) (class action consumers suffered no ascertainable loss as required by the West Virginia Consumer Credit and Protection Act because lender had not attempted to enforce unconscionable waiver of homestead exemption). Some unconscionable waivers may not result in the requisite loss of money or property even if enforced.

¹³¹ See *supra* notes 122-23 and accompanying text.

¹³² The definition of willful includes conduct the person should have known was a violation. OR. REV. STAT. § 646.605(10) (1993). Should these consumer watchdogs bring a class action, however, minimum damages recovery would be unavailable. See *infra* note 245 and accompanying text.

damages or punitive damages would need to prove the requisite "loss"; in contrast, a claimant seeking "equitable relief"¹³³ should not have to prove any loss. For example, a claimant could seek to avoid enforcement of an unconscionable contract term without proof of any loss. Private injunctive relief, which the UTPA either permits or should be reformed to permit,¹³⁴ also would be available without proof of loss. Thus, the recipient of unwanted advertisements by fax could seek to enjoin future transmissions.

This reform, however, might be insufficient to deter certain of the newly added UTPA violations for which there is little individual incentive for claimants to seek equitable relief. For example, a health spa that willfully fails to identify the person providing the health spa services in its contract¹³⁵ would be deterred little by the unlikely prospect of some consumer seeking private injunctive relief to halt that practice for the benefit of others. The loss condition on damages would insulate against any damages liability for that violation. The benefits of deterrence may justify a third approach: replacing the "loss" condition with one of "injury" to the consumer. Borrowed from Oregon's unlawful debt collection practices act¹³⁶ and other states' deceptive practice acts,¹³⁷ the injury standard avoids requiring some loss of money. Instead, claimants seeking the \$200 minimum damages (or other UTPA relief) need only show an "invasion of any legally protected interest."¹³⁸ The injury standard¹³⁹ as applied in other

¹³³ OR. REV. STAT. § 646.638(1) (1993).

¹³⁴ See discussion *infra* part III.F.

¹³⁵ See OR. REV. STAT. § 646.671(1) (1993).

¹³⁶ OR. REV. STAT. § 646.641(1) (1993) ("Any person injured as a result of willful use or employment . . . of an unlawful collection practice may bring an action . . . to recover actual damages or \$200 . . .").

¹³⁷ E.g., MASS. ANN. LAWS ch. 93A, § 9 (Law. Co-op. 1994).

¹³⁸ See *Leardi v. Brown*, 474 N.E.2d 1094, 1101 (Mass. 1985) (adopting Restatement (Second) of Torts definition of "injury" for purposes of Massachusetts deceptive practice statute, which was amended in 1979 to replace an ascertainable loss condition with one of injury). The tenants in *Leardi* whose lease contained an unlawful disclaimer of the habitability warranty were held to have suffered "injury" even though the landlord had not attempted to enforce the disclaimer. *Id.*

¹³⁹ The Oregon Court of Appeals has held that emotional upset is an "injury" for purposes of Oregon's unlawful debt collection private action justifying the minimum \$200 recovery. See *Creditors Protective Ass'n, Inc. v. Britt*, 58 Or. App. 230, 648 P.2d 414 (1982). If Oregon adopts the "injury" standard for the UTPA, courts should employ the Massachusetts standard of "invasion of any legally protected interest" and allow recovery in appropriate circumstances without proof of specific harm whether monetary or emotional. For example, a health spa customer who is not given the health spa rules as required by statute may not have suffered monetary

states nonetheless guards against purely “vicarious suits by self-constituted private attorneys general” by demanding that there be some relationship between the defendant and the injured claimant.¹⁴⁰ On balance, both bifurcation and the “injury”¹⁴¹ reform are superior to retaining the “loss” condition or simply abandoning any such requirement.

C. The Willfulness Condition

Oregon’s private remedy applies only to “willful”¹⁴² offenders who “knew or should have known” their conduct violated the UTPA.¹⁴³ The willful condition, meant to protect the careful, honest merchant, has been criticized for increasing the risk and cost of deceptive practice litigation.¹⁴⁴ One commentator has observed, however, that as to conditions of merchant liability in general, “[t]he best way to deal with rules which make it prohibitively expensive for consumers with legitimate grievances to ob-

or even emotional harm, but may nonetheless have been injured under this liberal standard and thereby recover UTPA minimum damages.

¹⁴⁰ See *Leardi*, 474 N.E.2d at 1102 (quoting Rice, *supra* note 121, at 314). For example, customers of a health spa that fails to provide the required UTPA disclosures should satisfy the injury standard, but those who never contracted with the health spa should not.

¹⁴¹ The Oregon Court of Appeals has held that the UTPA does not permit recovery for personal injury. *Gross-Haentjens v. Leckenby*, 38 Or. App. 313, 589 P.2d 1209 (1979) (claimant sought recovery for injuries suffered in accident allegedly resulting from dealer’s misrepresentation of condition of brakes). This decision was based on the language of the “loss” condition, and the outcome could be different under an “injury” standard. The floodgates to the UTPA would not necessarily be opened to personal injury lawyers desiring attorneys’ fees recovery. Among other things, the injured claimant would still need to prove that some willful unfair or deceptive practice caused the injury. Moreover, individuals not acting in their “business, vocation or occupation” are not liable under the UTPA. OR. REV. STAT. § 646.608(1) (1993). In any case, if the legislature does not want to allow physically injured claimants access to the UTPA even in these limited circumstances, it could expressly exclude personal injury claims when adopting the “injury” standard.

If the UTPA “loss” standard is retained, personal injuries caused by a UTPA violation should nonetheless be compensated under the UTPA if a claimant has incurred medical expenses and thus suffered the requisite loss of money. A federal district court has interpreted the *Leckenby* holding to exclude personal injury claimants from the UTPA even if they seek damages for medical expenses or property damage. See *Allen v. G.D. Searle & Co.*, 708 F. Supp. 1142, 1158 (D. Or. 1989). This interpretation, however, goes against the plain language of the UTPA.

¹⁴² OR. REV. STAT. § 646.638(1) (1993).

¹⁴³ OR. REV. STAT. § 646.605(10) (1993).

¹⁴⁴ *E.g., Lee*, *supra* note 44, at 155; *cf. Thomas v. Sun Furniture & Appliance Co.*, 399 N.E.2d 567, 570 (Ohio Ct. App. 1978) (To read Ohio statute to require proof of intent “would effectively emasculate the act and contradict its fundamental purpose.”).

tain redress is to increase the amounts awarded to prevailing consumers, rather than penalize merchants who have done nothing wrong."¹⁴⁵ Although the willful condition has been fatal to Oregon claimants who failed to plead it,¹⁴⁶ Oregon juries and judges appear likely to decide the question of willfulness in the claimant's favor if the issue reaches them.¹⁴⁷ Given this experience, Oregon should retain the willful condition in its UTPA.¹⁴⁸

One reasonable reform Oregon might consider is bifurcating the willful condition to make it apply only to actions seeking damages recovery but not to those seeking equitable relief. Oregon's Attorney General must prove willfulness only when seeking a civil penalty against a violator,¹⁴⁹ not when seeking injunctive relief or restitution for injured consumers. It seems consistent with easing the burden on the Attorney General to eliminate the willful condition for private litigants seeking equitable relief.¹⁵⁰

D. *The Statute of Limitation Condition*

The UTPA imposes a one year statute of limitation on private actions that commences upon the claimant's discovery of the violation.¹⁵¹ There is a two year limitation period, however, for the

¹⁴⁵ *Sovern, supra* note 23, at 462.

¹⁴⁶ *Heierman v. Murray & Holt Motors, Inc.*, 44 Or. App. 341, 605 P.2d 1359 (1980) (granting motion for nonsuit because claimant neither pleaded nor introduced any evidence of willfulness); *Luedeman v. Tri-West Constr. Co.*, 39 Or. App. 401, 592 P.2d 281 (1979) (same problem).

¹⁴⁷ *E.g.*, *Scott v. Western Int'l Surplus Sales, Inc.*, 267 Or. 512, 517 P.2d 661 (1973) (evidence sufficient to support judge's finding that merchant who had tent on display should have known the tent was misrepresented on its package); *Martin v. Cahill*, 90 Or. App. 332, 752 P.2d 857 (1988) (sufficient evidence to support jury finding of willful misrepresentation of property boundaries).

¹⁴⁸ Should the legislature enact a private remedy for unconscionable practices, the willfulness condition could be satisfied on proof the merchant knew or should have known its conduct was unconscionable. The Uniform Consumer Sales Practices Act provision on unconscionable practices employs the similar standard of whether the supplier "knew or had reason to know" of various inequitable circumstances. *UNIF. CONSUMER SALES PRACTICES ACT* § 4, 7A U.L.A. 241 (1971).

¹⁴⁹ *OR. REV. STAT.* § 646.642(3) (1993).

¹⁵⁰ Such bifurcation is consistent with one commentator's observation that the greatest problem with deceptive practice statutes generally is their "use of strict liability for remedies other than injunctive and restitutionary relief." See Thomas J. Holdych, *Standards for Establishing Deceptive Conduct Under State Deceptive Trade Practices Statutes that Impose Punitive Remedies*, 73 *OR. L. REV.* 235, 343 (1994).

¹⁵¹ *OR. REV. STAT.* § 646.638(5) (1993). See *Bodin v. B. & L. Furniture Co.*, 42 Or. App. 731, 735-36, 601 P.2d 848, 850 (1979) (borrowing the objective standard from Oregon fraud actions that discovery occurs when the claimant had sufficient

closest analogous action to the usual UTPA claim — fraud.¹⁵² The Oregon Supreme Court in dictum explained the shorter UTPA period as follows:

The evident purpose [of the UTPA] is to encourage private actions when the financial injury is too small to justify the expense of an ordinary lawsuit, provided that the action is timely initiated while the unlawful practice may be continuing and that the state is given an opportunity to investigate the practice for possible wider enforcement action.¹⁵³

The court also observed that the UTPA's private action was taken "verbatim" from the 1970 UTPCPL,¹⁵⁴ but that Act did not specify a statute of limitation. In fact, most states have expressly or impliedly adopted at least a two year period.¹⁵⁵

Oregon should adopt a two year period for its UTPA, as there is no good reason to employ a shorter period for these actions than for the closely analogous fraud actions. The supreme court's rationale supposes a consumer who would otherwise sleep on her rights is prompted to quick action by knowledge of the short limitation period. The Attorney General is then able to move quickly to enjoin the offender from victimizing other consumers. Of course, few claims proceed in this manner. Consumers are likely unaware of the fast-track requirements of the UTPA. They may also find it difficult to obtain a lawyer. Additionally, the Attorney General is not poised to investigate and act upon each private action filed. The shorter period compared to fraud and other common law actions instead strips consumers

knowledge to "excite attention and put a [reasonable] party upon his guard or call for an inquiry"). The UTPA does allow expired claims to be asserted as a counterclaim. OR. REV. STAT. § 646.638(6) (1993). Although such a claimant probably cannot receive a net positive damages recovery, attorneys' fees should be awarded to the successful counterclaimant without regard to the amount of the merchant's claim. See generally SHELDON & CARTER, *supra* note 12, § 7.3.4, at 381.

¹⁵² OR. REV. STAT. § 12.110(1) (1993). The limitation period for negligence actions is also two years, *id.*, though the discovery rule does not apply to most negligence claims. Oregon's new statutory regulation of the deceptive practices of mortgage bankers and mortgage brokers also specifies a limitation period for private actions that is more liberal than the UTPA. See OR. REV. STAT. § 59.925(4) (1993) (such actions must be commenced within the later of three years after the transaction or two years after discovery of the claim, but in the latter case no more than five years after the transaction).

¹⁵³ Weigel v. Ron Tonkin Chevrolet Co., 298 Or. 127, 135, 690 P.2d 488, 494 (1984) (footnote omitted).

¹⁵⁴ *Id.* at 135 n.5, 690 P.2d at 494 n.5.

¹⁵⁵ For a state-by-state listing of deceptive practice limitation periods, see PRIDGEN, *supra* note 2, at App. 3A.

of meritorious statutory claims and compels them to navigate the treacherous waters of the common law for actions brought more than one year after their discovery of the deception.¹⁵⁶ A national expert on deceptive practice litigation argues that those few states with a one year limitation period frustrate the purpose of deceptive trade practice statutes to give meaningful rights to unsophisticated consumers.¹⁵⁷ Oregon should remove its name from that ignoble list.

III

OREGON UTPA PRIVATE ACTION REMEDIES

A. *Guidelines for Reform*

Modeled after the 1970 UTPCPL, the UTPA private remedy attempts both to deter unscrupulous merchants and to provide incentive to victims to initiate enforcement actions they would not otherwise pursue.¹⁵⁸ Its ability to serve these dual purposes will become increasingly limited as the state's complementary enforcement role declines. That decline will expose old weaknesses and create new ones in a private remedy essentially unchanged

¹⁵⁶ An examination of Oregon case law reveals that most of the UTPA claims held time-barred would have been timely under a two year limitation period. *E.g.*, *Saenz v. Pittenger*, 78 Or. App. 207, 715 P.2d 1126 (1986); *Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, *review denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1206, 1227 (1983); *Myers v. MHI Investments, Inc.*, 44 Or. App. 467, 606 P.2d 652 (1980). The only case to fall outside a two year period involved unusual facts and was brought over three years after the claim accrued. *See Jaquith v. Ferris*, 64 Or. App. 508, 669 P.2d 334 (1983), *aff'd on other grounds*, 297 Or. 783, 687 P.2d 1083 (1984); *cf. Donohoe v. Mid-Valley Glass Co.*, 84 Or. App. 584, 735 P.2d 11 (UTPA claim apparently would have been timely under a two year period with a discovery rule), *review denied*, 303 Or. 534, 738 P.2d 977 (1987). Moreover, the claim in the Oregon case that established the standard for the discovery rule in UTPA actions would have been timely without regard to discovery under a two year standard. *Bodin v. B. & L. Furniture Co.*, 42 Or. App. 731, 601 P.2d 848 (1979).

¹⁵⁷ *See Jonathan Sheldon, UDAP Statutes That Work and Those That Do Not*, STATE LEGISLATIVE CONSUMER NEWS 6, 7 (Summer 1992).

¹⁵⁸ *See David A. Rice, Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U. L. REV. 559, 573 (1968). One commentator explained the private remedies' deterrence role as filling the void left by public enforcement that "can monitor and detect only a small fraction [of marketplace fraud]. . . . In contrast, when consumers have an effective private remedy, the unscrupulous merchant is never certain who can safely be defrauded, and who will respond with a lawsuit." *Toward Greater Equality*, *supra* note 90, at 1626 (footnotes omitted).

since its enactment in 1971.¹⁵⁹ The next sections of this Article examine each aspect of the private action remedies and propose various reforms to better encourage meritorious claims and deter unscrupulous merchants without unduly harassing the honest ones. Because Measure 5 impacts the judicial system as well as state agencies, reforms whenever possible should also encourage the efficient and speedy resolution of UTPA claims.

B. The UTPA Minimum Damage Award

The UTPA private action provides a \$200 award of minimum damages when actual damages are less.¹⁶⁰ This award intends to serve the same dual purposes of the private action in general: to deter violations and to encourage victims to sue despite small dollar losses.¹⁶¹ Adopted in 1971 from the 1970 UTPCPL, the \$200 award has remained unchanged. Adjusting the statutory award for inflation from 1971 to 1994 requires at least a threefold increase to approximately \$720 to have the same impact it had when enacted.¹⁶² Several states that award minimum damages¹⁶³

¹⁵⁹ The standard for entitlement of successful defendants to attorneys' fees was clarified in 1977 as discussed *infra* note 214 and accompanying text.

¹⁶⁰ OR. REV. STAT. § 646.638(1) (1993). For example, a consumer forced to pay \$2.89 for a razor advertised falsely at 89¢ recovered the \$200 minimum award. *Crooks v. Pay Less Drug Stores Northwest, Inc.*, 285 Or. 481, 592 P.2d 196 (1979).

¹⁶¹ *Hearings on H.B. 2386 Before the Senate Judiciary Comm.*, 67th Sess. (June 8, 1993) (testimony of Professor Richard A. Slottee). House Bill 2386 is discussed *infra* at notes 165-68 and accompanying text.

¹⁶² The inflation adjustment was calculated by reference to the increase in the U.S. consumer price index from 1971 to the fourth quarter of 1993 as published in Table B-108 of the *Economic Report of the President* (1994). One commentator has argued that the amount of the minimum recovery in state deceptive practice statutes should be based on uncompensated costs that the UTPA claimant incurs such as lost time. See Holdych, *supra* note 150, at 271 n.131. \$720 is not unreasonable compensation for such potential costs.

Apart from adjusting the UTPA damages award to account for inflation since its enactment, Oregon's legislature should adopt an automatic adjustment mechanism to allow for periodic adjustment of the statutory damages award without the need for further legislation. Both the 1968 and 1974 Uniform Consumer Credit Codes provide for adjustment of statutory dollar amounts each even-numbered year that the percentage of change in the Consumer Price Index for Urban Wage Earners and Clerical Workers, All Items, exceeds a specified amount. See UNIF. CONSUMER CREDIT CODE § 1.106, 7 U.L.A. 610 (1968); § 1.106, 7A U.L.A. 28 (1974). The "Administrator" (in Oregon it would be the Attorney General) is required to announce any periodic changes by rulemaking. *Id.* The federal Bankruptcy Reform Act of 1994 adopted a similar automatic adjustment procedure for bankruptcy exemptions. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 108.

¹⁶³ For a list of twenty-one states that award such damages, see SHELDON & CARTER, *supra* note 12, § 8.2.3.1, at 422 n.87.

have updated their awards recently to adjust for inflation over the last few decades. For example, in 1990 Idaho raised its \$500 award to \$1000.¹⁶⁴

Oregon is unquestionably overdue for an update to its UTPA statutory damages award. Realizing this, the Debtor/Creditor Section of the Oregon State Bar proposed House Bill 2386 in 1993 to increase the award prospectively to \$500.¹⁶⁵ Concerns about the impact of such an increase on small claims court actions, however, led the Senate to abandon the reform.¹⁶⁶ Testimony before the Senate Judiciary Committee urged that increasing the award to \$500 would allow a defendant sued for that amount in small claims court¹⁶⁷ to assert its constitutional right to trial by jury in actions exceeding \$200,¹⁶⁸ and thereby remove the action to district court.¹⁶⁹ In that event, the defendant could employ legal counsel denied it in the small claims forum,¹⁷⁰ and the claimant would presumably have to counter by seeking counsel herself. These results were portrayed as unfair to consumers.

This concern for small claims litigants is a red herring and, moreover, easily remedied. What merchant would demand a jury in light of juries' notorious sympathy for consumer claimants? A merchant would wisely do so only if convinced the consumer's claim is not merely untenable, but frivolous. In district

¹⁶⁴ IDAHO CODE § 48-608 (Supp. 1994).

¹⁶⁵ A corresponding bill to increase the minimum award under the unlawful debt collection practices act was introduced as Senate Bill 258.

¹⁶⁶ House Bill 2386 was ultimately enacted with replacement language addressing travel tour abuses. Act effective Nov. 4, 1993, Ch. 645, 1993 Or. Laws 1597. Senate Bill 258 remained in committee upon adjournment. Legislation introduced in the 1995 Oregon legislature as Senate Bills 224 and 67 seeks again to raise the respective UTPA and unlawful debt collection practice action minimum awards to \$500.

¹⁶⁷ Oregon small claims courts have exclusive jurisdiction over claims of \$200 or less, and concurrent jurisdiction with district (and justice) courts over claims from \$201 to \$2500. See OR. REV. STAT. § 46.405 (1993). See generally James W. Nass & Bradd A. Swank, *Oregon State Courts: Practice and Rules*, in 1 CIVIL LITIGATION MANUAL ch. 1 (Oregon State Bar 1993).

¹⁶⁸ OR. CONST. art. VII, § 3. See generally Fredric R. Merrill, *Equity Under the ORCP*, in OREGON EQUITABLE REMEDIES ch. 2 (Oregon Law Institute Seminar Materials, Mar. 11, 1988).

¹⁶⁹ *Hearings on H.B. 2386 Before the Senate Judiciary Comm.*, 67th Sess. (June 16, 1993) (testimony of Keith Burns). The defendant's right to remove a case from small claims to district court upon demanding trial by jury is governed by OR. REV. STAT. § 46.455 (1993).

¹⁷⁰ OR. REV. STAT. § 46.415(4) (1993) ("No attorney . . . shall appear on behalf of any party in litigation in the small claims department without the consent of the judge of the court.").

court, the merchant could defend against that frivolous claim with counsel and recover attorneys' fees.¹⁷¹ Otherwise, the merchant seeking a jury trial is being foolish. Once in district court, the claimant is not limited to the recovery sought in the small claims court action.¹⁷² Now in the hands of counsel, the claimant might seek punitive damages¹⁷³ and can recover attorneys' fees if the UTPA claim succeeds.¹⁷⁴ Even if the merchant prevails, it cannot recover its fees unless the action was frivolous. Given these circumstances, it is difficult to imagine that businesses will want a jury. In fact, businesses increasingly employ aggressive contractual devices such as arbitration¹⁷⁵ and waiver clauses to keep consumer claimants away from sympathetic juries.¹⁷⁶ Perhaps the legislature is concerned that no lawyers will assume the consumer's claim under the UTPA, leaving the consumer relocated in district court overmatched against the defendant's attorney. If so, the UTPA must be further reformed to encourage attorneys to pursue meritorious consumer claims without hesitation.

At least two solutions resolve any concern that defendants might opportunistically remove a case from small claims court if the damages sought exceed \$200.¹⁷⁷ Any increase of minimum damages could expressly apply only to actions brought outside of small claims court.¹⁷⁸ Alternatively, the \$200 jury trial threshold, increased by initiative in 1974 from \$20 to \$200,¹⁷⁹ could be re-

¹⁷¹ See OR. REV. STAT. § 646.638(3) (1993) (discussed *infra* part III.E.).

¹⁷² OR. REV. STAT. § 46.455(2)(c) (1993).

¹⁷³ See discussion *infra* part III.C.

¹⁷⁴ See OR. REV. STAT. § 646.638(3) (discussed *infra* part III.D.).

¹⁷⁵ See *infra* part III.H. (discussing arbitration clauses).

¹⁷⁶ Cf. SHELDON & CARTER, *supra* note 12, § 7.10A, at 149 (Supp. 1993) (urging as the first tip in effective consumer representation that a jury demand be made by consumers because "juries are usually sympathetic to the consumer").

¹⁷⁷ One commentator has observed that "[w]ealthy defendants have learned that merely demanding a jury as a strategic measure may deter less wealthy small claims plaintiffs from proceeding with their claims." Margreth Barrett, *The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims*, 39 HASTINGS L.J. 125, 127 (1987) (footnote omitted). Her argument is better suited to claims for which the successful consumer is unable to recover attorney fees.

¹⁷⁸ Professor Slottee testified before the Senate Judiciary Committee on House Bill 2386 that most consumer claimants in small claims court are not even aware of their UTPA remedies. *Hearings on H.B. 2386 Before the Senate Judiciary Comm.*, 67th Sess. (June 16, 1993) (testimony of Professor Richard A. Slottee). Instead, they are pursuing an unarticulated claim in the nature of fraud or unconscionability. The UTPA minimum damage award will therefore be utilized only in district court.

¹⁷⁹ See generally Don S. Willner, *More Justice Under Law*, 55 OR. L. REV. 183, 188 (1976). The \$200 UTPA award was borrowed in 1971 from the 1970 UTPCPL

formed again by initiative to allow larger claims of any nature to be pursued in small claims court without the defendant being able to compel trial by jury, and thus obtain removal of the case from the small claims forum.

Apart from the need to increase the UTPA minimum damages, Oregon should consider the fact that twenty-one states award a doubling or trebling of the actual damages proven by the consumer.¹⁸⁰ One commentator recently urged that the ideal deceptive practice statute would combine minimum and multiple damages and award the greater of minimum damages or treble the actual damages proven.¹⁸¹ Treble damages are urged to increase the merchant's incentive to settle the consumer's claim.¹⁸²

and has remained unchanged since then. In 1971, the jury trial removal threshold was \$20. Since 1974, the UTPA minimum damages and the jury trial threshold have coincided in amount.

¹⁸⁰ For a list, see *SHELDON & CARTER, supra note 12*, § 8.2.4.1, at 423 n.105. Although treble damages are recoverable under the federal or Oregon "RICO," see 18 U.S.C. § 1964(c) (1988); OR. REV. STAT. § 166.720 (1993), few UTPA claims can satisfy the narrow and rigorous standards for RICO liability. *Cf. Beckett v. Computer Career Inst., Inc.*, 120 Or. App. 143, 852 P.2d 840 (1993) (affirming UTPA judgment against vocational school that misrepresented its placement rate but granting motion to dismiss the students' Oregon RICO claim). Presently the subject of hearings before the 1995 Oregon legislature, Senate Bill 386 would eliminate the private Oregon RICO remedy.

¹⁸¹ See *Sheldon, supra note 157*, at 6. Senate Bill 224 introduced in the 1995 Oregon legislature would employ this damage formula for UTPA actions. Although a multiple damage remedy would take more consumer claims outside the \$2500 ceiling on the jurisdiction of small claims courts, see *supra note 167*, most consumers do not seek UTPA remedies in small claims court. Instead they pursue unarticulated causes of action in the nature of common law fraud or unconscionability for which multiple damages would be unavailable. See discussion *supra note 178*.

¹⁸² See *SHELDON & CARTER, supra note 12*, § 8.2.4.1, at 423. Massachusetts combines minimum and multiple damages specifically to prompt settlement. See *MASS. GEN. LAWS ANN. ch. 93A, § 9(3)* (West 1994). The Massachusetts claimant must make a written demand for relief before filing her claim. The merchant must then tender a settlement that is "reasonable in relation to the injury actually suffered" by the claimant or face the award of the greater of statutory minimum or multiple damages. *Id.* Conversely, the claimant who rejects a "reasonable" settlement offer is limited to recovering the amount tendered in that offer. *Id.* One commentator has argued the Massachusetts approach is unfair to businesses because, among other things, a merchant who refuses to settle because it honestly disputes the claim is penalized with multiple damages if the consumer eventually prevails. See Russell J. Boehner, Note, *Consumer Protection Statutes and the Common Law: Is the Imposition of Double or Treble Damage Awards "Unfair" to the Businessman?*, 15 *SUFFOLK U. L. REV.* 1157, 1181-82 (1981). In fact, the Massachusetts approach seems unfair to consumers: dishonest merchants avoid further liability by tendering the claimant's actual damages. This approach applied to the UTPA would allow dishonest merchants to avoid punitive damage liability by paying the actual damages of just those consumers who make a written demand for relief. This result is inadequate to

Though the threat of a mandatory trebling appears to be a valuable aid in prompting settlement and encouraging private actions, trebling is unnecessary for large dollar claims that already provide enough incentive. To avoid the trebling of Texas-sized damages,¹⁸³ a cap on the amount of actual damages that can be trebled (say, \$3000) should be imposed.¹⁸⁴

C. Punitive Damages Under the UTPA

Oregon is one of eight states whose deceptive practice statutes expressly authorize punitive damages.¹⁸⁵ Despite calls for punitive damage recovery reform prompted by occasional notoriously high awards,¹⁸⁶ punitive damages are crucial to the mission of the UTPA. They deter wrongful conduct,¹⁸⁷ function as an "inducement to bring actions that would not otherwise be pursued,"¹⁸⁸

deter unscrupulous merchants. Moreover, adjudicating what constitutes a reasonable offer is an unreasonable burden on the consumer litigant. Oregon should consider adding treble damages recovery to the consumers' arsenal of UTPA weapons, but should not employ the Massachusetts approach.

¹⁸³ *E.g.*, *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361 (Tex. 1987) (recovery of \$2,077,500 trebled). Texas has since amended its deceptive practice statute to limit mandatory trebling to the first \$1000 of damages; unlimited trebling is still permitted for knowing violations. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West Supp. 1994).

¹⁸⁴ In states that authorize doubling or trebling, courts have struggled to determine whether punitive damages can be recovered in addition to the statutory multiple damage award. See generally PRIDGEN, *supra* note 2, § 6.05[4], at 6-28 to 6-29. The difficulty is largely a matter of construing legislative intent, rather than an inherent incompatibility of these two awards. The best approach would be for the legislature to mandate trebling, subject to a reasonable cap, combined with discretionary but unlimited punitive damages.

¹⁸⁵ OR. REV. STAT. § 646.638(1) (1993) (the "court or the jury . . . may award punitive damages"). See generally PRIDGEN, *supra* note 2, § 6.05[4], at 6-26 n.40.

¹⁸⁶ See generally Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 485-90 (1993).

¹⁸⁷ *Andor v. United Air Lines, Inc.*, 303 Or. 505, 511, 739 P.2d 18, 22 (1987). In the last few years, states have begun to enact special government penalties and private damage awards against merchants who deceive elderly consumers. *E.g.*, CAL. CIV. CODE § 1780(b) (West Supp. 1994) (special award up to \$5000). The potential that juries will award substantial punitive damages under the UTPA against those who exploit the elderly is sufficient deterrence without amending the UTPA to provide a special penalty in such circumstances.

¹⁸⁸ Donald P. Hodel, *The Doctrine of Exemplary Damages in Oregon*, 44 OR. L. REV. 175, 182 (1965). The possibility of an attorney fees award, discussed *infra* part III.D., does not provide sufficient incentive for attorneys to pursue UTPA claims that are meritorious but not a "sure thing." The prospect of recovering additional fees through the punitive damage award may prompt lawyers to assume such UTPA litigation. Oregon courts have recognized this function of punitive damages by con-

and "provide strong inducement to settle UTPA private actions prior to trial."¹⁸⁹ It is therefore essential that UTPA punitive damages be held harmless from any potential legislative or judicial attack that might be waged on punitive damages generally.

Honest merchants need not fear punitive damages; in addition to the UTPA "willful" requirement for any private relief, Oregon courts award punitive damages only when the common law's stringent requirement is met. This standard, read into the UTPA by courts,¹⁹⁰ awards punitive damages only for "wanton misconduct"¹⁹¹ that demonstrates a "high degree of social irresponsibility."¹⁹² Necessarily difficult to apply and still evolving, this standard can best be understood through snapshot examples of its application. Courts have determined, for example, that merely negligent misrepresentation does not justify punitive damages.¹⁹³ Because such negligence is actionable under the UTPA,¹⁹⁴ punitive damages are therefore not automatically available for every UTPA violation. Intentional fraud, on the other hand, does justify punitive damages.¹⁹⁵ A reckless misrepresentation, in contrast, does not, absent "some showing of systematic or otherwise aggravated conduct evincing a high degree of social irresponsibility."¹⁹⁶

struing the UTPA to allow a separate award of attorneys' fees even if the claimant's lawyer has shared in a punitive damage award. *See infra* note 211.

¹⁸⁹ *See* Conroy, *supra* note 24, at 507 (citation omitted).

¹⁹⁰ *See, e.g.*, Crooks v. Pay Less Drug Stores Northwest, Inc., 285 Or. 481, 490, 592 P.2d 196, 200 (1979).

¹⁹¹ *See* UNIFORM CIVIL JURY INSTRUCTION 75.02, *in* OREGON JURY INSTRUCTIONS FOR CIVIL CASES (Oregon State Bar 1993) [hereinafter UNIFORM JURY INSTRUCTION].

¹⁹² *Andor v. United Air Lines, Inc.*, 303 Or. 505, 516, 739 P.2d 18, 25 (1993).

¹⁹³ *E.g.*, Weigel v. Ron Tonkin Chevrolet Co., 298 Or. 127, 140, 690 P.2d 488, 496 (1984) (eliminating jury's award of punitive damages on possibility that jury based award on merely negligent misrepresentation).

¹⁹⁴ The UTPA private action remedies false or misleading representations that satisfy the standard of willfulness; here whether the merchant knew or should have known of the falsity. *See* OR. REV. STAT. § 646.605(10) (1993).

¹⁹⁵ *E.g.*, Haag v. Cembellin, 89 Or. App. 75, 748 P.2d 143 (1987) (\$33,000 award upheld where jury found fraud), *review denied*, 305 Or. 273, 752 P.2d 1219 (1988). A Court of Appeals decision rejected a car dealer's argument that allowing punitive damages under the UTPA for consumer fraud violates the right to free expression under the Oregon Constitution. *Hinds v. Paul's Auto Werkstatt, Inc.*, 107 Or. App. 63, 67 n.5, 810 P.2d 874, 876 n.5, *review denied*, 311 Or. 643, 815 P.2d 1273 (1991).

¹⁹⁶ *Weigel*, 298 Or. at 140, 690 P.2d at 496. The common law has routinely denied punitive damages recovery for unconscionable contracts. *See generally* Bender, *supra* note 3, at 759-60 (observing courts have refused to award tort remedies such as punitive damages unless the merchant's unfair conduct constitutes some estab-

Until recently, Oregon juries were free to award any amount they deemed appropriate if the threshold for punitive awards was met. Oregon's constitutional restriction on post-verdict review of punitive damage awards,¹⁹⁷ however, was struck down on federal due process grounds by the U.S. Supreme Court in *Honda Motor Co. v. Oberg*,¹⁹⁸ a products liability case in which the jury had imposed a five million dollar award against the defendant ATV manufacturer.

Oregon juries considering UTPA claims have been much more subdued in their awards of punitive damages than their counterparts in certain products liability cases. Reported UTPA awards range from a modest \$500 to a generous but far from outrageous \$33,000.¹⁹⁹ The existence of constitutionally mandated post-verdict review of UTPA punitive damage awards in the wake of *Oberg* should thus not pose any real concern to consumer liti-

lished tort such as fraud). Therefore, even if unconscionable practices are included in the UTPA private remedy as urged in this Article, see *supra* part I.B., the common law standard read into the UTPA would likely deny punitive damages recovery for unconscionability alone.

¹⁹⁷ The Oregon Constitution has been construed to prohibit courts from reducing the jury's award of punitive damages. See generally Miles A. Ward, *Additur & Remittitur*, in 2 DAMAGES § 36.1, at 36-2 (Oregon State Bar 1990). The appellate court, however, can eliminate the award entirely if the common law standard for such recovery was not satisfied. Oregon presumably could also impose a statutory cap on punitive damage recovery to prospectively control jury awards.

¹⁹⁸ 114 S. Ct. 2331 (1994).

¹⁹⁹ See *Wolverton v. Stanwood*, 278 Or. 341, 563 P.2d 1203 (1977) (\$500); *Allen v. Morgan Drive Away, Inc.*, 273 Or. 614, 542 P.2d 896 (1975) (\$2000); *Sherrod v. Holzshuh*, 274 Or. 327, 546 P.2d 470 (1976) (\$5000); *Chamberlain v. Jim Fisher Motors, Inc.*, 282 Or. 229, 578 P.2d 1225 (1978) (error to award \$5000 in punitive damages when common law standard not satisfied); *Crooks v. Pay Less Drug Stores Northwest, Inc.*, 285 Or. 481, 592 P.2d 196 (1979) (same result for \$6000 award); *Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or. 127, 690 P.2d 488 (1984) (same result for \$10,000 award); *Martin v. Cahill*, 90 Or. App. 332, 752 P.2d 857 (1988) (\$10,000); *Hall v. Fitzhugh*, 80 Or. App. 423, 722 P.2d 54 (1986) (\$10,000); *Riviera Motors, Inc. v. Higbee*, 45 Or. App. 545, 609 P.2d 369 (\$10,000), *review denied*, 289 Or. 275 (1980); *Mabin v. Tualatin Dev. Co.*, 48 Or. App. 271, 616 P.2d 1196 (1980) (\$12,500); *Dailey v. Sundance Ranches, Inc.*, 59 Or. App. 142, 650 P.2d 994 (1982) (\$13,000), *review denied*, 294 Or. 460, 658 P.2d 1162 (1983); *Teague Motor Co. v. Rowton*, 84 Or. App. 72, 733 P.2d 93 (1987) (\$15,000); *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 797 P.2d 1019 (1990) (\$20,000 award overturned because of improper instructions informing jury of Oregon's statutory distribution procedure for punitive damage awards (OR. REV. STAT. § 18.540)); *Haag v. Cembellin*, 89 Or. App. 75, 748 P.2d 143 (1987) (\$33,000), *review denied*, 305 Or. 273, 752 P.2d 1219 (1988). Although these awards are relatively small, they are often large in relation to the actual damages suffered. E.g., *Riviera Motors*, 45 Or. App. at 545, 609 P.2d at 369 (\$200 UTPA minimum damages, \$10,000 punitive award). See generally Conroy, *supra* note 24, at 507-08.

gants.²⁰⁰ Moreover, this history of modest awards to Oregon consumer litigants should be cited to exempt UTPA claims from any other attempts to rein in punitive damage awards.²⁰¹

D. Attorneys' Fees to UTPA Claimants

The "American rule" followed by Oregon courts denies attorneys' fees to successful claimants unless authorized by statute or contract²⁰² and thus stifles most common law fraud or negligence claims of consumers. The UTPA encourages private enforcement by authorizing attorneys' fees to successful claimants,²⁰³ these fee awards, however, are a matter for the court's discretion.²⁰⁴

If Oregon's private action is to shoulder a greater enforcement

²⁰⁰ In compelling post-verdict review of Oregon punitive damage awards, the Supreme Court did not decide the standard of review that is constitutionally required. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 n.10 (1994) (observing there may not be much difference among the various standards employed in other states such as "passion and prejudice" of the jury or "gross excessiveness" of the award). On remand, the Oregon Supreme Court adopted the standard of whether the award was "within the range that a rational juror would be entitled to award in the light of the record as a whole." *Oberg v. Honda Motor Co.*, 320 Or. 544, ___ P.2d ___ (1995).

²⁰¹ Efforts to limit punitive damages are being conducted in Congress, the Oregon legislature, and the courts. Congress is considering legislation to limit punitive damages awards in product liability cases to the greater of three times the economic injury or \$250,000. H.R. 10, 104th Cong., 1st Sess. § 103(c)(2) (1995). The Oregon legislature's Joint Subcommittee on Civil Process has scheduled a public hearing in February 1995, to consider the abolition of punitive damages. Finally, the Supreme Court has granted certiorari to review an Alabama case that held punitive damages of two million dollars for consumer fraud was constitutionally reasonable. *BMW of North Am., Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 63 U.S.L.W. 3555 (U.S. Jan. 23, 1995) (No. 94-896). In a concurring opinion, an Alabama Supreme Court justice noted that inflation-adjusted punitive damage awards from reported cases in other jurisdictions for fraud in the sale of automobiles ranged from \$12,000 to \$196,000 with an average of approximately \$71,000. 646 So. 2d at 630. Even when adjusted for inflation, the Oregon UTPA awards listed *supra* at note 199 all fall below this "national average."

²⁰² See *Mattiza v. Foster*, 311 Or. 1, 4, 803 P.2d 723, 725 (1990). Part of the so-called tort reform package, section 6 of Senate Bill 385 would award attorneys' fees to the prevailing party in actions in contract or tort in which the plaintiff claims \$20,000 or less.

²⁰³ OR. REV. STAT. § 646.638(3) (1993) ("court may award . . . reasonable attorney fees at trial and on appeal . . .").

²⁰⁴ *Id.* Discretionary fee awards were proposed in the 1970 UTPCPL. SUGGESTED STATE LEGISLATION, *supra* note 44, § 8(d), at 149. Some states have improved on this suggestion by making awards to successful consumers mandatory rather than permissive. For a state-by-state listing of mandatory and permissive attorneys' fees provisions, see SHELDON & CARTER, *supra* note 12, at App. A.

load, it is critical that the UTPA attorney fee award be made mandatory. Oregon's Supreme Court has stated emphatically that the "availability of basic compensation to counsel [through an award of UTPA attorneys' fees] . . . cannot be problematical if consumers are going to be able to bring UTPA actions against dishonest and unscrupulous merchants."²⁰⁵ Oregon's legislature should take this cue and ensure that victorious claimants will be awarded attorneys' fees.²⁰⁶ Failing statutory reform, Oregon trial courts should heed the Supreme Court's message and employ the standard used in federal civil rights cases: discretionary fees should be awarded as a matter of course to successful claimants unless special circumstances make the award "unjust."²⁰⁷

Court discretion to determine the amount of the award is perhaps more ominous to consumer lawyers than the discretion to deny fees altogether. Consumer lawyers believe courts award inadequate fees to consumers because the underlying claims are themselves often very small.²⁰⁸ In fixing fee awards for claims

²⁰⁵ *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 213, 797 P.2d 1019, 1023 (1990) (discussed *infra* note 211).

²⁰⁶ The most recent uniform statute to address consumer transactions, Article 2A of the UCC, provides that consumer lessees who successfully claim their lease is unconscionable "shall" be awarded reasonable attorneys' fees. U.C.C. § 2A-108(4) (1990). Regrettably, Oregon did not adopt this subsection. See *supra* note 82 and accompanying text. Senate Bill 224 introduced in the 1995 Oregon legislature would amend the UTPA private remedy to award mandatory fees to the prevailing consumer.

UTPA claimants might seek mandatory fees pursuant to the parties' contract. Although consumer contracts do not often provide fees for the consumer, consumers might invoke Oregon's reciprocal statutory allowance of fees. See OR. REV. STAT. § 20.096(1) (1993) (prevailing party "shall" be awarded fees if contract grants fees to either party). Unfortunately, this statute is apparently limited to actions to enforce the contract and therefore might not apply to most UTPA claims. Compare *Bliss v. Anderson*, 36 Or. App. 559, 562, 585 P.2d 29, 31 (1978) (§ 20.096 inapplicable to misrepresentation claim) with *Millard v. Smedes*, 42 Or. App. 889, 892, 601 P.2d 908 (1979) (distinguishing *Bliss* to award fees for successful misrepresentation claim when contract allowed fees for actions "in connection with" the contract and where claimant affirmed contract in seeking money damages rather than rescission).

²⁰⁷ See *Leaffer & Lipson*, *supra* note 6, at 552 (urging courts to employ the liberal civil rights standard in awarding fees to consumers under state deceptive trade practice statutes).

²⁰⁸ See, e.g., *Conroy*, *supra* note 24, at 502 (reporting that Oregon consumer lawyers generally believe that insufficient fees awards explain in part why so few UTPA actions are brought); see also *Stewart Macaulay, Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y 115, 136 (1979); *William C. Whitford, Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1030 ("[T]here is a widespread belief among [consumer] attorneys that courts will not really award attorney fees commensurate with the time and effort involved where the amount in controversy is small.") (footnote omitted).

generally, Oregon courts have identified the amount in controversy as a relevant factor.²⁰⁹ Though many consumer protection statutes specifically provide that the amount of the claimant's damage recovery is not controlling in determining the claimant's fee award,²¹⁰ Oregon's UTPA does not. Oregon's underdeveloped case law governing fees for successful consumer claims in conjunction with the lack of express guidance in the UTPA gives little comfort to Oregon consumer attorneys.²¹¹ The legislature should use express language to make it clear that the amount of damages recovered will not affect the calculation of attorney fees under the UTPA.

E. Attorneys' Fees to UTPA Defendants

Adapted from the 1970 UTPCPL, the UTPA allowance of attorneys' fees originally authorized the court to award "in addition to the relief provided in this section, reasonable attorney fees and costs."²¹² This language might be read to entitle successful defendants, as well as successful claimants, to attorney

²⁰⁹ See generally Thomas C. Sand & Julie R. Vacura, *Costs and Attorney Fees*, in 2 DAMAGES § 32.21, at 32-18 (Oregon State Bar 1990). Oregon's Court of Appeals has noted, however, that although the amount of recovery is "germane" to the award of fees, it is not an absolute limitation, as otherwise a defendant "by a vigorous or obstreperous defense, could force abandonment of the claim or [obtain] an attractive settlement simply because it would be uneconomic for the [plaintiff] to continue the effort." *Willamette Prod. Credit Ass'n v. Borg-Warner Acceptance Corp.*, 75 Or. App. 154, 157, 706 P.2d 577, 579 (1985) (non-UTPA action to foreclose lien), *review denied*, 300 Or. 477, 713 P.2d 1058 (1986).

²¹⁰ E.g., CONN. GEN. STAT. ANN. § 42-110g(d) (West 1992) (court may award "costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery"); S.C. CODE ANN. § 37-5-202(8) (Law. Co-op. 1989); UNIF. CONSUMER CREDIT CODE § 5.108(6), 7A U.L.A. 169 (1974).

²¹¹ The Oregon Supreme Court has construed the UTPA to reject a merchant's argument that an award of punitive damages sufficient to compensate the claimant's lawyer precludes a separate award of attorneys' fees under the UTPA. See *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 797 P.2d 1019 (1990). This result is crucial because the opportunity to share in any UTPA punitive damage award and to receive a separate UTPA fee award will subsidize those meritorious but unsuccessful claims for which the consumer lawyer receives nothing; cf. *Ekl v. Knecht*, 585 N.E.2d 156, 165 (Ill. App. Ct. 1991) (construing Illinois' statute to reach a contrary result, denying discretionary attorneys' fees when the punitive damage award amply compensates the lawyer). Despite the favorable result in *Honeywell*, the court considered only the limited issue of whether the UTPA precludes an otherwise willing court from awarding fees on top of a large punitive damages award. The court did not consider whether it would be an abuse of the trial court's discretion to deny fees in such circumstances. Such a denial of attorneys' fees would frustrate UTPA policies and should not be tolerated.

²¹² See Mooney, *supra* note 14, at 128 n.63.

fees. Twenty years ago, Professor Mooney urged against this pro-defendant interpretation because it “would likely cause many meritorious private suits never to be brought for fear of an irrational outcome,” thus frustrating the “important policy of encouraging substantial private policing of the Act.”²¹³ In 1977, Oregon’s legislature resolved the uncertainty by authorizing the court to award fees to successful defendants only upon finding the UTPA action was “frivolous.”²¹⁴

This frivolous standard has been questioned recently by consumer advocates. Article 2A of the UCC employs a similar standard for consumer leases: fees are allowed for the successful defense of “groundless” unconscionability claims.²¹⁵ Several commentators have condemned the UCC’s “groundless” standard as dealing a “death blow” to consumer claims because consumers fear that courts will retrospectively deem unsuccessful claims groundless.²¹⁶ The frivolous (or groundless) standard, however, seems a fair compromise in the difficult balance of encouraging consumer enforcement while protecting honest merchants from spurious claims.²¹⁷ Oregon can retain its frivolous standard²¹⁸ but should guard against any standard more

²¹³ *Id.*; cf. PRIDGEN, *supra* note 2, § 6.06[3][a], at 6-40 (“One wonders whether many consumers will be brave enough to pursue their statutory rights in [those jurisdictions that award fees to businesses that successfully defend a consumer claim] . . .”).

²¹⁴ OR. REV. STAT. § 646.638(3) (1993).

²¹⁵ U.C.C. § 2A-108(4)(b) (1990). Oregon did not adopt the UCC attorneys’ fee provision. See *supra* note 82 and accompanying text.

²¹⁶ See Charles A. Heckman, *Article 2A of the Uniform Commercial Code: Government of the Lessor, by the Lessor, and for the Lessor*, 36 ST. LOUIS U. L.J. 309, 331 (1992); Donald B. King, *Major Problems With Article 2A: Unfairness, “Cutting Off” Consumer Defenses, Unfiled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869, 873 (1992).

²¹⁷ See Lovett, *supra* note 1, at 749 (“Such a combination of financial encouragement and responsibility seems the most promising vehicle to protect both consumer rights and business interests.”); see also Holdych, *supra* note 150, at 306. Should Oregon reform the UTPA to remove the rulemaking condition from its catchall, some defendants may seek recovery under the frivolous standard to discourage attempts at the creative extension of that catchall. Courts should award fees under this standard sparingly, if at all, when the question resolved against the consumer is whether certain merchant conduct otherwise proven to have occurred is unfair or deceptive for purposes of the catchall.

²¹⁸ Too few Oregon cases have interpreted the UTPA frivolous standard to determine whether what appears reasonable in theory has been applied fairly in practice. The cases include *Estate of Smith v. Ware*, 307 Or. 478, 769 P.2d 773 (1989) (fees to UTPA defendant proper even though they were incurred in defense of both UTPA claim and common law fraud) and *Heierman v. Murray & Holt Motors, Inc.*, 44 Or. App. 341, 605 P.2d 1359 (1980) (award of \$450 fees to defendant where plaintiff

favorable to defendants.²¹⁹

neither alleged nor proved the defendant's misconduct was willful). Other Oregon statutes employ the frivolous standard and might be looked to as persuasive authority for UTPA purposes. *See, e.g.*, OR. REV. STAT. § 20.098(2) (1993) (certain breach of consumer warranty actions); OR. REV. STAT. § 128.155 (1993) (certain actions by trust beneficiaries); OR. REV. STAT. § 260.225 (1993) (actions to compel election statement); OR. REV. STAT. § 656.390 (1993) (review of workers' compensation claims); OR. REV. STAT. § 659.160(7) (1993) (discrimination in higher education); *see also* Creditors Protective Ass'n v. Britt, 58 Or. App. 230, 648 P.2d 414 (1982) (applying the frivolous standard in § 646.641(2) of Oregon's Unlawful Debt Collection Practices Act).

²¹⁹ Introduced in the 1991 session, House Bill 3279 would have made an award of fees mandatory in favor of the prevailing party in any civil action. Section 22 of that bill would have aided consumers by making an award to successful UTPA claimants mandatory, but it would have endangered them by replacing the UTPA's frivolous standard for prevailing defendants with a mandatory award for any successful defense. The bill fortunately was still in the House Judiciary Committee upon adjournment. Section 96 of Senate Bill 385 introduced in the 1995 Oregon legislature would amend the UTPA to authorize discretionary fees to both prevailing consumers and prevailing merchants. Should the legislature adopt this approach, consumers should urge courts to exercise their discretion to deny fees to merchants except when the consumer's action was frivolous.

Consider what the result might be if a prevailing defendant argues for attorneys' fees pursuant to the parties' contract. Some states, but not Oregon, have a statute that expressly denies enforcement to the consumer's promise to pay the other party's attorneys' fees. *E.g.*, UNIF. CONSUMER CREDIT CODE § 2.507 (Alternative A), 7A U.L.A. 94 (1974). Should the issue arise, Oregon courts should construe the UTPA to exclusively govern the merchant's right to fees as a prevailing party. To enforce a contractual boilerplate allowance of fees would frustrate the carefully balanced policies in the UTPA's attorney's fees provision.

Defendants might also attempt to use Oregon's offer of judgment procedure to undercut the UTPA's frivolous standard. Rule 54 of the Oregon Rules of Civil Procedure allows the defendant to serve the plaintiff with a pre-trial offer to allow judgment against the defendant in a specified amount. If the plaintiff rejects the offer but fails ultimately to obtain a more favorable judgment, the plaintiff "shall not recover costs, disbursements, and attorney fees incurred after the date of the offer," and the defendant "shall" recover its "costs and disbursements" after the offer was served. Among other changes, § 1 of Senate Bill 385 would amend Rule 54 to add that the defendant in such circumstances may also recover its post-offer "reasonable" attorney and expert witness fees. Consider the hypothetical situation under existing law of a UTPA claimant who seeks the \$200 minimum damages as well as punitive damages. Should the defendant make an offer of judgment limited to \$200 and the plaintiff prevail on her claim but fail to recover any punitive damages, the offer of judgment procedure would nullify the consumer's victory. Rule 54 would deny recovery of the consumer's attorney fees incurred after the offer even though she otherwise prevailed in the UTPA action. Moreover, the defendant could recover its post-offer costs and disbursements even though the UTPA claim was not frivolous, but valid. Consider the additional hypothetical of a UTPA defendant who offers judgment for nominal damages on a UTPA claim that is not ultimately proven. This defendant could collect its post-offer costs and disbursements even if the action, though unsuccessful, was not "frivolous." Because these results would undercut the legislature's intent to award costs and fees to UTPA defendants for

A more recent Oregon statute, however, exposes a potential problem with the UTPA frivolous standard which takes no apparent account of the consumer's motives. Adopted in 1983 and applicable to all civil actions, ORS 20.105 awards fees to any litigant who successfully defends a meritless claim pursued in bad faith or for some other improper purpose.²²⁰ This statute provides honest merchants with adequate protection against spurious claims, and the legislature can now repeal the more specific UTPA award for frivolous claims. Moreover, it deals more fairly with consumers who in good faith pursue a meritless UTPA claim *pro se*. In that circumstance, section 20.105 would deny the successful merchant its fees because the consumer acted in good faith. Failing the repeal of the UTPA frivolous standard, courts should exercise their discretion in awarding attorneys' fees under the UTPA to "read in" a requirement that *pro se* claims be both meritless and in bad faith to justify an award of fees to the successful merchant.²²¹

F. Injunctive Relief Under the UTPA to Private Claimants

Whether a UTPA private claimant can obtain injunctive relief is an open question. The UTPA authorizes "such equitable relief as [the court] deems necessary or proper."²²² At least one national commentator has interpreted this provision to allow injunctive relief.²²³ However, this language, derived from the 1970

frivolous actions only, courts should construe the UTPA to override and displace the Rule 54 procedure.

²²⁰ See *Mattiza v. Foster*, 311 Or. 1, 803 P.2d 723 (1990) (construing § 20.105 to require both improper purpose and a meritless claim to justify fees).

²²¹ This interpretation is consistent with the allowance of attorneys' fees to successful defendants in § 2A-108(4)(b) of the UCC, which awards fees only if the consumer lessee brought an unconscionability claim she "knew to be groundless."

Rule 17 of the Oregon Rules of Civil Procedure, which presumably would govern a *pro se* pleading under the UTPA, employs a similar standard. Though that rule has been construed to award attorneys' fees to sanction either a meritless claim or one asserted for an improper purpose, merit is determined by "the best of the knowledge, information and belief" of the pleader. *Seely v. Hanson*, 317 Or. 476, 480, 857 P.2d 121, 123-24 (1993) (quoting OR. R. CIV. P. 17). Thus, an unsophisticated *pro se* claimant ignorant of the UTPA requirements, such as those of ascertainable loss and willfulness, might escape liability under Rule 17 for the opponent's fees.

²²² OR. REV. STAT. § 646.638(1) (1993).

²²³ See *PRIDGEN*, *supra* note 2, § 6.04[2], at 6-18 n.11 (listing Oregon as among the states that authorize private injunctive actions for deceptive practices): The Oregon Court of Appeals has stated in dictum that the UTPA "offers injunctive relief," but perhaps the court was referring to public enforcement actions where that remedy is

UTPCPL, is less clear when read in connection with other provisions of the 1970 UTPCPL and subsequent Oregon history. The 1970 UTPCPL separately authorized "injunctive or other equitable relief" for any private action.²²⁴ This authorization, however, was contained in a subsection otherwise addressing class action relief which Oregon failed to adopt. Moreover, the substantially similar private remedy in Oregon's Unlawful Debt Collection Practices Act, adopted in 1977, expressly refers to injunctive relief in addition to the separate UTPA reference to "such equitable relief as [the court] deems necessary or proper."²²⁵

Despite this history, it is important that the UTPA be amended or, failing that, construed to allow private injunctive relief. The Attorney General is expressly authorized to seek injunctive relief,²²⁶ and this authority is part of the necessary equipment private attorneys general need to bear their expanding responsibility for enforcement.

Two important issues arising from the experience of other jurisdictions should be considered in setting the standard for private injunctive relief. First, other jurisdictions have struggled to determine whether a claimant should be allowed injunctive relief if the claimant is not likely to be duped again by the same practice.²²⁷ For example, a former vocational school student who discovers the school is misrepresenting its placement efforts might seek injunctive relief to benefit future students. It seems reasonable to allow private attorneys general the same opportunity as state attorneys general to secure injunctive relief to benefit others.²²⁸

unquestionably available. See *Creditors Protective Ass'n v. Britt*, 58 Or. App. 230, 232, 648 P.2d 414, 415 (1982).

²²⁴ See SUGGESTED STATE LEGISLATION, *supra* note 44, § 8(b), at 149.

²²⁵ See OR. REV. STAT. § 646.641(1) (1993).

²²⁶ OR. REV. STAT. §§ 646.632(1), 646.636 (1993). Many UTPA requirements are particularly amenable to injunctive relief, such as the prohibition against unwanted fax and telephone solicitations. OR. REV. STAT. § 646.608(1)(ff), (hh) (1993).

²²⁷ See generally PRIDGEN, *supra* note 2, § 6.04[2], at 6-18 to 6-20; SHELDON & CARTER, *supra* note 12, § 8.4.3.2, at 440.

²²⁸ California law authorizes "any person acting for the interests of itself, its members or the general public" to seek injunctive and other relief for unfair business practices. CAL. BUS. & PROF. CODE § 17204 (West Supp. 1995). California courts have held both individuals and organizations have standing under this statute to seek injunctive relief as private attorneys general for the benefit of the public. See *Consumers Union of U.S., Inc. v. Fisher Dev., Inc.*, 257 Cal. Rptr. 151 (Cal. Ct. App. 1989) (consumers group had standing under section 17204 to seek injunction on behalf of general public against discriminatory practices in residential subdivision); *Hernandez v. Atlantic Fin. Co.*, 164 Cal. Rptr. 279 (Cal. Ct. App. 1980) (individual

The second issue is whether the claimant seeking injunctive relief must demonstrate that the unlawful practice is continuing. An Oregon court considered but did not decide this issue for purposes of public injunctive relief under the UTPA.²²⁹ Courts in a few other jurisdictions (notably Washington state) have construed their consumer statutes as demanding that private enforcement be “in the public interest”²³⁰ and, therefore, that the plaintiff demonstrate a pattern of misconduct and potential for repetition. It is not unreasonable for courts to exercise their discretion to so limit private injunctive relief. These courts, however, have extended that condition to private damages recovery, which is indefensible. Isolated and nonrecurring fraud is still reprehensible and should not be immune from statutory attack. Moreover, Washington’s experience with its public interest requirement compels that other states avoid it except perhaps in awarding private injunctive relief. The requirement has spawned extensive case law and added needless complexity, uncertainty, and expense to Washington’s private action.²³¹

G. Class Actions for UTPA Relief

Consumer class actions have been described by advocates as

had standing under section 17204 to seek injunction on behalf of general public for violation of California automobile sales finance act). Unlike class actions, there is no requirement under section 17204 that the representative plaintiff prove she was personally damaged by the conduct sought to be enjoined. *Hernandez*, 164 Cal. Rptr. at 284. Senate Bill 383 introduced into the 1995 Oregon legislature would authorize any Oregon resident to seek the same remedies that the Attorney General may obtain. As applied to the UTPA, this bill would give standing to consumers to seek injunctive relief, restitution for injured consumers, and civil penalties on behalf of the state.

²²⁹ *State ex rel. Johnson v. International Harvester Co.*, 25 Or. App. 9, 13, 548 P.2d 176, 178 (1976) (concurring opinion considered whether the state must show a continuing practice to obtain UTPA injunctive relief, and concluded in some circumstances proof of a single unlawful act could justify such relief).

²³⁰ See generally PRIDGEN, *supra* note 2, § 5.03[1], at 5-11 to 5-15; SHELDON & CARTER, *supra* note 12, § 7.5.3 at 387-91. Washington’s jurisprudence is the most prominent. Washington courts have based this “public interest” requirement on statutory language that Washington’s act “shall not be construed to prohibit acts or practices . . . which are not injurious to the public interest.” WASH. REV. CODE ANN. § 19.86.920 (West 1989).

²³¹ See generally SHELDON & CARTER, *supra* note 12, § 7.5.3.1, at 387-89. One commentator has urged that courts adopt the “public interest” condition to private relief because the FTCA so limits actions by the FTC. See Boehner, *supra* note 182, at 1184. It is more prudent to allow state private actions to fill the enforcement gap to remedy isolated misconduct that the FTC is not permitted to pursue. See Sovern, *supra* note 23, at 460.

an "especially appropriate remedy for consumers"²³² and by detractors as "legalized blackmail."²³³ Until 1973, Oregon denied class actions seeking damage relief and refused to adopt the 1970 UTPCPL's authorization of such actions when it enacted the UTPA.²³⁴ In 1973, however, Oregon authorized class actions for damages.²³⁵ Consumer class actions could be the ideal enforcement vehicle to balance the future deficit in public enforcement of the UTPA. At least three limitations on such actions, however, will likely diminish their potential to deter and redress unscrupulous merchant conduct. These limitations are: (1) the related commonality and predominance requirements, (2) Oregon's unique claim form procedure, and (3) the restrictions on class action recovery of UTPA minimum damages.

Rule 32 of the Oregon Rules of Civil Procedure (ORCP) restates the federal requirement of commonality of questions of law or fact as a condition to class certification.²³⁶ The commonality prerequisite and the related need for the predominance of such common questions²³⁷ present a formidable obstacle to UTPA class relief unless the claim involves standardized sales presentation fraud or the like.²³⁸ Despite their sometimes detri-

²³² Laird C. Kirkpatrick, *Consumer Class Litigation*, 50 OR. L. REV. 21, 21 (1970).

²³³ Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 843 (1974).

²³⁴ See SUGGESTED STATE LEGISLATION, *supra* note 43, § 8(b), at 149. See generally Mooney, *supra* note 14, at 129 n.67.

²³⁵ This authorization is now found at Rule 32 of the Oregon Rules of Civil Procedure, replacing the 1973 authorization in OR. REV. STAT. §§ 13.210-410. For a persuasive argument based on what is now ORCP 32(K) that class action relief is available under the UTPA despite the reference in the UTPA private remedy to "individual" actions, which the legislature apparently overlooked in authorizing class action relief generally in 1973, see Mooney, *supra* note 14, at 129 n.67.

²³⁶ OR. R. CIV. P. 32(A)(2) (1993).

²³⁷ OR. R. CIV. P. 32(B)(3) (1993) (providing as a pertinent factor in determining the fairness and efficiency of class action adjudication the extent to which "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"). Predominance, however, is easier to satisfy for UTPA claims than in common law fraud actions. See Leaffer & Lipson, *supra* note 6, at 550-51 (observing certain elements relied upon by defense counsel in defeating predominance, such as intent and reliance, may be irrelevant in deceptive trade statute actions).

²³⁸ See SHELDON & CARTER, *supra* note 12, § 8.3.4.2, at 434-36; Lovett, *supra* note 1, at 745; *cf.* Coe v. National Safety Assocs., Inc., 137 F.R.D. 252 (N.D. Ill. 1991) (vacating order certifying class fraud action by investors in water filter sales scheme because sales presentations varied even though allegedly based on a standard "script").

mental impact on consumer class actions, the commonality and predominance requirements are well suited to permit class actions when efficient and should be retained.

The second obstacle to UTPA class actions, Oregon's mandatory claim form procedure, should be eliminated. This procedure limits the defendant's damages liability to just those class members who submit individual claim forms requesting relief.²³⁹ Unique to Oregon,²⁴⁰ this procedure has been blamed for the abandonment of meritorious class actions and for injustices that result when wrongdoing defendants retrieve huge damage awards that go unclaimed.²⁴¹ Both plaintiff lawyers and commentators in Oregon have urged the repeal and replacement of the claim form procedure with an escheat of unclaimed damages to the state's Common School Fund.²⁴² This proposal was rejected by the legislature, however, in 1991.²⁴³ A more modest reform would give the court discretion to impose the claim form procedure. For example, the court might do so when class members can readily be located and individual damages are substantial. The legislature in adopting the discretionary approach might set clear guidelines to foster predictability and address the concern that the claim form procedure deters the initiation of class actions. An alternative reform is repeal of the claim form procedure for consumer class actions, or, more specifically, for class actions seeking damages under the UTPA. Unclaimed damages in the latter case could escheat to the Consumer Protection and Education Revolving Account.²⁴⁴

The third obstacle, ORCP 32(K), precludes recovery of the \$200 minimum damages in UTPA class actions. Professor Mooney explained that the objective of the minimum penalty to encourage private actions is achieved sufficiently in class actions

²³⁹ OR. R. CIV. P. 32(F)(2) (1993).

²⁴⁰ See Philip Emerson, *Oregon Class Actions: The Need for Reform*, 27 WILLAMETTE L. REV. 757, 759 (1991) (noting no other state imposes a mandatory claim form procedure). *But cf.* IND. CODE ANN. § 24-5-0.5-4(b) (Burns 1991) (providing that money recovered in a consumer class action that cannot "with due diligence" be restored to the consumers within a year after the judgment shall be returned to the defendant); WYO. STAT. § 40-12-108(b) (1977) (same provision).

²⁴¹ Emerson, *supra* note 240, at 768-70.

²⁴² See *id.*; Bob Zarnetske, Recent Development, *Oregon Class Actions: The Continuing Need for Legislative Reform*, 72 OR. L. REV. 205, 217-28 (1993).

²⁴³ See Zarnetske, *supra* note 242, at 217 n.78.

²⁴⁴ OR. REV. STAT. § 180.095 (1993).

without such an award.²⁴⁵ He observed that federal courts had refused to certify class actions seeking to recover statutory damages under the federal Truth in Lending Act (TILA), thus confirming recovery minimums are "usually inappropriate in class actions."²⁴⁶ TILA's technical requirements can be violated innocently, and violations are thus proven easily. Attorneys therefore don't need much encouragement to bring TILA class actions. Aggregated statutory damage liability might also be unfair when levied against a lender who violated TILA innocently. Moreover, technical TILA violations propagated in the standard loan disclosure form can involve thousands of claimants.²⁴⁷ In contrast, UTPA violators have acted willfully and are thus less sympathetic defendants. UTPA violations usually involve issues of credibility and few are proven as easily as those under TILA, so that greater encouragement is needed of UTPA private actions. Moreover, in the mid-1970s Congress addressed the concern of mass statutory damage recovery in TILA class actions by authorizing such recovery subject to a reasonable cap.²⁴⁸ Oregon might similarly amend the ORCP to authorize minimum damages recovery in UTPA class actions subject to a cap of \$25,000.²⁴⁹

H. Arbitration of UTPA Claims

Arbitration has been hailed in recent decades by advocates as the consumer's ally to provide a realistic consumer enforcement mechanism.²⁵⁰ Recent widespread inclusion of arbitration clauses by businesses in their consumer contracts,²⁵¹ however,

²⁴⁵ Mooney, *supra* note 14, at 129 n.67; see also UNIF. CONSUMER CREDIT CODE § 5.201 cmt. 2, 7A U.L.A. 183 (1974) (explaining that the UCCC denies recovery of consumer penalties in class actions for the same reason).

²⁴⁶ Mooney, *supra* note 14, at 129 n.67.

²⁴⁷ The most notorious case denying class certification under TILA involved a class of 130,000 members each seeking the minimum TILA award of \$100, a total of \$13,000,000, for an alleged technical violation. *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).

²⁴⁸ 15 U.S.C. § 1640(a)(2)(B) (1988) (making the penalty amount in class actions discretionary and imposing a cap of the lesser of \$500,000 or one per cent of the creditor's net worth).

²⁴⁹ Twenty-five thousand dollars is the maximum civil penalty the Attorney General can recover upon proof of each willful violation. See OR. REV. STAT. § 646.642(3) (1993).

²⁵⁰ See generally Willner, *supra* note 179, at 185.

²⁵¹ See generally Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112 (1993).

has initiated a debate on whether arbitration hurts the consumer more than it helps. The explanation for the emerging shift in opinion is that arbitration improves on inadequate common law consumer actions, but lags behind the remedial advances of such statutory actions as the UTPA. For example, the right to recover UTPA minimum damages in arbitration is uncertain,²⁵² as is the arbitrator's authority to award punitive damages for UTPA violations.²⁵³ Attorneys' fees might also be unavailable to the successful claimant in UTPA arbitration. The UTPA's statutory allowance of fees refers to an award by "the court" in an "action" brought "under this section."²⁵⁴ A Massachusetts court construing a substantially identical fee provision held it inapplicable in deceptive practice arbitration.²⁵⁵ Because most consumers will therefore be unable to obtain counsel, arbitration is less desirable than small claims court where the consumer will not have to confront the defendant's counsel.

Arbitration's shortcomings to the UTPA claimant are not limited to remedial concerns. Arbitration can deny the consumer the right to engage a jury in UTPA actions exceeding \$200.²⁵⁶ Additionally, class action relief, more efficient in theory than arbitration, may be unavailable in arbitration.²⁵⁷ Finally, the arbitration process does not generate binding precedent which would both provide standards to guide honest merchants and aid in the speedy resolution of claims against dishonest ones.

Reform of the deleterious effects of arbitration on consumers,

²⁵² See generally G. Richard Shell, *The Power to Punish: Authority of Arbitrators to Award Multiple Damages and Attorneys' Fees*, 72 MASS. L. REV. 26 (1987) (arguing that arbitrators should be allowed to award treble and other statutory damages under state deceptive practices statutes).

²⁵³ See SHELDON & CARTER, *supra* note 12, § 8.2.5.1, at 428-30 (noting that courts are split in cases thus far decided in contexts other than deceptive practices); Shell, *supra* note 252. See generally Timothy E. Travers, Annotation, *Arbitrator's Power to Award Punitive Damages*, 83 A.L.R.3d 1037 (1978).

²⁵⁴ OR. REV. STAT. § 646.638(3) (1993).

²⁵⁵ *Schultz v. Subaru of Am., Inc.*, 553 N.E.2d 893 (Mass. 1990) (statute referring to "any action commenced hereunder").

²⁵⁶ See generally SHELDON & CARTER, *supra* note 12, § 7.7.1, at 145 (Supp. 1993).

²⁵⁷ Compare *Dickler v. Shearson Lehman Hutton, Inc.* 596 A.2d 860 (Pa. Super. Ct. 1991) (remanding for class certification proceedings in arbitration of claim under arbitration agreement that is silent on whether it permits class actions) with *Gammara v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (court is powerless to compel arbitration on a class basis when the arbitration agreement does not provide for a class action), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994). Presumably under either approach class actions could be frustrated by expressly negating them in an arbitration agreement.

however, is problematic. The Supreme Court has held that federal law governing transactions in interstate commerce (the Federal Arbitration Act)²⁵⁸ preempts state law that would deem claims concerning such transactions inarbitrable.²⁵⁹ Even though Oregon cannot render most UTPA claims inarbitrable, that would not be the most prudent reform regardless of preemption. Rather than deny arbitration of consumer claims, reform should focus on providing the same remedial opportunities in arbitration as are available in private judicial actions under the UTPA.²⁶⁰ For example, Oregon's arbitration act²⁶¹ could be amended to expressly authorize attorneys' fees in arbitration to the same extent that such fees would be available in a court proceeding. Alternatively, the UTPA's allowance of fees could be amended to reference arbitration actions.²⁶²

Certain disadvantages to binding arbitration, such as the denial of a jury trial, necessarily result from the arbitration model and are not amenable to reform. To assure these deprivations were agreed to fairly, courts should apply unconscionability and related fairness and assent doctrines liberally to police the validity of the consumer's agreement to arbitrate.²⁶³ The UTPA can aid

²⁵⁸ 9 U.S.C. § 1 (1988).

²⁵⁹ See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In a recent case, the Supreme Court rejected the urging of the respondent and of twenty states in a brief amici curiae to overrule its holding in *Southland*. *Allied-Bruce Terminix Co. v. Dobson*, 1995 WL 15045 (U.S. Jan. 18, 1995) (deciding to continue federal control over arbitration in cases involving any degree of interstate commerce). See generally *SHELDON & CARTER*, *supra* note 12, § 7.7.3, at 400; Joanne M. D'Alcomo, Note, *Resolving the Conflict Between Arbitration Clauses and Claims Under Unfair and Deceptive Practices Acts*, 64 B.U. L. REV. 377, 396-99 (1984).

²⁶⁰ Mediation may offer an alternative to judicial resolution of disputes that avoids the remedial drawbacks of binding arbitration. In 1994, Lane County began to implement a mediation program for small claim cases using volunteer mediators. A similar program might be considered for use in other counties or for UTPA claims in other courts.

²⁶¹ OR. REV. STAT. §§ 36.300-365 (1993).

²⁶² See *Shell*, *supra* note 252, at 37 (observing the better approach is to amend the state's arbitration act as Texas has done because otherwise every statute awarding fees to consumers must be amended individually).

²⁶³ See generally Jonathan E. Breckenridge, Note, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN. SURV. AM. L. 925 (1993). The Federal Arbitration Act permits states to invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988). In *Allied-Bruce Terminix Co. v. Dobson*, 1995 WL 15045 (U.S. Jan. 18, 1995), the Supreme Court interpreted this authority to mean that states cannot "decide a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Id.* at *10. Therefore, to the extent possi-

against imposing arbitration through overreaching by providing a statutory remedy to challenge the conscionability of merchant practices as advocated in this Article.²⁶⁴ Consumers might therefore challenge an agreement to arbitrate that denies them access to UTPA protection as itself an unfair trade practice.²⁶⁵

IV

THE FUTURE OF OREGON'S ENFORCEMENT AND DETERRENCE OF DECEPTIVE TRADE PRACTICES

Twenty years ago, Professor Mooney urged an attack on rampant market fraud by giving Oregon's Attorney General more money to pursue public enforcement.²⁶⁶ Measure 5 has since devastated that design. The role of public enforcement under the UTPA must therefore be restructured to make better use of declining public resources. The following strategies would best complement the increased role of private enforcement of market fraud.

Whether or not the legislature removes the rulemaking condition from the UTPA catchall,²⁶⁷ the Attorney General should engage more actively in rulemaking under the UTPA. If removed as a condition to the catchall, rulemaking will ease the claimant's task of proving that a particular offensive practice is unfair or deceptive. It has also been argued persuasively that increasing the specificity of legislation increases compliance.²⁶⁸

Significant enforcement resources should be employed to coordinate and encourage private enforcement efforts. For example, the DOJ could more actively educate the public on the

ble, consumer litigants should direct their arguments of unfairness to the consumer contract as a whole.

²⁶⁴ See *supra* part I.B.

²⁶⁵ Oregon should avoid the type of legislation being considered in Texas mandating that its deceptive practices act, which governs unconscionable practices, will not invalidate an agreement to arbitrate. Texas H.B. 845, 73d Sess. (1993). That bill appears to be industry's attempt to beat back legitimate Texas consumer challenges with a political stick.

²⁶⁶ See Mooney, *supra* note 14, at 160.

²⁶⁷ See *supra* part I.A.

²⁶⁸ See Whitford, *supra* note 208 at 1019-25; see also Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 590 (1989) ("[I]f I were representing a client, I would be happy to discover the more specific provisions of [certain states' deceptive practice statutes] . . .").

private remedies available to combat consumer fraud. It could also urge legislative reform to encourage private enforcement.

When enforcing the UTPA, the DOJ should concentrate on the most serious continuing offenders²⁶⁹ who are eluding or are undeterred by private enforcement. When possible, the DOJ should act in concert with other state attorneys general to impose the enforcement energies and penalties of several states on the offending business. The wrongdoer who might otherwise manipulate the various statutory or judicial loopholes in a single state's law is less able to prevail on technical grounds and more likely to settle quickly when enforcement energies are channeled simultaneously through the least problematic and toughest state law. This public "class action" approach to enforcement may be the most efficient way for a state like Oregon to spend its limited public enforcement dollars.²⁷⁰

Finally, Professor Mooney's proposal to add a criminal sanction to the Attorney General's enforcement arsenal²⁷¹ should be reconsidered for its potential to deter market wrongdoers.²⁷² The UTPA authorizes the Attorney General to seek a civil penalty against willful violators,²⁷³ but this penalty has little influence on defendants who are insolvent or able to conceal their assets.²⁷⁴ Oregon law imposes criminal sanctions for a few specific trade practices such as violations of gasoline price display and credit card solicitation requirements.²⁷⁵ Oregon's new regu-

²⁶⁹ In 1975, Professor Mooney criticized the Attorney General for pursuing enforcement actions that arguably were not in the "public interest." See Mooney, *supra* note 14, at 156.

²⁷⁰ One might anticipate "free rider" problems as states may choose to reserve their resources if others are actively pursuing some national fraud. In practice, states might be encouraged to join the group enforcement efforts to share in the benefits of a monetary award or settlement. The FTC as a federal enforcement vehicle for national fraud avoids any such "free rider" problem, but the FTC has resources too limited to combat national fraud effectively without help. See *supra* note 29.

²⁷¹ See Mooney, *supra* note 14, at 125-27.

²⁷² See Smith, *supra* note 17, at 427 (quoting Neil Goldschmidt who, as a Portland legal aid attorney in 1969, remarked that criminal penalties would have a "strong deterrent effect" on consumer fraud).

²⁷³ OR. REV. STAT. § 646.642(3) (1993) (penalty in court's discretion not to exceed \$25,000 "per violation").

²⁷⁴ See Mooney, *supra* note 14, at 127.

²⁷⁵ See OR. REV. STAT. § 646.990 (1993). At the federal level, the mail fraud offense is employed routinely to combat garden variety consumer fraud. *E.g.*, *United States v. DeFusco*, 930 F.2d 413 (5th Cir.) (five year sentence for fraudulent contest scheme promoter who sent letters to millions of consumers falsely promising cars,

lation of the deceptive practices of mortgage bankers and mortgage brokers carries the penalty of a Class C felony.²⁷⁶ Oregon should consider sanctioning willful consumer fraud under the UTPA by imposing the same penalty.

CONCLUSION

There are two risks in advocating reform of the UTPA to aid its private enforcement. First is the risk that pursuing such reform could backfire if, once the debate on consumer protection has been initiated, the legislature is persuaded to curtail rather than to enhance the private remedy.²⁷⁷ Second is the risk that reform will go too far and overshoot the desired balance of encouraging legitimate claims without harassing honest businesses.²⁷⁸ The moderate reforms proposed in this Article seek to avoid the greater risk that without legislative action Oregon consumers will become the unintended victims of Measure 5.

gold, furs, and cash to those who visited a time-share development), *cert. denied*, 112 S. Ct. 239 (1991).

²⁷⁶ OR. REV. STAT. § 59.992(1) (1993).

²⁷⁷ See Shapiro, *supra* note 44, at 494 n.289.

²⁷⁸ The Texas Deceptive Trade Practices Act is the subject of much commentary accusing the Texas legislature of having crossed the line between protection and harassment to the detriment of honest businesses. *E.g.*, John R. Harrison, Jr., Comment, *The Deceptive Trade Practices — Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879 (1986).

