FAIR IS FAIR—RESHAPING ALASKA'S UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT

RYAN P. O'QUINN* & THOMAS WATTERSON†‡

ABSTRACT

Few fields of law impact as wide a swath of population as consumer protection law. Alaska adopted its consumer protection statute, the Unfair Trade Practices and Consumer Protection Act (UTPCPA), amid a national movement to strengthen consumer protection laws. The UTPCPA uses broad language to encompass a wide range of conduct. However, creative pleading and recent applications of the UTPCPA have expanded the law in ways that threaten Alaska businesses even in the absence of culpable conduct. This Note reviews the history of consumer protection, Alaska's UTPCPA, and the incentives leading to an expanding application of the UTPCPA. The Note concludes by proposing potential legislative solutions to rein in abuse of the Act.

---

* B.S., B.A., North Carolina State University, 2004; Ph.D., University of North Carolina at Chapel Hill, 2009; J.D., Duke University School of Law, expected 2012. The author would like to thank his friends and family for their support and the members of the Alaska Law Review for helpful discussions and editorial guidance.

† B.A., University of Delaware, 2007; J.D., Duke University School of Law, expected 2012. The author would like to thank his wife, without whom none of his success would have been possible, and the members of the Alaska Law Review for their editorial guidance.

‡ The authors contributed equally. This Note originated as two independently written notes. After discovering over coffee at Kaladi Brothers in downtown Anchorage that they had written on the same topic, the authors decided to combine the notes to create a more comprehensive discussion. Special thanks goes to Mr. Matthew Block of Lane Powell, P.C., Anchorage, AK, for his assistance and thoughtful conversations on this topic. The opinions expressed in this Note are solely those of the authors, and any errors are the authors' own.

INTRODUCTION

Few fields of law impact as wide a swath of population as consumer protection law. After all, modern societies and economies demand that virtually all citizens fulfill their wants and needs in the market. State consumer protection acts became popular in the 1960s and 1970s after the Federal Trade Commission (FTC) proved unable to prevent or punish fraudulent or deceptive practices through national actions. Modeled after and encouraged by the FTC, these acts are often referred to as "Little FTC Acts." Alaska's Unfair Trade Practices and Consumer Protection Act[1] (UTPCPA) has noble goals—to shield Alaskans from unfair and deceptive merchants and to promote the flow of trade. Like similar "Little FTC Acts" across the country, the UTPCPA is broadly worded to encompass a wide range of conduct and to evolve with the times. Broad language, however, can also result in inconsistent application of the law. This Note makes the case that decisions by Alaska courts over the past decade have distorted the meaning of the statute and have applied it in ways that harm small businesses and put Alaskan consumers at risk. In Part I, this Note begins by examining the history of consumer protection law from common law fraud to the FTC to the rise of "Little FTC Acts." Part II introduces the features of the Alaska UTPCPA and compares it to other similar state statutes. Part III explores where things went wrong with the application of the UTPCPA, and finally, Part IV suggests how changing the Act could better serve the interests of both citizens and businesses.

I. THE HISTORY OF CONSUMER PROTECTION

Prior to modern state consumer protection laws, consumers could bring actions at common law for fraud or misrepresentation against sellers of goods or services. The Writ of Deceit was one of the earliest actions at common law, dating back to 1201.[2] With such a long history, fraud and misrepresentation developed a clear jurisprudence. Early in this country's development, the test for fraud or misrepresentation was described as:

> If a man represents as true that which he knows to be false, and makes the representation in such a way or under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted on, and the person to whom the

1. ALASKA STAT. §§ 45.50.471–45.50.561 (2010).
2. DAN B. DOBBS ET AL., PROSSER & KEETON ON TORTS § 105, at 727 (5th ed. 1984).

> representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, there is fraud to support an action of deceit at law, and to be a ground for the rescission of the transaction in equity.[3]

In Alaska today, the test for intentional misrepresentation remains the same. "Alaska law imposes an independent duty to refrain from the tort of intentional misrepresentation. The essential elements of that tort are: (1) a false representation of fact, (2) knowledge of the falsity of the representation, (3) intention to induce reliance, (4) justifiable reliance, and (5) damages."[4]

An important element of the common law tort of fraud or intentional misrepresentation is the requirement of scienter. A plaintiff bringing an action for fraud or intentional misrepresentation must demonstrate "proof that the maker knew of the untrue character of his or her representation."[5] Further, a plaintiff must show that the defendant made a false representation, knew of the falsehood, and intended to misrepresent the information.[6] Often these requirements create a significant hurdle to plaintiffs and limit consumers' protection from fraud and misrepresentation.[7]

Up until the early twentieth century, the predominant form of protection that the government provided to consumers was two Latin words of warning: *caveat emptor*.[8] *Caveat emptor* left the consumer to his own judgment to determine the quality of a good or the accuracy of merchants' sales pitches, and it assumed the consumer could bargain with merchants and choose which merchants to patronize on the basis of their reputations.[9] This reliance on individualism and reputation for consumer protection worked in an economy where consumers did most of their dealing face to face with small merchants. But, as industrialization expanded the capabilities to produce and market goods to a large number of people, consumers began calling for an end to the

3. Lowe v. Trundle, 78 Va. 65, 67 (1883) (citation omitted).

4. Jarvis v. Ensminger, 134 P.3d 353, 363 (Alaska 2006) (citing City of Fairbanks v. Amoco Chem. Co., 952 P.2d 1173, 1176 n.4 (Alaska 1998)).

5. Bubbel v. Wein Air Alaska, Inc., 682 P.2d 374, 381 (Alaska 1984) (citing RESTATEMENT (SECOND) OF TORTS § 530 cmt. b (1977)).

6. *Id.*

7. *See* William A. Lovett, *Louisiana Civil Code of 1808: State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 754 n.86 (1972).

8. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 7 (2005) ("Although the strength of caveat emptor as a concept in American law had diminished by the beginning of the twentieth century, common law remedies remained inadequate to protect consumers in some situations.").

9. Lovett, *supra* note 7, at 727.

doctrine of *caveat emptor*.[10] While consumer movements began to erode the influence of *caveat emptor* through the beginning of the twentieth century, it was not until the 1930s and the strengthening of the FTC that the law departed from the doctrine of *caveat emptor* in any significant fashion.[11]

A. Nascent Consumer Protection: The Development of the Federal Trade Commission

In 1914, Congress passed the Federal Trade Commission Act (FTC Act),[12] which was the first major step in consumer protection and unfair competition law. At its roots, however, the FTC was designed to prevent unethical business practices from harming the flow of commerce, not to protect consumers.[13] It was essentially an extension and evolution of antitrust law.[14] An early aim of the FTC was to "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[15] Moreover, courts interpreted the FTC's initial powers as covering only anti-competitive practices between businesses, not as providing consumer protection.[16] In *FTC v. Raladam Co.*, the Supreme Court emphasized that the power of the FTC under section 5 of the FTC Act[17] depended on the

10. *Id.*

11. *Id.* at 728.

12. Ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

13. *See* Michael I. Miller, Comment, *The Class Action (Un)Fairness Act of 2005: Could it Spell the End of the Multi–State Consumer Class Action?*, 36 PEPP. L. REV. 879, 883 (2009) (citing Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 226 (1981)); *see also* Schwartz & Silverman, *supra* note 8, at 7–8.

14. Miller, *supra* note 13, at 883; *see also* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 11 (2006) (the original purpose of the Federal Trade Commission was to curb monopolistic behavior on the part of businesses, not to help consumers). For a detailed historical review of events leading to the creation of the FTC, see Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds With Antitrust History and Precedent*, 73 TENN. L. REV. 131, 133–54 (2006).

15. Stephen Buckingham, Comment, *Distinguishing Deception and Fraud: Expanding the Scope of Statutory Remedies Available in Pennsylvania for Violations of State Consumer Protection Law*, 78 TEMP. L. REV. 1025, 1042 (2005) (quoting FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part*, 302 U.S. 112 (1937)).

16. *See* FTC v. Raladam Co., 283 U.S. 643, 646–47 (1931).

17. Section 5 of the original FTC Act stated, "unfair methods of competition in commerce are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce." § 5, 38 Stat. at 719.

prerequisites "(1) that the methods complained of are *unfair*, [and] (2) that they are methods of *competition* in commerce."[18] Thus, the original FTC Act covered only "unfair method[s] of competition" that injured the business of a competitor, not deceptive or unfair practices that hurt only the consuming public.[19] When all or most members of an industry used a deceptive practice that harmed consumers, the courts were unable to provide a remedy, as the practices were not unfair in the sense that they harmed competition.[20]

Only in 1938 did the FTC begin to resemble the consumer watchdog it is today. In passing the Wheeler-Lea Act,[21] Congress gave the FTC broad powers to regulate business practices that were unfair to the individual citizen-consumer.[22] The FTC finally had the power to protect consumers with the declaration that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are . . . unlawful."[23] Further, Congress gave the FTC broad discretion regarding when, where, and how the Commission would act.[24] Congress trusted the Commission to bring actions only when they were justified and in the interest of the public at large.[25]

Given the choice to specifically proscribe defined instances of unfair or deceptive conduct, Congress declined because "it would undertake an endless task" if it tried to provide an exhaustive list of illegal actions.[26] Also, Congress decided not to provide specific definitions for "unfair" and "deceptive," choosing instead to allow its decisions and regulations to shape the meanings of the terms as times and practices changed.[27] Such indeterminateness allowed for flexibility to evolve according to community standards and market changes.[28]

18. *Raladam*, 283 U.S. at 646.

19. *See id.* at 649; *see also* Scheuerman, *supra* note 14, at 11.

20. *See* Pep Boys-Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941) (noting that the FTC under the *Raladam* rule was powerless to help the public when there was not a threat to competition); *see also* Scheuerman, *supra* note 14, at 11.

21. Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a) (2006)).

22. *See* Schwartz & Silverman, *supra* note 8, at 8–9.

23. *See* § 3, 52 Stat. at 111.

24. *See id.*

25. Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Act: Reconsidering the FTC as Rule Model*, 52 OHIO ST. L. J. 437, 437 (1991).

26. Schwartz & Silverman, *supra* note 8, at 8 (quoting H.R. REP. NO. 1142, at 19 (1914) (Conf. Rep.)).

27. Sovern, *supra* note 25, at 443.

28. Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 299 (2000) ("UDAP statutes are

Congress has still not explicitly defined what constitutes a "deceptive" act or practice, and it did not do so with "unfair" acts or practices until the 1994 amendments narrowing the FTC Act.[29]

Congress specifically chose not to grant individual private rights of action under the FTC Act. In fact, a proposal to allow a private right of action failed during the FTC Act negotiations; the opponents voiced concerns about abusive litigation by some plaintiffs' attorneys.[30] Consumers were left with rights of action based in common law fraud or breach of contract.[31] As a result, consumers generally found that it was "less expensive to suffer most deceptive trade practices than to remedy them through legal action."[32]

B. Development of State Law "Little FTC Acts"

The inadequacies of the FTC came to a head in the late 1960s when two independent incendiary reports were released chastising the FTC for its inefficiency and failure to benefit consumers.[33] First, Ralph Nader led a group of law students—later termed Nader's Raiders—who reviewed FTC documents and decisions.[34] The Nader Report portrayed an ineffective and bureaucratic FTC with a long list of consumer protection failures.[35] Second, in response to the Nader Report, President Nixon commissioned the American Bar Association (ABA) to review the

undeniably, and purposefully, broad and flexible in scope, and the delegations of regulatory authority in those statutes are similarly broad.").

29. *See* Jeff Sovern, *Protecting Privacy With Deceptive Trade Practices Legislation*, 69 FORDHAM L. REV. 1305, 1321 (2001) (citing Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (codified as amended at 15 U.S.C. § 45(n) (2006))).

30. Schwartz & Silverman, *supra* note 8, at 12 (citing 51 CONG. REC. 13,113–18 (1914)). A proposed amendment to the Act by Senator Clapp of Minnesota would have provided:

> [A]ny person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefore in any district court of the United States in the district in which the defendant resides or may be found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of the suit, together with a reasonable attorney's fee.

51 CONG. REC. 13,113. The amendment was rejected forty-one to eighteen. Schwartz & Silverman, *supra* note 8, at 14.

31. Buckingham, *supra* note 15, at 1027.

32. *Id.* (quoting Lovett, *supra* note 7, at 725).

33. *See* Miller, *supra* note 13, at 886.

34. EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 3 (Richard W. Baron Publishing Co. 2d ed. 1969).

35. *Id.* at 37–95.

consumer protection efforts of the FTC.[36] While the ABA Report was not as scathing as the Nader Report, it highlighted the same failures and found the FTC's consumer protection efforts to be inadequate.[37]

As the 1960s came to a close, the FTC was prepared to admit that it could not respond to all the consumer claims it received as well as unfair competition claims from businesses.[38] An initial model for state legislation on consumer protection came from an FTC proposal itself, and the FTC collaborated with state governments and the Committee on Suggested State Legislation to develop false advertising statutes.[39] Similarly, in 1964 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Deceptive Trade Practices Act.[40] Unhappy with this effort,[41] the FTC again collaborated with the Committee on Suggested State Legislation to develop its own model statute, the Unfair Trade Practices and Consumer Protection Law.[42]

Three versions of the statute were promulgated to give state legislatures options in fitting the provision into existing state codes. The first option banned all "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[43] The second provided a slightly modified provision against "false, misleading, or deceptive methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[44] Finally, the third option listed twelve specific banned practices plus a catch-all provision that made illegal "any act or practice which is unfair or deceptive to the consumer."[45] The consumer protection movement

36. Scheuerman, *supra* note 14, at 13 n.79; COMMISSION TO STUDY THE FTC, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 4 (1969) [hereinafter *ABA Report*].

37. *See ABA Report*, *supra* note 36, at 37.

38. *See* Debra P. Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 490–91 (2008).

39. *See* Scheuerman, *supra* note 14, at 15; *see also* Lovett, *supra* note 7, at 730.

40. UNIF. DECEPTIVE TRADE PRACTICES ACT (1964) (amended 1966) (withdrawn 2000).

41. Scheuerman, *supra* note 14, at 15. Specifically, the FTC disliked that the Uniform Deceptive Trade Practices Act did not authorize action by the state attorney general and believed that the catch-all provision could cause confusion. *Id.*

42. UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (1970) (Comm. on Suggested State Legislation).

43. *Id.*

44. *Id.*

45. *Id.* The twelve enumerated deceptive practices were:

> (1) passes off goods or services as those of another;
> (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

quickly gained momentum, and by 1973, a mere three years later, forty-four of the fifty states had already passed some version of the model act.[46]

The various state consumer protection acts (CPAs) had done little to change the status quo by the mid-1970s. Both the FTC and the state attorneys general—who were initially the only parties capable of bringing state law actions—"confine[d] their activities to cases likely to have a broad impact."[47] The state attorneys general quickly found that they had the same problems that the FTC did prior to Ralph Nader's excoriation: limited staff, limited resources, and an abundance of claims being filed by their citizens.[48] Consequently, states gradually incorporated private rights of action for individual consumers to sue unsavory businesses.[49] A private right of action alone may still under-deter unfair and deceptive practices.[50] To sweeten the pot, many states added treble damages, punitive damages, or statutory minimum

(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) uses deceptive representations or designations of geographic origin in connection with goods or services;
(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;
(7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
(8) disparages the goods, services, or business of another by false or misleading representation of fact;
(9) advertises goods or services with intent not to sell them as advertised;
(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

UNIF. DECEPTIVE TRADE PRACTICES ACT § 2 (1966); *see also* Sovern, *supra* note 25, at 446–47.

46. Scheuerman, *supra* note 14, at 17–18.

47. Jon Mize, Comment, *Fencing Off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653, 660 (2005) (quoting Sovern, *supra* note 25, at 448).

48. Sovern, *supra* note 25, at 448.

49. *Id.* at 448–49.

50. *See* William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 289 (1971).

damages provisions.[51] Many also awarded attorneys' fees to prevailing consumer plaintiffs to incentivize the bringing of actions.[52]

C. Modern State Consumer Protection Acts—The Rise of Private Actions

Today, the CPA laws of the fifty states and the District of Columbia[53] have each evolved based on the needs of the citizens and the demands of the era. Ensuring that victims of consumer fraud have access to the courts is particularly important in today's climate of predatory lending, identity theft, and e-commerce situations in which

51. *See* Stark & Choplin, *supra* note 38, at 495.

52. *Id.* at 484.

53. *See* Scheuerman, *supra* note 14, at 18–20; CAROLYN L. CARTER & JONATHON SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES app. A (7th ed. 2008). The fifty state statutes currently in effect are: ALA. CODE §§ 8-19-1–8-19-15 (2010); ALASKA STAT. §§ 45.50.471–45.50.561 (2010); ARIZ. REV. STAT. ANN. §§ 44-1521–44-1534 (2010); ARK. CODE ANN. §§ 4-88-101–4-88-207 (2010); CAL. CIV. CODE §§ 1750–1785 (West 2010); COLO. REV. STAT. §§ 6-1-101–6-1-115 (2010); CONN. GEN. STAT. §§ 42-110a–42-110q (2010); DEL. CODE ANN. tit. 6, §§ 2511–2527, 2580–2584 (2010) (Consumer Fraud Act); *id.* §§ 2531–2536 (2010) (Deceptive Trade Practices Act); D.C. CODE §§ 28-3901–28-3913 (2010); FLA. STAT. §§ 501.201–501.213 (2010); GA. CODE ANN. §§ 10-1-370–10-1-375 (2011); HAW. REV. STAT. §§ 480-1–480-24 (2010); IDAHO CODE ANN. §§ 48-601–48-619 (2010); 815 ILL. COMP. STAT. 505/1–505/12 (2010) (Consumer Fraud and Deceptive Business Practices Act); *id.* at 510/1–510/7; IND. CODE §§ 24-5-0.5-1–24-5-0.5-12 (2010); IOWA CODE §§ 714.16–714.16A (2009); KAN. STAT. ANN. §§ 50-623–50-640, 50-675a–50-679a (2009); KY. REV. STAT. ANN. §§ 367.110–367.990 (LexisNexis 2010); LA. REV. STAT. ANN. §§ 51:1401–51:1420 (2010); ME. REV. STAT. tit. 10, §§ 1211–1216 (2009); MD. CODE ANN., COM. LAW §§ 13-101–13-501 (LexisNexis 2010); MASS. GEN. LAWS ch.93A §§ 1–11 (2010); MICH. COMP. LAWS §§ 445.901–445.922 (2010); MINN. STAT. §§ 325D.43–325D.48 (2010); MO. REV. STAT. §§ 407.010–407.307 (2010); MONT. CODE ANN. §§ 30-14-101–30-14-142 (2010); NEB. REV. STAT. §§ 87-301–87-306 (2010); NEV. REV. STAT. §§ 598.0903–598.0999 (2010); N.H. REV. STAT. ANN. §§ 358-A:1–358-A:13 (2010); N.J. STAT. ANN. §§ 56:8-1–56:8-91 (West 2010); N.M. STAT. ANN. §§ 57-12-1–57-12-22 (2010); N.Y. GEN. BUS. LAW §§ 349–350 (Consol. 2010); N.C. GEN. STAT. §§ 75-1.1–75-35 (2010); N.D. CENT. CODE §§ 51-15-01–51-15-11 (2009); OHIO REV. CODE ANN. §§ 4165.01–4165.04 (LexisNexis 2010); OKLA. STAT. tit. 78, §§ 51–55 (2010); OR. REV. STAT. §§ 646.605–646.656 (2009); 73 PA. CONS. STAT. §§ 201-1–201-10 (2010); R.I. GEN. LAWS §§ 6-13.1-1–6-13.1-27 (2010); S.C. CODE ANN. §§ 39-5-10–39-5-160 (2009); S.D. CODIFIED LAWS §§ 37-24-1–37-24-35 (2010); TENN. CODE ANN. §§ 47-18-101–47-18-125 (2010); TEX. BUS. & COM. CODE ANN. §§ 17.41–17.63 (West 2009); UTAH CODE ANN. §§ 13-2-1–13-2-8 (LexisNexis 2010); VT. STAT. ANN. tit. 9, §§ 2451–2480g (2010); VA. CODE ANN. §§ 59.1-196–59.1-207 (2010); WASH. REV. CODE §§ 19.86.010–19.86.920 (2010); W. VA. CODE §§ 46A-6-101–46A-6-110 (2010); WIS. STAT. §§ 100.18, 100.20–100.264 (2010); WYO. STAT. ANN. §§ 40-12-101–40-12-114 (2010); 5 GUAM CODE ANN. §§ 32101–32603 (2010); P.R. LAWS ANN. tit. 3, §§ 341–341w (2010); V.I. CODE ANN. tit. 12A, §§ 101–123, 180–185 (2010).

there is never face to face contact with a fraudulent merchant.[54] States articulated five predominant legislative purposes in passing "Little FTC" CPAs:

1) To wholly compensate victims for losses;
2) To punish fraudulent offenders;
3) To make the bringing of cases feasible even when attorneys' fees might be greater than a potential damages award;
4) To encourage members of the bar to take on consumer protection cases; and
5) To deter future fraud, deception, and unfair trade practices.[55]

The most important difference between the FTC Act and "Little FTC Acts" is a private right of action.[56] In 2009, Iowa became the last of the fifty states to grant a private right of action for consumer fraud claims.[57] Private rights of action allow consumers to protect themselves from fraud, misrepresentation, and other deceptive trade practices without the constraints that come with actions at common law, and they provide an extra deterrent to injurious merchants and businesses.[58] During the period when states enacted "Little FTC Acts," one consumer protection advocate argued: "Without effective private remedies the widespread economic losses that result from these trade practices remain uncompensated, and furthermore, private remedies are highly desirable for additional consumer bargaining power and more complete discipline against fraud in the marketplace."[59] Several features of "Little FTC Acts" help to encourage consumer actions; however, these features vary widely across the states. These features, and their differences, are discussed in the following sections.

54. *See* Stark & Choplin, *supra* note 38, at 488; *see also* Sovern, *supra* note 29, at 1354–58 (examining the roles of state CPAs in e-commerce and personal data management contexts).

55. Stark & Choplin, *supra* note 38, at 499.

56. Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 375 (1990); *see also* DEE PRIDGEN & RICHARD M. ALDERMAN, 1 CONSUMER PROTECTION AND THE LAW § 2:10, at 41 (2010); Scheuerman, *supra* note 14, at 23–25. During the same time that states were enacting consumer protection statutes, the Nixon administration attempted to develop a federal private right of action for unfair or deceptive trade practices, but internal opposition resulted in the proposition never gaining any real traction. Lovett, *supra* note 50, 279–80.

57. Rob Sand, Note, *Fraud's Final Frontier: Iowa's Battle Over Becoming the Final State to Allow Private Consumer Fraud Actions*, 35 IOWA J. CORP. L. 615, 623 (2010). The bill was H.F. 712, 84th Gen. Assem., Reg. Sess. (Iowa 2009).

58. Stark & Choplin, *supra* note 38, at 484.

59. Lovett, *supra* note 50, at 271.

1. Increased Damages Awards

Most unfair or deceptive trade practices do not result in significant harm to individual consumers.[60] Consequently, normal remedies would result in little incentive for any injured parties to bring claims of unfair or deceptive trade practices.[61] The punishment and deterrent functions of private actions would not materialize.[62] To encourage private parties to litigate their unfair or deceptive trade practices claims, CPAs allow for various methods to increase damages.[63]

Similarly, harm from unfair or deceptive practices normally falls below the costs of bringing a lawsuit.[64] Without an award of attorneys' fees, "the costs of going to court were so formidable that it was rarely worth it for consumers to litigate claims involving relatively small amounts of money."[65] To encourage private actions and to "mak[e] the consumer's access to justice really viable,"[66] consumer protection statutes typically allow for prevailing plaintiffs to recover reasonable attorneys' fees and court costs.[67]

Twenty states set a minimum damages award for successful plaintiffs to encourage litigation of harms normally too insignificant to litigate.[68] The minimum damages award varies from as low as $25[69] to as high as $2000,[70] and the plaintiff is awarded the higher of the actual or

60. In a survey on consumer fraud conducted in 2005, the FTC found the median loss due to fraud to be $60. KEITH B. ANDERSON, FTC, CONSUMER FRAUD IN THE UNITED STATES: THE SECOND FTC SURVEY 45 (2007), *available at* http://ftc.gov/opa/2007/10/fraud.pdf.

61. CARTER & SHELDON, *supra* note 53, § 13.1, at 807.

62. *Id.*

63. PRIDGEN & ALDERMAN, *supra* note 56, § 6:10, at 448–50.

64. *See* ANDERSON, *supra* note 60, at 47 (finding the median amount paid in connection with consumer fraud was $60 and the seventy-fifth percentile was $200).

65. PRIDGEN & ALDERMAN, *supra* note 56, § 6:17, at 476.

66. Lovett, *supra* note 7, at 744.

67. *See* Schwartz & Silverman, *supra* note 8, at 25–26; Stark & Choplin, *supra* note 38, at 484, 496 (surveying consumer protection laws in all fifty states and finding that forty-five allow for courts to award plaintiffs attorneys' fees); *see also* PRIDGEN & ALDERMAN, *supra* note 56, app. 6A at 541–43 (providing a table of the availability of attorneys' fees for unfair and deceptive practices claims).

68. *See* PRIDGEN & ALDERMAN, *supra* note 56, § 6:10, at 448–49; *see also id.* § 6:11, at 450, app. 6A at 542–43; *see, e.g.*, ALA. CODE § 8-19-10(a)(1) (2010) (greater of actual damages or $100); CAL. CIV. CODE § 1780 (West 2010) (actual damages but not less than $1000); COLO. REV. STAT. § 6-1-113(2) (2010) (greater of actual damages or $500); MASS. GEN. LAWS ch. 93A, § 9(3) (2010) (greater of actual damages or $25); MICH. COMP. LAWS ANN. § 445.911(2) (2010) (greater of actual damages or $250); MONT. CODE ANN. § 30-14-133(1) (2010) (greater of actual damages or $500); UTAH CODE ANN. § 13-11-19(2) (2010) (greater of actual damages or $2000).

69. MASS. GEN. LAWS ch. 93A, § 9(3) (2010).

70. UTAH CODE ANN. § 13-11-19(2) (2010).

statutory damages. Some states also extend minimum damages to deter particular frauds, primarily those against the elderly.[71] Further, a plaintiff does not always need to show any damages in order to collect statutory damages.[72]

Most states allow courts to treble damages in private consumer protection lawsuits in order to punish some forms of bad behavior.[73] Treble damages, unlike statutory minimum damages, require the plaintiff to show actual damages.[74] In some states, treble damages apply when a trier of fact finds the defendant acted willfully, knowingly, intentionally, or in bad faith.[75] A few states provide treble damages to every plaintiff who shows a violation of the consumer protection statute.[76] Generally, because actual damages must be shown and because there is often a trigger requiring some form of bad behavior, treble damages help deter larger frauds while minimum damages help deter smaller frauds.[77]

A smaller number of states explicitly allow judges to award punitive damages to successful plaintiffs.[78] Punitive damages in consumer protection acts serve the same purposes as in common law fraud actions—they are intended to punish egregious actions and to deter other potential injurers.[79] Some consumer protection acts call for punitive damages when the defendant injured some vulnerable class of victims, such as the elderly or disabled.[80]

71. *See* PRIDGEN & ALDERMAN, *supra* note 56, app.6A at 542–43; *see, e.g.*, HAW. REV. STAT. § 480-13(b)(1) (2010).

72. *See* Carter v. LaChance, 766 A.2d 717, 719 (N.H. 2001) (interpreting the New Hampshire Consumer Protection Act, N.H. REV. STAT. ANN. §§ 358-A:1–358-A:13 (2010), which states that the court "shall award" minimum damages upon a showing of a violation of the statute, to mean that the plaintiff does not need to demonstrate actual damages).

73. Schwartz & Silverman, *supra* note 8, at 23; PRIDGEN & ALDERMAN, *supra* note 56, § 6:10, at 449.

74. PRIDGEN & ALDERMAN, *supra* note 56, § 6:10, at 449; *see*, *e.g.*, Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 825 P.2d 714, 721 (Wash. Ct. App. 1992).

75. PRIDGEN & ALDERMAN, *supra* note 56, § 6:10, at 449; *see, e.g.*, GA. CODE ANN. § 10-1-399(c) (2010) (requiring treble damages for intentional violations); MASS. GEN. LAWS ch. 93A, § 9(3) (2010) (allowing a court to award up to three times actual damages for willful and knowing violations).

76. ALASKA STAT. § 45.50.531(a) (2010); D.C. CODE ANN. § 28-3905(k) (LexisNexis 2010); HAW. REV. STAT. § 480-13 (2010); N.J. STAT. ANN. § 56:8-19 (West 2010); N.C. GEN. STAT. § 75-16 (2010); *see* Schwartz & Silverman, *supra* note 8, at 23.

77. *See* PRIDGEN & ALDERMAN, *supra* note 56, § 6:10, at 449.

78. *Id.* § 6:16, at 467.

79. *Id.* § 6.16, at 467–68.

80. *See* CARTER & SHELDON, *supra* note 53, at 845; *see, e.g.*, ARK CODE ANN. § 4-88-204 (2010).

2. Class Actions

Class actions provide another method to remedy wrongs that cause only small harms against individuals, but the collective harm is large enough to warrant litigation costs. Critics of class action suits claim that plaintiffs' attorneys seeking a windfall, rather than aggrieved consumers, pursue them, and the attorneys bring cases regardless of whether they are meritorious.[81] Further, because damages and litigation costs are so high for class actions, even innocent defendants may settle a claim to avoid a costly trial or any risk of a potentially bankrupting settlement.[82]

"Little FTC Acts" vary widely in how they treat class action lawsuits. A few states explicitly prohibit class actions by private parties.[83] Others explicitly provide that class action suits are available to plaintiffs.[84] The majority of "Little FTC Acts" remain silent on the availability of class action suits.[85] Where the legislation neither prohibits nor authorizes class action consumer protection suits, most states allow class actions under their general rules.[86]

Because class actions present lucrative opportunities for named plaintiffs and plaintiffs' attorneys, some states that allow consumer

81. *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 4 (2000); *see generally* Scheuerman, *supra* note 14.

82. Scheuerman, *supra* note 14, at 38.

83. ALA. CODE § 8-19-10(f) (2010); GA. CODE ANN. § 10-1-399(a) (2010); LA. REV. STAT. ANN. § 51:1409(A) (2010); MISS. CODE ANN. § 75-24-15(4) (2010); MONT. CODE ANN. § 30.14-133(1) (2010); S.C. CODE ANN. § 37-5-202(1), (3) (2010); *see also* PRIDGEN & ALDERMAN, *supra* note 56, app.6A at 541–43.

84. CAL. CIV. CODE § 1781 (2010); D.C. CODE ANN. § 28-3905(k)(1) (LexisNexis 2010); HAW. REV. STAT. ANN. § 480-13(c) (LexisNexis 2010); IDAHO CODE ANN. § 48-608(1) (2010); IND. CODE ANN. § 24-5-0.5-4(b) (LexisNexis 2010); KAN. STAT. ANN. § 50-634(b)–(d) (2010); MASS. GEN. LAWS ANN. ch. 93A, § 9(2) (West 2010); MICH. COMP. LAWS ANN. § 445.911(3) (West 2010); MO. ANN. STAT. § 407.025(2)–(3) (West 2010); N.H. REV. STAT. ANN. § 358-A:10-a (LexisNexis 2010); N.M. STAT. ANN. § 57-12-10(E) (LexisNexis 2010); OHIO REV. CODE ANN. § 1345.09(B) (LexisNexis 2010); R.I. GEN. LAWS § 6-13.1-5.2(b) (2010); UTAH CODE ANN. § 13-11-19(3) (West 2010); WYO. STAT. ANN. § 40-12-108(b) (2010); *see also* PRIDGEN & ALDERMAN, *supra* note 56, app.6A at 541–43.

85. Schwartz & Silverman, *supra* note 8, at 29; PRIDGEN & ALDERMAN, *supra* note 56, § 6:29, at 516, app.6A at 541–43.

86. Schwartz & Silverman, *supra* note 8, at 29; PRIDGEN & ALDERMAN, *supra* note 56, § 6:29, at 516. The general rationale for allowing consumer protection class actions when the "Little FTC Act" remains silent on the issue is that "[u]nless there is a clear and direct statutory provision precluding class actions for a given cause of action, then class actions are authorized." Karen S. Little, LLC v. Drury Inns, Inc., 306 S.W.3d 577, 583 (Mo. App. Ct. 2010); *cf.* Tucker v. Sierra Builders, 180 S.W.3d 109, 115 n.9 (Tenn. Ct. App. 2005) ("The [Tennessee Consumer Protection] Act limits private actions to 'individual' claims. Accordingly, class actions cannot be maintained under the TCPA.").

protection class actions have restrictions or safeguards against abuse.[87] A few states limit the recovery in consumer protection class action suits to actual damages and prevent plaintiffs from recovering statutory or minimum damages.[88]

3. The Reliance Requirement

In a common law action for fraud or misrepresentation, plaintiffs must show that they relied on a vendor's statements and that the reliance was justified before recovering any damages allegedly caused by a misstatement.[89] A few states continue to require plaintiffs in consumer protection cases to show reliance on an alleged misrepresentation,[90] but most do not require any showing of reliance.[91] Those states that do not require a showing of reliance generally follow the test from federal FTC cases: whether the act has the tendency or capacity to deceive consumers.[92] By eliminating the reliance requirement, those states eliminated a hurdle for plaintiffs but also allowed for awards based on conduct that may have caused no harm.[93]

D. The Evolution of State CPAs

States found that "Little FTC Acts" provided citizens and businesses with "double barrel" protection when the "big FTC" in Washington could not or would not act.[94] Attorneys general could bring large actions in the public interest on behalf of the state, while individual consumers could bring smaller private actions with bonuses such as statutory damages and attorneys' fees.[95] Though generally based on the same model acts, the state statutes quickly began to diverge in language and application.[96] On one extreme, California's Unfair Competition Law[97] allows virtually anyone to sue on the basis of consumer fraud on behalf of the public, regardless of whether they were

87. PRIDGEN & ALDERMAN, *supra* note 56, § 6:34, at 536.
88. Schwartz & Silverman, *supra* note 8, at 29; *see, e.g.*, COLO. REV. STAT. § 6-1-113(2) (2010); OHIO REV. CODE ANN. § 1345.09(E) (2010); UTAH CODE ANN. § 13-11-19(2) (2010).
89. PRIDGEN & ALDERMAN, *supra* note 56, § 3:3, at 56–57; *see also* Lowe v. Trundle, 78 Va. 65, 67 (1883).
90. Schwartz & Silverman, *supra* note 8, at 18.
91. *Id.* at 19; PRIDGEN & ALDERMAN, *supra* note 56, § 3:4, at 57.
92. Schwartz & Silverman, *supra* note 8, at 19.
93. *See* Scheuerman, *supra* note 14, at 38.
94. Sovern, *supra* note 29, at 1349–51.
95. *Id.*
96. *See generally* James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L. J. 1, 7 (1994).
97. CAL. BUS. & PROF. CODE § 17200 (West 1997).

personally injured or even impacted.[98] On the other extreme, as previously mentioned, Iowa had no private action at all until late 2009 and only established one in response to price gouging during relief efforts from a disastrous flood.[99]

CPAs were not intended to be limitless, although increasingly "creative" applications of them in the courts may make them seem so. Reverence for federal FTC precedent and careful definitions are among the statutory tools that states can employ to rein in use of consumer statutes.[100] Analysis can be difficult; as these statutes typically have been on the books for only forty years or less, common law decisions are fewer than in more established fields of law. Many states choose to defer to FTC decisions and federal court interpretations, but federal appellate courts and FTC panels handle cases from different perspectives and with different resources than a lower state court.[101] Even if a state purports to align its consumer action analysis with the FTC, it often falls short in practice. This dichotomy can result in clear federal FTC violations not violating state CPAs, and vice versa.[102]

One major issue is that the field is still unsettled and rapidly developing; with relatively little common law to guide them, many state courts treat every case as one of first impression and interpret CPAs inconsistently.[103] Much as Justice Louis Brandeis[104] and later Justice Sandra Day O'Connor[105] proclaimed that states should serve as legislative laboratories, each state has had to examine and, when needed, amend and update its CPA statute to better serve its citizens. The next section will examine Alaska's version of the statute as well as how the Alaska courts and Legislature have dealt with some of these challenges.

98. Alan S. Brown & Larry E. Hepler, *Comparison of Consumer Fraud Statutes Across the Fifty States*, 55 FDCC QUARTERLY 263, 265–66 (2005).

99. *See* Sand, *supra* note 57.

100. Kaplan & Smith, *supra* note 28, at 281.

101. *See* Nehf, *supra* note 96, at 7.

102. Richard E. Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant or Elusive Panacea?*, 33 S.C. L. REV. 479, 507 (1982).

103. Bauer, *supra* note 14, at 132.

104. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.").

105. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.").

II. THE ALASKA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT

Amidst the developing consumer protection backdrop, Alaska has continued to refine its own UTPCPA since its initial enactment in 1970.[106] Alaska based the UTPCPA "on legislation developed in large part by the Federal Trade Commission, [and it] is designed to meet the increasing need in Alaska for the protection of consumers as well as honest businessmen from the depredations of those persons employing unfair or deceptive trade practices."[107] The language in Alaska's UTPCPA parallels the Uniform Deceptive Trade Practices Act[108] drafted by the National Conference of Commissioners on Uniform State Laws.[109] As a result, Alaska's Act contains a list of specifically prohibited practices that is followed by a catch-all provision. Alaska adopted a modified version of the twelve enumerated practices from the model act[110]—but then added even more. As of January 2011, there are fifty-seven acts or practices banned in the "laundry list."[111] The Alaska Legislature appears far from daunted by the "endless task" of identifying prohibited acts.[112]

Some commentators have asked whether the "laundry list" state consumer protection statutes may run into constitutionality issues. Specifically, even though the statute explicitly states that the list of enumerated practices is non-exclusive,[113] could a defendant challenge the statute facially on void-for-vagueness grounds?[114] In *State v. O'Neill*

106. ALASKA STAT. § 45.50.471 (b)(1)–(57) (2010).

107. *Judiciary Committee Report on HCSCS for Senate Bill No. 352*, ALASKA H. JOURNAL SUPP. NO. 10 AT 1, 1970 ALASKA H. JOURNAL 744.

108. UNIF. DECEPTIVE TRADE PRACTICES ACT (1964) (amended 1966) (withdrawn 2000).

109. W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc., 101 P.3d 1047, 1052–53 (Alaska 2004).

110. Compare ALASKA STAT. § 45.50.471(b)(1)–(11) with the twelve practices enumerated in note 45, *supra*. Alaska appears to have combined the first two enumerated practices in the model statute.

111. ALASKA STAT. § 45.50.471(b)(1)–(57).

112. *See* H.R. REP. NO. 1142, at 19 (1914) (Conf. Rep.); *see also* text accompanying note 26.

113. It actually does so in two places. ALASKA STAT. § 45.50.471(b) ("The terms 'unfair methods of competition' and 'unfair or deceptive acts or practices' include, but are not limited to, the following acts."); ALASKA STAT. § 45.50.471(c) ("The unlawful acts and practices listed in (b) of this section are in addition to and do not limit the types of unlawful acts and practices actionable at common law or under other state statutes.").

114. For a well-reasoned debate regarding a statute of similar construction, see Albert L. Norton, Jr., *The South Carolina Unfair Trade Practices Act and the Void-For-Vagueness Doctrine*, 40 S.C. L. REV. 641 (1989). Norton concluded that the South Carolina Unfair Trade Practices Act was likely unconstitutionally vague.

Investigations, Inc. the Alaska Supreme Court held that the UTPCPA is not unconstitutionally vague, and it also importantly noted that the statute is remedial rather than penal.[115] With constitutional challenges out of the way, Alaska plaintiffs put the UTPCPA to frequent use—within four years of *O'Neill Investigations*, Alaska was second in the nation in complaints brought under CPAs per capita, with 6.39 actions brought per 1000 Alaska residents.[116]

The rest of this part will highlight some of the notable features available to consumers in the UTPCPA.

A. Mechanisms of Plaintiffs' Actions

Like most states, Alaska permits consumer actions to be brought under the statute by both the state attorney general and individual consumers. As discussed previously, most actions brought by state attorneys general mirror those brought by the federal FTC—generally large actions that are clearly in the public interest.[117] Although Alaska's UTPCPA does not explicitly authorize or prohibit private parties from bringing class action lawsuits,[118] class actions are permitted by Alaska Civil Rule 23.[119]

Smaller actions are cost prohibitive and difficult to fully investigate, particularly given Alaska's unique geography. The attorney general

---

One convincing piece of evidence *against* such a statute being unconstitutional is that the federal FTC Act has been held by the Court of Appeals for the Seventh Circuit not to be overly vague. The panel held that "unfair methods of competition" is no more vague than "due process of law." *Id.* at 644–45 (quoting Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919)).

115. *Id.* at 647–48, 659 (citing State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980)). Notably, the *O'Neill Investigations* court did state in dicta that although the statute was not unconstitutionally vague, there were no guiding regulations promulgated by the Attorney General's office to aid with application and interpretation of the statute: "We think that it would be the better practice for the Attorney General to exercise his discretionary rule-making power to fill in the interstices of the Alaska Act rather than relying exclusively on adjudication." 609 P.2d at 533 n.49.

116. Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 440 (1984). Delaware was first on the list, but the unusual number of companies incorporated there (with little other presence) and the liberal construction of its statute make it something of an anomaly. Based on actions brought by actual citizens against businesses doing business within the state's borders, Alaska may well have been number one.

117. Mize, *supra* note 47, at 660.

118. The title of section 45.50.531 of the Alaska Statutes is "[p]rivate and class actions," but the text does not mention class action suits. *See* ALASKA STAT. § 45.50.531 (2010).

119. *See* ALASKA R. CIV. P. 23; *see, e.g.*, Turner v. Alaska Commc'ns Sys. Long Distance, Inc., 78 P.3d 264 (Alaska 2003).

cannot represent or advise individual citizens, who must have a private attorney in all other circumstances.[120] The exception is consumer claims involving less than $10,000, in which case citizens can bring the action themselves in small claims court without an attorney present.[121]

Alaska is one of the most aggressive states with respect to how deeply attorney general actions penetrate the traditional domain of tort law. For example, in *O'Neill Investigations*, the state brought an action based on harassment, typically governed solely by tort law.[122] The court found that harassment of citizens over the phone by debt collectors was an unfair or deceptive trade practice under section 45.50.471(a) of the Alaska Statutes, presumably by using the "catch-all" provision.[123] The infusion of tort law causes of action into consumer protection statutes is an example of how different states diverge in interpretation. North Carolina's consumer protection statute[124] is very similar in its structure to the Alaska UTPCPA, but North Carolina courts went the opposite direction, holding that actions brought on the basis of traditional tort law are not valid uses of the statute.[125]

Alaska is similar to many other states in that the burden of proof for plaintiffs bringing consumer actions is substantially lower than the burden in related actions such as breach of contract or common law fraud.[126] Often consumer protection actions do not require particularity of pleading—effectively allowing attorneys general and citizens, including plaintiffs lawyers, to sue now and find evidence (or hope for a settlement) later.[127] Critics allege that this makes state CPA claims, including those in Alaska, exploitable as a "pile-on" charge—a fallback with lower standards of proof that might stick when other tort law

120. ALASKA DEP'T OF LAW, CONSUMER PROTECTION UNIT, CONSUMER PROTECTION IN ALASKA 2 (2010), *available at* http://www.law.state.ak.us/pdf/consumer/BrochureGeneric_web.pdf. (hereinafter CONSUMER PROTECTION UNIT).

121. *Id.*

122. State v. O'Neill Investigations, Inc., 609 P.2d 520, 536 (Alaska 1980); Dunbar, *supra* note 116, at 451.

123. A specific provision on the "laundry list" addressing telephone solicitation was not added until 1993. 1993 Alaska Sess. Laws ch. 60, 3 (codified at ALASKA STAT. § 45.63); ALASKA STAT. § 45.50.471(b)(35) (2010) (listing violating AS 45.63 (solicitations by telephonic means) as an unfair or deceptive trade practice).

124. N.C. GEN. STAT. §§ 75-1–75-49 (2010).

125. *See* Dunbar, *supra* note 116, at 451 n.42.

126. *See, e.g.*, Schwartz & Silverman, *supra* note 8, at 5. ("State consumer protection statutes have their origin in common law fraud and misrepresentation claims as well as in federal consumer protection law. Yet, when states adopted CPAs, they did not explicitly include many of the required elements of the common law actions in the statutes.").

127. *Id.* at 33–34.

claims do not.[128] For example, a recent federal case applying Alaska law saw the plaintiffs, franchisees of a rental car company, assert twelve separate causes of action in a suit against the parent company that included UTPCPA claims alongside traditional breach of contract and fraud claims.[129] None of the nine states with "laundry list" consumer protection acts that include a "catch-all" provision[130] require plaintiffs to prove the elements of common law fraud in consumer protection actions.[131] In Alaska, this has been the law since *O'Neill Investigations*.[132]

To bring an action, first a plaintiff must have standing.[133] "The basic requirement for standing in Alaska is adversity."[134] To bring a UTPCPA claim the plaintiff must have interest-injury standing.[135] "Under the interest-injury standing test . . . [plaintiffs] must have an interest adversely affected by the actions of [the defendants], and they must have a 'sufficient personal stake in the controversy to guarantee . . . adversity.'"[136]

Then, "[t]wo elements must be proved to establish a prima facie case of unfair or deceptive acts or practices under the [UTPCPA]: (1) that the defendant is engaged in trade or commerce; and (2) that in the

128. Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *"That's Unfair!" Says Who – The Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 WASHBURN L. J. 93, 94–95 (2007).

> In many instances, CPA claims are "piled on" to product liability and other tort claims. In other words, a plaintiffs' lawyer may assert CPA claims as a fallback should he or she fail to show that the product was defective, that the defendant was negligent, or that his or her client was injured as a result.

Id.

129. Alaska Rent–A–Car, Inc. v. Cendant Corp., No. 3:03-cv-00029-TMB, 2007 WL 2206784, at *1 (D. Alaska July 27, 2007).

130. *See* Buckingham, *supra* note 15, at 1034 nn.97 & 101. As of the latter part of the decade, those states were Alaska (ALASKA STAT. § 45.50.471 (2010)), Georgia (Uniform Deceptive Trade Practices Act, GA. CODE ANN. § 10-1-371 (2010)), Idaho (Idaho Consumer Protection Act, IDAHO CODE ANN. § 48-601 (2010)), Maryland (Maryland Consumer Protection Act, MD. CODE ANN., Com. Law § 13-101 (2010)), Mississippi (MISS. CODE ANN. § 75-24-1 (2010)), New Hampshire (N.H. REV. STAT. ANN. § 358-A:1 (2010)), Rhode Island (Unfair Trade Practice and Consumer Protection Act, R.I. GEN. LAWS § 6-13.1-1 (2010)), and Tennessee (Tennessee Consumer Protection Act of 1977, TENN. CODE ANN. § 47-18-101 (2010)).

131. Buckingham, *supra* note 15, at 1034–37.

132. *Id.*; *see also* State v. O'Neill Investigations, Inc., 609 P.2d 520, 534–35 (Alaska 1980).

133. Neese v. Lithia Chrysler Jeep of Anchorage, Inc., 210 P.3d 1213, 1218 (Alaska 2009).

134. Trustees for Alaska v. State, 736 P.2d 324, 327 (Alaska 1987).

135. *Neese*, 210 P.3d at 1219.

136. *Id.* (quoting Adams v. Pipeliners Union 798, 699 P.2d 343, 346 (Alaska 1985)).

conduct of trade or commerce, an unfair act or practice has occurred."[137] First, an act or practice must be in the conduct of trade or commerce to fall under the UTPCPA because "the entire thrust of the [UTPCPA] is directed at regulating practices relating to transactions involving consumer goods and services."[138] The term "consumer goods" is "generally understood to mean goods 'used or bought for use primarily for personal, family, or household purposes.'"[139] For instance, the UTPCPA applies to services such as repairs[140] and debt collection.[141] Real property, however, is not a consumer good.[142] Further, even the sale of standing timber falls beyond the scope of the UTPCPA because it is not a "consumer good" but rather real property.[143] Similarly, the servicing of a mortgage does not fall under the UTPCPA.[144] While the product must be a consumer good or service, the UTPCPA can still apply to business-to-business transactions.[145]

Once an act or practice is in the conduct of trade or commerce, the plaintiff must then show that the act or practice is unfair or deceptive.[146] Alaska adopted the FTC definition of unfair or deceptive: "[a]n act or practice is deceptive or unfair if it has the capacity or tendency to deceive."[147] An act or practice can be unfair without being deceptive; in order to determine if an act or practice is unfair, a trier of fact should rely on:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or

137. *O'Neill Investigations*, 609 P.2d at 534.
138. State v. First Nat'l Bank of Anchorage, 660 P.2d 406, 412 (Alaska 1982).
139. Aloha Lumber Corp. v. Univ. of Alaska, 994 P.2d 991, 1002 (Alaska 1999) (quoting ALASKA STAT. § 45.09.109 (2010)).
140. *See* ALASKA STAT. § 45.50.471(b)(15) (2010) (repair services).
141. *O'Neill Investigations*, 609 P.2d at 534 (finding defendant debt collector was "engaged in trade or commerce as a business entity, regulated under the Department of Commerce").
142. *First Nat'l Bank*, 609 P.2d at 412–14 (using the listed prohibitions in section 45.50.471(b) of the Alaska Statutes as examples of consumer goods and stating that the statute was "directed solely at regulating transactions involving 'products and services sold to consumers in the popular sense.'" (quoting Neveroski v. Blair, 358 A.2d 473, 480 (N.J. 1976))).
143. *O'Neill Investigations*, 609 P.2d at 534.
144. Barber v. Nat'l Bank of Alaska, 815 P.2d 857, 861 (Alaska 1991).
145. W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc., 101 P.3d 1047, 1052–53 (Alaska 2004).
146. *See O'Neill Investigations*, 609 P.2d at 534.
147. *Id.* at 534 (citing FTC v. Raladam Co., 316 U.S. 149, 152 (1942)).

> unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[148]

The plaintiff need not prove intent to deceive, or even that deception actually happened; "[a]ll that is required is a showing that the acts and practices were capable of being interpreted in a misleading way."[149] Indeed, "[t]estimony of consumers that they were misled is sufficient to sustain a prima facie case of unfair and deceptive practices."[150] However, in *Garrison v. Dixon*[151] the Alaska Supreme Court held that a claim that was sufficient to meet the minimum standard in *Odom v. Fairbanks Memorial Hospital* failed when the plaintiffs "never produced credible evidence" to support the claim and the plaintiffs brought the action in bad faith.[152] In *Kenai Chrysler Center, Inc. v. Denison*,[153] the Alaska Supreme Court applied a flexible and case-specific approach to find that a car dealership violated the UTPCPA in selling a car to a developmentally disabled adult.[154] There, the court specifically noted that "[m]any other jurisdictions define 'unfair or deceptive acts or practices' to extend beyond conduct specifically prohibited by statute or common law; instead of looking for expressly prohibited conduct, these cases focus on the unfairness of the disputed practice under the specific circumstances presented."[155]

B. Damages

The UTPCPA allows the attorney general to obtain injunctive relief on behalf of citizens as well as restitution and civil penalties ranging from $1,000 to $25,000.[156] Alaska is in the minority of states that allow

148. *Id.* at 535 (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 n.5 (1972)); *see also* Kenai Chrysler Ctr., Inc. v. Denison, 167 P.3d 1240, 1255–57 (Alaska 2007).

149. Odom v. Fairbanks Mem'l Hosp., 999 P.2d 123, 132 (Alaska 2000) (quoting *O'Neill Investigations*, 609 P.2d at 534–35).

150. *O'Neill Investigations*, 609 P.2d at 535.

151. 19 P.3d 1229 (Alaska 2001).

152. *Id.* at 1235.

153. 167 P.3d 1240 (Alaska 2007).

154. *Id.* at 1256.

155. *Id.* The court looked to a Fourth Circuit case that defined an unfair trade practice as an "inequitable assertion of power or position" and found that it is possible for the exercise of a contractual right, "when it involves egregious and aggravating conduct, to constitute an unfair . . . trade practice." *Id.* (quoting S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese, 284 F.3d 518, 539–40 (4th Cir. 2002)). The court also looked to a Georgia case where a seller's failure to investigate the validity of its title amounted to an unfair trade practice. *Id.* (citing Regency Nissan, Inc. v. Taylor, 391 S.E.2d 467, 470 (Ga. Ct. App. 1990)).

156. ALASKA STAT. § 45.50.551(b) (2010); CONSUMER PROTECTION UNIT, *supra* note 120, at 2.

attorneys general and private citizens to pursue damages.[157] The Alaska UTPCPA formerly provided criminal as well as civil sanctions for unfair trade practices, and although the state was one of the first and only ones in the nation to do so, the criminal sanctions were removed in 1978 due to concerns about constitutionality.[158] Part of the difficulty remains, however, as the attorney general can recover civil penalties from first-time violators; other jurisdictions require a cease and desist order to be issued and violated first.[159]

The most significant damages provisions in the Alaska UTPCPA involve the damages available in private actions. Under the UTPCPA successful plaintiffs may seek either three times the actual damages[160] or $500 for each violation.[161] Describing the purpose of treble damages in Alaska's UTPCPA, the Alaska Supreme Court stated that "[t]he legislative history of Alaska's provision establishes that treble damages were adopted not just to deter fraud, but also to encourage injured parties to file suits under the UTPCPA and to ensure that they would be adequately compensated for their efforts."[162] The statute's language does not clearly indicate that a court should award treble damages to every successful plaintiff.[163] However, in *Kenai Chrysler* the Alaska Supreme Court noted that by allowing the court to provide other relief it

157. Lovett, *supra* note 7, at 740–41.

158. Paula W. Gold & Robert D. Cohan, *State Protection of the Consumer: Integration of Civil and Criminal Remedies*, 12 NEW ENG. L. REV. 933, 946 (1977). The criminal penalties provision was found in section 45.50.551(c) of the Alaska Statutes but was repealed by 1978 Alaska Sess. Laws ch. 166, 21.

159. Gold & Cohan, *supra* note 158, at 936–37.

160. *Kenai Chrysler*, 167 P.3d at 1259–60 ("[Section 45.50.531(a) of the Alaska Statutes] appears to authorize treble damages based solely on an allegation and finding that the UTPCPA has been violated. In addition to specifying that treble damages are to be awarded as a matter of course, subsection 531(a) goes on to allow the court to 'provide other relief it considers necessary and proper'—thereby reinforcing the provision's intent to make treble damages automatic." (quoting ALASKA STAT. § 45.50.531(a) (2010))).

161. ALASKA STAT. § 45.50.531(a).

162. *Kenai Chrysler*, 167 P.3d at 1260 (citing *Judiciary Committee Report on HCSCS for Senate Bill No. 352*, ALASKA H. JOURNAL SUPP. NO. 10 AT 1, 1970 ALASKA H. JOURNAL 744).

163. ALASKA STAT. § 45.50.531(a). Indeed, in an unreported opinion, the Alaska Supreme Court explicitly declared that under section 45.50.531(a) of the Alaska Statutes "the court is given discretion to award an amount up to treble damages." Stanton v. Daly, No. S-4637, No. S-4750, 1993 WL 13563630, at *1 (Alaska May 26, 1993). Further, this case is at least indicative that a situation existed where both the trial court and the Alaska Supreme Court agreed with a reduction from treble damages. *See id.*

considers necessary and proper, the statute "reinforc[ed] the provision's intent to make treble damages automatic."[164]

In addition to treble damages, "[t]he court may provide other relief it considers necessary and proper,"[165] which generally allows the court to award punitive damages.[166] Under section 45.50.531(i) of the Alaska Statutes, fifty percent of any award of punitive damages granted under subsection (a) must go to the state's general fund.[167] Proponents of these provisions believe that they encourage private suits filed by vulnerable plaintiffs even when the potential windfall is very small. Opponents believe that along with the absence of the need to show reliance and the availability of class actions, defendants can be exposed to potentially massive liability resulting in settlements for even meritless suits.[168]

C. Attorneys' Fees

Typically, in the United States each party bears its own litigation costs, but to encourage private actions many states enable plaintiffs to receive attorneys' fees if victorious in consumer protection cases.[169] The Alaskan model of attorneys' fees instead follows a modified version of the typical "English Rule," which allows for a full recovery of attorneys' fees.[170] The fees are calculated under Alaska Civil Rule 82(b) as a percentage of the total judgment[171] depending on the size of the

164. *Kenai Chrysler*, 167 P.3d at 1259. Here, the court was answering whether punitive and treble damages could both be awarded; the fact that treble damages could be automatic is not clearly necessary for the decision. *See id.* at 1259–60.

165. ALASKA STAT. § 45.50.531(a).

166. *See Kenai Chrysler*, 167 P.3d at 1259.

167. ALASKA STAT. § 45.50.531(i). Punitive damages do not include treble damages, as the statute distinguishes between treble damages, which are automatic, and punitive damages, which fall under the category of other remedies in subsection (a). *See Kenai Chrysler*, 167 P.3d at 1260.

168. *See* Scheuerman, *supra* note 14, at 38.

169. Stark & Choplin, *supra* note 38, at 494; *supra* text accompanying notes 64–67.

170. *See* Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule: Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 33 n.138 (2006). For a discussion of the history of Alaska's attorneys' fees shifting law, see Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 37–46 (1996). Alaska Rule of Civil Procedure 68 also presents a significant fee shifting rule, but it is beyond the scope of this Note.

171. The judgment used to calculate damages is the net award, rather than a gross award, if there are counterclaims. Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating, Inc., 555 P.2d 964, 967 (Alaska 1976). Pre-judgment interest is included in the judgment award. ALASKA R. CIV. P. 82(b)(1). Punitive damages are also included in calculating attorneys' fees, but the judge can choose not to include punitive damages if he provides a reason. Sturm, Ruger & Co. v. Day,

judgment, whether the litigation was contested, and whether the case went to trial.[172] The judge may vary the attorneys' fees awarded if the judge considers the variance to be warranted based on a list of factors.[173]

The initial purpose of Alaska Civil Rule 82 was "to partially compensate a prevailing party for the costs to which he has been put in the litigation in which he was involved" and not "to be used . . . as a vehicle for accomplishing any purpose other than providing compensation where it is justified."[174] However, trial courts began to use the imposition of attorneys' fees for other purposes soon after Civil Rule 82's adoption.[175] Full attorneys' fees are appropriate when the losing party acted with bad faith or vexatious conduct[176] or brought a frivolous

627 P.2d 204, 205 (Alaska 1981); *see also* Di Pietro & Carns, *supra* note 170, at 51–52.

172. ALASKA R. CIV. P. 82(b)(1). In cases where the successful party does not receive a monetary judgment, the court awards the party thirty percent of the reasonable attorneys' fees accrued. *Id.* at 82(b)(2).

173. ALASKA R. CIV. P. 82(b)(3). Those factors are:

> (A) the complexity of the litigation;
> (B) the length of trial;
> (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
> (D) the reasonableness of the number of attorneys used;
> (E) the attorneys' efforts to minimize fees;
> (F) the reasonableness of the claims and defenses pursued by each side;
> (G) vexatious or bad faith conduct;
> (H) the relationship between the amount of work performed and the significance of the matters at stake;
> (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
> (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
> (K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

Id.

174. Preferred Gen. Agency of Alaska v. Raffetto, 391 P.2d 951, 954 (Alaska 1964); *see also* Stepanov v. Gavrilovich, 594 P.2d 30, 37 (Alaska 1979); Malvo v. J.C. Penney Co., 512 P.2d 575, 588 (Alaska 1973); State v. Abbott, 498 P.2d 712, 731 (Alaska 1972).

175. Di Pietro & Carns, *supra* note 170, at 47.

176. Horton v. Hansen, 722 P.2d 211, 218 (Alaska 1986) ("The award of full attorney's fees is 'manifestly unreasonable' in the absence of a bad faith defense or vexatious conduct by the losing party." (quoting Mullen v. Christiansen, 642 P.2d 1345, 1351 (Alaska 1982))); Garrison v. Dixon, 19 P.3d 1229, 1234 (Alaska 2001) ("We will affirm an award of full, actual attorney's fees under Rule 82 where the superior court finds that the losing party has engaged in vexatious or bad faith litigation.").

suit.[177] The application of Civil Rule 82 is difficult because much discretion remains invested in courts to vary awards by considering a number of complex factors.[178]

Civil Rule 82 obviously influences the language of the Alaska UTPCPA, but plaintiffs still maintain a slight edge.[179] Under section 45.50.537 of the Alaska Statutes, a prevailing plaintiff in a UTPCPA claim "shall be awarded costs as provided by court rule and full reasonable attorney[s'] fees at the prevailing reasonable rate" instead of at the discounted rate provided in Alaska Civil Rule 82.[180] The court, however, still must agree that the fees are "reasonable."[181] Similar to the discretion provided in Civil Rule 82,[182] trial courts applying section 45.50.537 of the Alaska Statutes maintain broad discretion over what constitutes "full reasonable attorneys' fees" in light of the totality of the circumstances.[183] Even the state gets in on the act—if the attorney general brings a consumer protection action on behalf of the public and wins, the state receives its full fees, including the costs of investigation.[184]

Prevailing defendants, on the other hand, generally receive only the reduced fees from Civil Rule 82; they receive full reasonable attorney fees only "[i]f the action is found to be frivolous."[185] "Frivolous" is further defined in the Act as "not reasonably based on evidence or on existing law or a reasonable extension, modification, or reversal of existing law" or "brought to harass the defendant or to cause unnecessary delay or needless expense."[186] In *Garrison v. Dixon*,[187]

177. Crawford & Co. v. Vienna, 744 P.2d 1175, 1178 (Alaska 1987) (reversing a denial of attorneys' fees because the suit was frivolous).

178. *See* ALASKA R. CIV. P. 82 ("(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule."). The debate over the existence and application of Rule 82 is beyond the scope of this Note. However, it is worth noting that, for Alaskans, the Rule may work just fine.

179. *See* ALASKA STAT. § 45.50.537 (2010).

180. *Id.* § 45.50.537(a).

181. Kenai Chrysler Ctr., Inc. v. Denison, 167 P.3d 1240, 1260–61 (Alaska 2007).

182. ALASKA R. CIV. P. 82(b)(3).

183. *Kenai Chrysler*, 167 P.3d at 1260–61 (upholding a superior court's twenty percent reduction in attorneys' fees despite not finding a problem with the hourly billing rate or the number of hours billed). In *Kenai Chrysler*, the plaintiffs argued that the standard to determine attorneys' fees should be "whether the fees were reasonably incurred by the prevailing plaintiff," but the court rejected this view for the broad discretion of the trial court. *Id.* at 1261.

184. ALASKA STAT. § 45.50.537(d).

185. *Id.* § 45.50.537(b).

186. *Id.* § 45.50.537(e)(1–2).

187. 19 P.3d 1229 (Alaska 2001).

plaintiffs brought a claim under the UTPCPA against a competing real estate agent for allegedly improper advertisements.[188] The court supported a finding that the action was frivolous because "[t]he [plaintiffs] never produced credible evidence that the central theme of the ads . . . was unfair or deceptive. They did not produce even one person who had read the ads and could testify to any confusion."[189] Additionally, defendants can recover enhanced attorneys' fees at the court's discretion under Civil Rule 82.[190] For instance, the court in *Garrison* supported its decision to award full attorneys' fees to the defendant under Civil Rule 82 because the plaintiffs litigated the case in bad faith to harass a business competitor.[191]

Recently, Di Pietro and Carns surveyed Anchorage trial lawyers about their most recent trials and found that state courts granted attorneys' fees in about half of all state court trials.[192] "The most frequent criticism of Civil Rule 82 by personal injury defense attorneys was that they could not collect fee awards from the losing plaintiffs."[193] Sympathetic witnesses and deep pockets can make defendants who attempt to recover fees look like "ogres."[194] Moreover, some plaintiffs do not have the funds to pay any award, refuse to pay, or declare bankruptcy.[195] Interestingly, the Alaska Supreme Court at one time had a common law "public interest litigant exception" that essentially ignored Civil Rule 82 for unsuccessful plaintiffs from whom extracting attorneys' fees would be against the public interest, but the exemption was abrogated by statute in 2003.[196]

188. *Id.* at 1230–31.
189. *Id.* at 1235.
190. *See* ALASKA R. CIV. P. 82(b)(3). In *Garrison*, a UTPCPA action, the court declared, "[w]e will affirm an award of full, actual attorney's fees under Rule 82 where the superior court finds that the losing party has engaged in vexatious or bad faith litigation." 19 P.3d at 1234.
191. *Garrison*, 19 P.3d at 1235.
192. Di Pietro & Carns, *supra* note 170, at 61.
193. *Id.* at 60.
194. *Id.*
195. *Id.*
196. ALASKA STAT. § 09.60.010 (2010) (amended by § 2, 2003 Alaska Sess. Laws ch. 86, 2); Benjamin J. Roesch, Comment, *Erie Similarities: Alaska Civil Rule 68, "Direct Collisions," and the Problem of Non–Aligning Background Assumptions*, 23 ALASKA L. REV. 81, 86–87 (2006); *see also* Anchorage Daily News v. Anchorage Sch. Dist., 803 P.2d 402, 404 (Alaska 1990) (holding prevailing public interest litigants were entitled to full reasonable attorneys' fees, just as in the statute); Anchorage v. McCabe, 568 P.2d 986, 993–94 (Alaska 1977) (no fees may be awarded against an unsuccessful public interest litigant), *superseded by statute*, 2003 Alaska Sess. Laws ch. 86.

In their survey, Di Pietro and Carns found that of the fourteen cases where the defendant won, only four had collected fees.[197] The potential award of attorneys' fees did affect post-judgment settlements, which was the most common reason given by attorneys for no award of attorneys' fees.[198] Often, the award of attorneys' fees would be waived by the prevailing party in return for the losing party agreeing not to appeal the ruling.[199]

Defendants are also restricted in terms of recovering attorneys' fees from class action suits.[200] In *Turner v. Alaska Communications Systems Long Distance, Inc.*, the Alaska Supreme Court held that absent class members are generally not responsible for costs associated with the litigation, and a court cannot place an award for attorneys' fees on them.[201] Holding absent parties who remain passive throughout the litigation liable for fees could encourage some class members to opt out and leave some without a remedy.[202] Defendants can still recover from named plaintiffs because "[the] ruling does not eliminate Civil Rule 82 attorney[s'] fees in class actions; it simply limits Civil Rule 82's possible reach to named parties . . . ."[203] However, the court has also expressed hesitancy to award attorneys' fees to defendants in class actions, as doing so might "undercut provisions meant to encourage plaintiffs to bring meritorious claims."[204] If Civil Rule 82 applies too rigidly then it may have a chilling effect on litigation that the state encourages.[205] Meanwhile, class actions cause defendants to face larger potential losses and higher costs than individual actions.[206] While defendants see increased damages and litigation costs, the potential for recovery of

197. Di Pietro & Carns, *supra* note 170, at 61.
198. *Id.* at 73.
199. *Id.* at 73–74.
200. Turner v. Alaska Commc'ns Sys. Long Distance, Inc., 78 P.3d 264, 266 (Alaska 2003).
201. *Id.* at 270.
202. *Id.* at 268.
203. *Id.* at 269.
204. Catalina Yachts v. Pierce, 105 P.3d 125, 131 (Alaska 2005).
205. Monzingo v. Alaska Air Group, Inc., 112 P.3d 655, 667 (Alaska 2005).
206. *See id.* at 666–67 ("Moreover, class action defendants are highly motivated to vigorously defend any class action. Not only are the monetary stakes high in most class actions, but defeat of a class action may preclude later claims by absent members of the putative class and can often foreclose devastating public relations and reputation costs for a company. Alaska Airlines admitted as much when arguing for enhanced attorney's fees: 'Faced with a billion dollar damages claim, a simultaneous motion to certify a 3.8 million member class, and expert counsel brought in from the Outside, Alaska Airlines was forced to respond in a proportionate manner . . . [and] expended a reasonable number of hours and resources given the magnitude of Plaintiff's claim.'").

attorneys' fees is diminished, particularly in UTPCPA claims where state policy encourages plaintiffs to bring claims.

D. Treatment of the Federal FTC Act

Like most states, Alaska modeled its UTPCPA after the federal FTC Act.[207] States vary, however, in the deference that they give to the federal Act and to decisions issued by the FTC. The Alaska UTPCPA states that "[i]n interpreting [section 45.50.471 of the Alaska Statutes] *due consideration and great weight* should be given the interpretation of 15 U.S.C. 45(a)(1) (§ 5(a)(1) of the Federal Trade Commission Act)."[208] The provision was pivotal in the resolution of the previously discussed landmark case *O'Neill Investigations*.[209] There, the court found that the FTC's prior exercise of jurisdiction in the area of debt practices was entitled to great weight in the state court decision-making process.[210] The court further held that FTC consent orders shall be considered interpretations with "clear precedential value."[211] Alaska is the only state that gives FTC consent orders precedential value.[212] Nevertheless, in Alaska federal FTC precedent remains merely persuasive and not mandatory in the application of the UTPCPA.

A recent case, *ASRC Energy Services Power and Communications, LLC v. Golden Valley Electric Association, Inc.*, examined the authority of FTC precedent when it conflicts with prior Alaska case law.[213] In *O'Neill Investigations*, the court relied on an FTC decision to develop Alaska's standard for unfair acts or practices.[214] In *ASRC*, Golden Valley challenged the *O'Neill Investigations* decision because the FTC has since modified the standard that the court relied on in *O'Neill Investigations*.[215] The court looked to a similar case in Montana, which also affords "due

207. *See* Scheuerman, *supra* note 14, at 18; Schwartz & Silverman, *supra* note 8, at 3.
208. ALASKA STAT. § 45.50.545 (2010) (emphasis added).
209. 609 P.2d 520, 529 (Alaska 1980).
210. *Id.*
211. *Id.*; *see also* Day, *supra* note 102, at 481.
212. Jeff Sovern, *Good Will Adjustment Games: An Economic and Legal Analysis of Secret Warranty Regulation*, 60 MO. L. REV. 323, 389 (1995).
213. No. S-12630, No. 6617, No. S-12989, 2011 Alas. LEXIS 118, at *24 (Alaska Nov. 4, 2011).
214. *O'Neill Investigations, Inc.*, 609 P.2d at 529. This Note discusses the *O'Neill Investigations* standard in part II.A at the text accompanying footnotes 146–150, *supra*.
215. *ASRC*, 2011 Alas. LEXIS 118, at *28 ("[T]he 1974 legislature did not intend that Alaska courts would be required to abandon Alaska precedent where later changes in the federal approach conflicted with Alaska law.").

consideration and weight" to FTC interpretations.[216] The Montana court followed the old FTC standard while still claiming to give due consideration and weight to FTC interpretations.[217] However, in that case the court noted that the FTC change placed the primary focus of the inquiry on *substantial consumer injury*.[218] Montana's standard already required *substantial consumer injury*, whereas Alaska's standard also considers injury to businesses and allows for business versus business disputes. Consequently, the Alaska standard announced in *O'Neill Investigations* strays further from the modified FTC standard than the Montana standard does.

Nevertheless, the court in *ASRC* found that a majority of states still use the old FTC standard, and therefore it inferred that using the old FTC standard does not conflict with the newer FTC interpretations.[219] Moreover, the court found that the due consideration and great weight given to FTC interpretations should not overrule Alaska precedent when later changes in the FTC's approach conflict with Alaska precedent.[220]

E. Exempted Conduct

Alaska exempts several notable categories of consumer transactions from coverage under its Act. Perhaps speaking to the importance of land and the care required in its transfer, all transactions in real property are exempted from the statute.[221] Alaska is one of only seven states that has both a "general" exemption and "specific" exemptions in its statute.[222] In the "general" exemption, the statute exempts prosecution under the Act itself for all conduct "regulated" under *any* state or federal law; Alaska is one of only two states that go that far in their exemptions.[223] The Act has

216. *Id.* at *32–33 (citing Rohrer v. Knudson, 203 P.3d 759 (Mont. 2009)).
217. *Rohrer*, 203 P.3d at 763–64.
218. *Id.* at 763 n.1.
219. *ASRC*, 2011 Alas. LEXIS 118, at *30–31.
220. *Id.* at *28.
221. *See* State v. First Nat'l Bank of Anchorage, 660 P.2d 406, 414 (Alaska 1982); *see also* Nehf, *supra* note 96, at 65–67 (although there was no express prohibition on including transfers of real property under the Act, the court found that the provisions of the Act dealt with goods and services only, and not the overall "conduct of trade or commerce").
222. Scott Thomas O'Neal, *Exempting the Protection Out of Michigan's Consumer Protection Act: A Call for Returning Consumer Protection to the Act*, 84 U. DET. MERCY L. REV. 237, 252–53 (2007). The other states are Florida, Idaho, Illinois, Michigan, Virginia, and Washington. *Id.* at 252.
223. Schwartz, Silverman & Appel, *supra* note 128, at 105. The other state is Oklahoma. *Id.* The general exemption appears in section 45.50.481(a)(1) of the Alaska Statutes. Critics have argued that exempting any conduct plausibly "regulated" under law makes the exemption impossibly broad. *See* O'Neal, *supra*

"specific" exemptions as well that explicitly exempt certain industries, most notably the insurance industry.[224] The result is that insurance policyholders typically do not have private rights of action against insurance companies under the Act; these claims are dealt with through other aspects of state law. Finally, Alaska's statutes and courts have been oddly silent over whether Alaska exempts licensed professionals from the Act, as many other states do.[225] Presumably, claims filed under the UTPCPA would skyrocket if doctors, lawyers, accountants, and other such professionals were subject to the heightened damages awards and lower standard of proof of the UTPCPA. The Alaska Supreme Court has chosen not to reach this issue in several cases.[226]

F. Unique Business-Related Causes of Action

The UTPCPA is a useful tool not only for consumer plaintiffs, but increasingly for business plaintiffs as well, particularly small businesses. The "unfair trade practices" portions of the statute are perhaps best fit for businesses, but the decision in Alaska to lump the unfair competition and consumer protection laws into one statute has resulted in a blurring of the actions. It is clear today that in Alaska a business can sue another business under the UTPCPA, though this is not explicit in the statute. The statute also clearly covers traditional unfair competition practices such as "passing off" and misrepresentation.[227] In addition, businesses can and should take advantage of the Act's provisions that prevent trademark dilution, misappropriation of trade dress, and injury to

note 222, at 239. The Alaska Supreme Court has narrowly interpreted unfair acts as exempt only when the business is regulated and the unfair acts are somehow prohibited under other law, basically deferring to the other statute's penalties. Matanuska Maid, Inc. v. State, 620 P.2d 182, 186 (Alaska 1980).

224. *See* O'Neal, *supra* note 222, at 253 (citing O.K. Lumber Co. v. Providence Washington Ins. Co., 759 P.2d 523, 528 (Alaska 1988)).

225. *See* Bauer, *supra* note 14, at 155.

226. *See, e.g.*, Yukon-Koyukuk Sch. Dist. v. Arneson, No. 3AN–01–3791 CI, 2002 WL 34119570, at *6 (Alaska Super. Ct. Dec. 2002).

227. ALASKA STAT. § 45.50.471(b)(1–2) (2010). Passing off and misrepresentation are distinct but related theories of unfair competition that form the basis of modern trademark law. Passing off involves the literal presentation of goods in the market and "passing them off" as those of another. It is based in traditional ideas of fraud and deceit. Misappropriation as a tort relates to misuse of "intangible" investments made by others. Modern-day applications include rights of publicity and trade secrets. *See* David L. Lange, *The Intellectual Property Clause in Contemporary Trademark Law: An Appreciation of Two Recent Essays and Some Thoughts about Why We Ought to Care*, 59 LAW & CONTEMP. PROBS. 213, 220–21 (1996).

reputation.[228] These actions present additional enforcement possibilities when considered in conjunction with federal protection under Section 43(a) of the Lanham Act or Alaska's common law of trademarks.

Business actions become more complicated and controversial if the business plaintiff sues under a theory of consumer protection rather than a theory of unfair competition.[229] Such actions were found to be legal in *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*,[230] based on the premises that the UTPCPA is a remedial statute that must be interpreted broadly and that legislative history showed that private rights of action were intended to protect not only consumers but also "honest businessmen."[231]

The Alaska court system again upheld a business versus business action in the recent case *ASRC Energy Services Power and Communications, LLC v. Golden Valley Electric Association, Inc.*[232] In that case, a contractor sued an electric utility over contract disputes arising out of the contractor's requests for additional compensation.[233] The contractor amended its complaint, claiming that the utility had misrepresented technical data about the project and failed to disclose details about the construction that may have led to delays.[234] Included in the amended complaint was a UTPCPA claim.[235] As the litigation proceeded, the utility added UTPCPA counterclaims asserting that the contractor had violated the Act by falsifying the documents supporting the requests for additional compensation.[236] Both sets of claims were eventually presented to the jury, even though both parties (and the trial court) struggled to define what acts constituted "unfair or deceptive" practices under the UTPCPA.[237]

The full impact that this new context for consumer protection litigation could have on Alaska courts and businesses has yet to be determined, and it is a focus of this Note in Parts III and IV.

228. *See* Mitchell M. Wong, Note, *Aesthetic Functionality Doctrine and the Law of Trade–Dress Protection*, 83 CORNELL L. REV. 1116, 1129 n.64 (1998) (citing ALASKA STAT. §§ 45.50.180, 45.50.471(b)(1, 3, 4, 7, 11), 45.50.531(a) (2010)).

229. *See* Parts III–IV, *infra*.

230. 101 P.3d 1047 (Alaska 2004).

231. *Id.* at 1050–54.

232. No. S-12630, No. 6617, No. S-12989, 2011 Alas. LEXIS 118 (Alaska Nov. 4, 2011).

233. *Id.* at *3–6.

234. *Id.* at *6.

235. *Id.*

236. *Id.* at *7.

237. *Id.* at *9–10. This case will be further discussed in Parts III and IV, *infra*.

III. PROBLEMS IN APPLICATION: FRANKENSTEIN'S MONSTER ATTACKS

For all the benefits that consumer protection acts provide to society, there is also little question that they have morphed far beyond what the legislatures ever intended.[238] The Alaska UTPCPA is no exception. This part of the Note outlines four major problems with the Act: (1) subjecting defendants to punishment without culpability, (2) lacking a requirement to show reliance, (3) handling of attorneys' fees; and (4) allowing business versus business and business versus consumer actions. Proposed solutions to these problems appear in Part IV.

Critics have identified generalized weaknesses in CPA structure. Several commentators have concluded that CPAs put significant strain on the judicial system without offsetting gains in real consumer protection.[239] Part of the strain comes from uneven application; there is substantial variance in how CPAs are written and how they are interpreted nationwide.[240] This creates forum shopping and hinders attempts to unify state laws and certify multistate class actions.[241] The statutes are too broad and assume "judicious exercise of discretion"—which some commentators assert simply is absent.[242] Alaska's Act is no exception. While many consumers have found justice through UTPCPA actions, some consumers and many businesses have found frustration.

238. *See* J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 347 (1992).

239. Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little–FTC Acts?*, 63 FLA. L. REV. 163, 166 (2011); *see also* Henry N. Butler & Jason S. Johnson, *Reforming State Consumer Protection Liability: An Economic Approach*, COLUM. BUS. L. REV. 1, 7 (2010) ("[A]ccording to leaders of the tort reform movement, this massive upsurge in state CPA litigation does not reflect some new wave of false and deceptive consumer marketing practices. Rather it is a tide of, at best, highly doubtful claims brought by private class action attorneys seeking a big payday, a tide of litigation that is symptomatic of a broader litigation crisis. Overly broad judicial interpretation of state CPAs has long been of concern to commentators, and economic criticism of judicial expansion as to what constitutes actionable conduct under CPAs has become increasingly intense.").

240. Schwartz & Silverman, *supra* note 8, at 17.

241. *Id.*

242. Sovern, *supra* note 25, at 467; *see also* Norton, *supra* note 114, at 644–45 (broad and vague CPA statutes and lack of procedural protections can lead to defendants being punished for conduct not clearly unlawful).

A. Punishment Without Culpability

As previously mentioned, the lower burdens of proof, treble damages, and attorneys' fees provided in the Act make it an attractive tool for prospective plaintiffs. Automatic treble damages in particular are a buzz saw for a defendant encountering a suit because the higher damages award does not rest on any sort of culpable conduct. The chance of an unfavorable result tripling an already large liability dramatically changes the expected losses for the defendant, even if the plaintiff has a meritless case.[243] When defendants are likely to face paying high damages whether their conduct was culpable or not, then they have less incentive to refrain from culpable conduct.[244]

Even a business that carefully follows every regulation could be exposed to massive liability if any part of its advertising or product labeling is determined to have had the slightest capacity to deceive.[245] A state may be able to crow about a big money verdict while the corporate defendant bears it in the short term; however, after one too many days in the courthouse, the business may ultimately decide it is no longer worthwhile to do business in the state.[246] Thus, in the end certain consumer victories may not be in the true public interest at all.[247]

Increased damages awards also distort settlement amounts. A defendant who believes he has a meritorious defense may still settle. The Alaska UTPCPA provides treble damages automatically,[248] so the risk of a high damages award may induce settlement from defendants who would have otherwise won at trial.[249] At the same time, the incentives for plaintiffs are reversed; increased damages create the possibility of a windfall settlement for a non-meritorious claim.

Recent examples in Alaska illustrate these issues. First, an actuarial firm incorrectly estimated rising healthcare costs for a state pension,

243. Schwartz & Silverman, *supra* note 8, at 33–34.

244. *See* Butler & Wright, *supra* note 239, at 65.

245. State v. O'Neill Investigations, Inc., 609 P.2d 520, 534–35 (Alaska 1980); Schwartz, Silverman & Appel, *supra* note 128, at 95.

246. *See* Sovern, *supra* note 212, at 402 (providing the example of automobile companies readily offering "secret" free warranty programs to fix car problems to restore and enhance goodwill only until states passed legislation mandating it for all citizens on consumer protection grounds).

247. Sovern, *supra* note 25, at 437.

248. Kenai Chrysler Ctr., Inc. v. Denison, 167 P.3d 1240, 1259–60 (Alaska 2007) ("[Section 45.50.531(a) of the Alaska Statutes] appears to authorize treble damages based solely on an allegation and finding that the UTPCPA has been violated."); see also supra note 162 and accompanying text.

249. *See* Butler & Wright, supra note 239, at 65.

resulting in a nearly $2 billion shortfall for the pension.[250] The state sued partially under the UTPCPA, and the automatic treble damages increased the risk of trial for the firm. The actuarial firm was sued for $2.8 billion, and it quickly settled with the state for $500 million.[251] Another action created a deterrent effect but was unevenly enforced: In 2009 two souvenir shops in Juneau targeting cruise ship tourists with huge discount sale signs outside their shops were sued by the state for unfair trade practices based on false advertising.[252] One jewelry store owner was fined $50,000, but cried foul since he was targeted and dozens of others on the streets nearby were not.[253] The deterrence seemed to work, as far fewer signs were seen the next tourist season, but at a cost: many retailers said sales were down because there was nothing to herd tourists into the stores.[254]

B. No Reliance

In order to encourage consumer protection suits and to deter fraud, many jurisdictions eliminate the requirement for plaintiffs in consumer protection suits to show reliance on a misrepresentation either as an element of the tort or as a part of causation.[255] Without a requirement for plaintiffs to show reliance, defendants can be liable for damages due to misrepresentations on which no one relied and that did no actual harm.[256] Further, without a requirement of reliance and causation, defendants can be liable to all consumers of a good or service, not just the victims; as a result potential defendants are over deterred from activity.[257] Plaintiffs—both businesses and consumers alike—have an incentive to attempt to classify almost any claim as a consumer protection violation because the lack of a reliance requirement makes the claim easier to prove. As a result, cases that should be a simple breach of

250. Pat Forgey, *Alaska's Pension Suit Settled for $500M*, JUNEAU EMPIRE, Jun. 13, 2010, *available at* http://www.juneauempire.com/stories/061310/sta_653072396.shtml.
251. *Id.*
252. Kim Marquis, *State Pursues Businesses with Bogus "Sale" Ads*, JUNEAU EMPIRE, Sept. 9, 2009, *available at* http://www.juneauempire.com/stories/090909/loc_491251093.shtml.
253. *Id.*
254. Kim Marquis, *"Sale" Signs Less Prevalent in Tourist District*, JUNEAU EMPIRE, May 14, 2010, *available at* http://www.juneauempire.com/stories/051410/loc_638917941.shtml.
255. *See* Scheuerman, *supra* note 14, at 20, 30–31.
256. *Id.* at 31–32.
257. *Id.* at 39.

contract claim between businesses[258] become consumer protection actions.

Claims under the UTPCPA do not require a showing of reliance; "[a]ll that is required is a showing that the acts and practices were capable of being interpreted in a misleading way."[259] In *Odom v. Fairbanks Memorial Hospital*, the Alaska Supreme Court overturned a hospital's motion to dismiss a former employee's claims, including a UTPCPA claim, and held that a plaintiff does not even have to show an injury.[260] However, just one year after *Odom*, the Alaska Supreme Court found in *Garrison v. Dixon*[261] that a claim sufficient to survive a motion to dismiss under the standard expressed in *Odom* failed on summary judgment.[262] The Alaska Supreme Court specifically noted that the plaintiff's UTPCPA claim failed because a plaintiff must show an ascertainable loss of money or property as a result of the UTPCPA violation.[263]

C. Attorneys' Fees

Another problem in applying the UTPCPA lies in the attorneys' fee shifting provisions described in Part II. From one side, the threat of a defendant obtaining even partial attorneys' fees may cause plaintiffs not to bring meritorious claims.[264] Access to the courts and justice system is a major concern regarding Civil Rule 82 overall, in particular when the purpose of the statute is to encourage consumers to bring claims.[265] As one commentator has described the English Rule on attorneys' fees: "middle class and rich consumers are the usual beneficiaries of these statutes. The poor consumer seems protected only marginally."[266]

Alternatively, although successful defendants are entitled to recover attorneys' fees, they are much less likely to collect on the award than successful plaintiffs. If the court does not find the action frivolous, then the defendant must submit a motion for attorneys' fees.[267] The

258. *See* W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc., 101 P.3d 1047, 1049 (Alaska 2004); *see also supra* notes 227–237 and accompanying text.

259. Odom v. Fairbanks Memorial Hosp., 999 P.2d 123, 132 (Alaska 2000) (quoting State v. O'Neill Investigations, Inc., 609 P.2d 520, 534–35 (Alaska 1980)).

260. *Id.* at 132–33.

261. 19 P.3d 1229 (Alaska 2001).

262. *Id.* at 1236.

263. *Id.* at 1235 n.22.

264. Stark & Choplin, *supra* note 38, at 508–11.

265. *See* Catalina Yachts v. Pierce, 105 P.3d 125, 131 (Alaska 2005).

266. Stewart Macaulay, Address, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching v. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 586 (1989).

267. ALASKA STAT. § 45.50.537(b) (2010).

courts have already expressed hesitancy about imposing awards of attorneys' fees against plaintiffs when statutory purposes promote litigation in that area.[268] While plaintiffs automatically receive full attorneys' fees under the UTPCPA, defendants can normally only be awarded reduced fees under Civil Rule 82.

Even when defendants win an award of attorneys' fees, they may never be able to collect the fees. In the events leading to *Compton v. Kittleson*,[269] Kittleson represented the Nelvises as plaintiffs in a UTPCPA claim.[270] The defendants in that UTPCPA claim offered to settle the claim for $25,000, but the Nelvises rejected the claim due to a fee arrangement that would have left them with only $3,000[271] and the possibility of receiving treble damages and full reasonable attorneys' fees under the UTPCPA.[272] The Nelvises lost on all counts in the UTPCPA trial, and the court awarded the defendants almost $100,000 in attorneys' fees.[273] That award, however, did not go directly to the defendants because the Nelvises declared bankruptcy.[274]

D. Business Actions

The most alarming faults of the UTPCPA have been revealed since *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, in which one business was permitted to sue another on grounds of consumer protection rather than unfair competition.[275] Commentators on both sides of the issue have debated the merits of allowing businesses to act as de facto consumers for decades, with some calling for a "blurring of the line between consumers and businesses"[276] and, at the extreme, granting businesses the right to litigate any and all disputes arising from even the most routine and ordinary commercial transactions.[277]

268. *See Catalina Yachts*, 105 P.3d at 131.

269. 171 P.3d 172 (Alaska 2007). *Compton* is a case where the plaintiffs sued an attorney for malpractice after they lost a UTPCPA claim. *Id.*

270. *Id.* at 173.

271. *Id.* at 174–75. Subsequent to adopting the fee arrangement but prior to the settlement, a federal bankruptcy judge criticized a similar fee arrangement and an informal ethics opinion ruled the fee arrangement likely put impermissible pressure on clients to reject plea offers. *Id.*

272. *Id.* at 175.

273. *Id.* The fee was awarded under Alaska Civil Rule 68, which provides attorneys' fees as a result of the losing party rejecting a settlement offer. *Id.*

274. *See id.*

275. 101 P.3d 1047, 1050–54 (Alaska 2004).

276. *See* Michael Flynn & Karen Slater, *All We Are Saying is Give Business a Chance: The Application of State UDAP Statutes to Business–to–Business Transactions*, 15 LOY. CONSUMER L. REV. 81, 84, 87 (2003).

277. Note, *Toward Greater Equality in Business Transactions*: *A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1623 (1983).

Although many businesses in this country are small and giving businesses private rights as "consumers" would provide Main Street Mom 'n' Pop stores with more protection,[278] the rights of larger firms must be considered as well. Many businesses have argued that the increasingly "creative" actions brought under state CPAs are abusive and that courts are overstepping their statutory authority.[279] Even those favoring business actions admit that it is at best "a form of consumer protection *one step removed*"[280] and that the lowered standards of proof, along with treble and punitive damages provisions, provide incentives to bring claims of little merit.[281] In 1972 Massachusetts became the first state to permit business versus business actions under its CPA.[282] Texas followed in the next few years.[283] Texas allows any business with assets under $25 million to sue another as a consumer, not just for unfair competition.[284] Business versus business actions are best facilitated by states with catch-all provisions like Alaska's;[285] however, many of these states have struggled after authorizing the actions with uneven application.[286] Whether or not a state allows business versus business actions depends on its interpretation of certain definitions; all CPAs define those who can sue as "persons" or "consumers," and how courts interpret those terms determines the issue.[287] Unfortunately, legislative history is lacking for many state CPAs, including the UTPCPA, because most of them were hastily passed based on model acts.[288]

The reasoning in *Western Star Trucks* demonstrates that the plain language of the UTPCPA supports business versus business actions

278. *Id*. at 1629–30; Flynn & Slater, *supra* note 276, at 87.

279. Franke & Ballam, *supra* note 238, at 348 (citing Wayne E. Green, *Lawyers Give Deceptive Trade Statutes New Day in Court, Wider Interpretations*, WALL ST. J., Jan. 24, 1990, at B1).

280. Note, *supra* note 277, at 1632 (emphasis added) (quoting David F. Bragg, *Now We're All Consumers – The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 8 (1976)).

281. *Id.* at 1639.

282. Michael C. Gilleran & L. Seth Stadfeld, *Little FTC Acts Emerge in Business Litigation*, 72 A.B.A. J. 58 (1986).

283. Franke & Ballam, *supra* note 238, at 414.

284. Macaulay, *supra* note 266, at 587 (citing TEX. BUS. COM. CODE ANN. § 17.45 (Vernon 1987)).

285. Franke & Ballam, *supra* note 238, at 423.

286. *See* Flynn & Slater, *supra* note 276, at 93–97 (stating that Florida courts have struggled with inconsistent precedent since authorizing business versus business actions); Sovern, *supra* note 25, at 463 (describing how increased usage of the Texas act in the wake of authorizing business versus business actions helped expose many problems; the statute had to be amended eight times in fifteen years).

287. Flynn & Slater, *supra* note 276, at 87.

288. *See* Kaplan & Smith, *supra* note 28, at 277 n.114.

under a theory of consumer protection,[289] but the court admitted that dicta in prior case law and holdings in two of its prior cases did not support such a theory.[290] The court appealed to plain language and legislative history arguments, stating that the act applies to any acts "in the conduct of trade or commerce"[291] and that it was "based on legislation developed in large part by the Federal Trade Commission, [and] is designed to meet the increasing need in Alaska for the protection of consumers as well as honest businessmen from the depredations of those persons employing unfair or deceptive trade practices."[292] There is a problem with this line of analysis: honest businessmen were indeed meant to be protected under the Act—not under a consumer protection theory, but rather under an unfair competition theory.

The Alaska court is not alone in its confusion; courts throughout the country have lost track of the difference between unfair competition and consumer protection, partly because so many states have lumped both theories together in one statute.[293] The ideological underpinnings of the FTC and "Little FTC Acts" have been pegged as being progressive in origin—to rectify uneven bargaining power between consumers and monopolistic large corporations.[294] If two companies are so uneven in bargaining that the lesser needs protection like a consumer, then perhaps the action is appropriate, but how often does this happen?[295] Take, for example, the fact pattern in *Western Star Trucks*: Western Star Trucks, Inc. breached an oral agreement that it had with a supplier, Big Iron Equipment Service, Inc. Big Iron Equipment relied on the

289. 101 P.3d 1047, 1049–54 (Alaska 2004).

290. *Id*. at 1047–48, 1050–51 (citing State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982); Aloha Lumber Corp. v. Univ. of Alaska, 994 P.2d 991 (Alaska 1999)).

291. *Id.* at 1050 (quoting ALASKA STAT. § 45.50.471(a) (2010)).

292. *Id.* at 1052 (emphasis in original) (quoting *Judiciary Committee Report on HCSCS for Senate Bill No. 352*, ALASKA H. JOURNAL SUPP. NO. 10 AT 1, 1970 ALASKA H. JOURNAL 744).

293. *See* Staci Zaretsky, Note, *Trademark Law and Consumer Protection Law – Deception is a Cruel Act: "Uniform" State Deceptive Trade Practices Acts and Their Deceptive Effects on the Trademark Claims of Corporate Competitors*, 32 W. NEW ENG. L. REV. 549, 593 (2010).

294. Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws*, 33 WM. MITCHELL L. REV. 163, 174–76 (2006).

295. See Zaretsky, *supra* note 293, at 574. Moreover, the Alaska Supreme Court recently noted that "nowhere in *Western Star* did we suggest that relative power influenced our decision." ASRC Energy Servs. Power and Commc'ns, LLC v. Golden Valley Elec. Ass'n, Inc., No. S-12630, No. 6617, No. S-12989, 2011 Alas. LEXIS 118, at *39 (Alaska Nov. 4, 2011).

contract.[296] Western Star Trucks did not dispute the agreement had been breached, but Big Iron Equipment sued (and won) in the lower court based on the UTPCPA and thus was awarded treble damages for a simple breach of contract claim.[297] Once the Alaska Supreme Court affirmed, the game was on: business versus business actions were permitted.[298] It is difficult to conceive of an action that a business could bring against another business in Alaska that does not already fit under another cause of action. False advertising or trademark dilution? Businesses (not consumers) have redress under the federal Lanham Act.[299] Supplier reneged on a promise of goods? Such injuries are breach of contract claims with typical reliance requirements and typical damages, not trumped up "consumer protection" torts. The extent of the damage in Alaska wrought by this misinterpretation of the statute remains unclear, but a warning shot has already been fired: in 2005, an action brought under the UTPCPA by a business survived the summary judgment stage again, but this time, it was *against a consumer*.[300] The court reasoned that *O'Neill Investigations* demanded a liberal interpretation of the statute, and thus all the defendants had to do was show any "ascertainable loss" suffered in the course of "trade or commerce."[301]

The *O'Neill Investigations* standard was again applied in a business action in the 2011 case *ASRC Energy Services Power and Communications, LLC v. Golden Valley Electric Association, Inc.*[302] What began as a contract dispute between two businesses resulted in both parties adding UTPCPA claims.[303] The jury found that ASRC breached its contract and violated the UTPCPA.[304] However, the jury also attributed all of Golden

296. *Id.*
297. *Id.*
298. *See id*. at 1054.
299. *See* Dayle L. Wallien, *The Unfair Trade Practice of False Advertising*, ITEMS OF INT. (2005), *available at* http://www.alaskalaw.com/falseadv.htm.
300. Corneliussen v. Bridgestone/Firestone North Am. Tire LLC, No. 3AN-03-03558CI, 2005 WL 6399469, at *11–12 (Alaska Super. Ct. Mar. 31, 2005). However, summary judgment in Alaskan courts is a stricter standard than in federal courts. *See* Meyer v. State of Alaska, Dep't of Revenue, 994 P.2d 365, 368 (Alaska 1999). For instance, when a positive paternity test established a 99.98% probability that the defendant was the father, a simple statement by the defendant that he did not have intercourse with the plaintiff created a triable issue of fact, and the Alaska Supreme Court overturned the trial court's grant of summary judgment. *Id.*
301. *Corneliussen*, 2005 WL 6399469, at *11–12.
302. No. S-12630, No. 6617, No. S-12989, 2011 Alas. LEXIS 118 (Alaska Nov. 4, 2011); *see also* notes 232–237, *supra*, and accompanying text.
303. *ASRC*, 2011 Alas. LEXIS 118, at *6–7.
304. *Id*. at *10.

Valley's damages[305] to the UTPCPA violations, meaning the damages would treble in addition to Golden Valley receiving attorneys' fees.[306] As a result of expanding the UTPCPA to business versus business disputes, what should have been a typical contract dispute resulted in competing UTPCPA claims, along with their reduced standards and enhanced damages. Nevertheless, the court strongly upheld the viability of business versus business actions from *Western Star Trucks*.[307]

Where are the limits? Can a fast food restaurant be sued for making a mistake on a drive-thru order? For making someone fat? Similar actions are actually happening across the United States based on statutes like Alaska's.[308] Moreover, how long will it be before businesses begin to reframe any contract dispute as a consumer protection action?

IV. PUTTING THE HORSE BACK IN THE BARN: PROPOSED REVISIONS TO THE ACT

As a result of the problems discussed in Part III, the UTPCPA is being used to assert novel causes of action not by consumers who have been legitimately wronged, but by schemers targeting deep-pocketed companies and unpopular defendants who will settle rather than litigate.[309] Given the liberal reading *O'Neill Investigations* allows,[310] the Alaska Supreme Court is unlikely to limit the application of the UTPCPA; thus, the best hope for reform will be from statutory revisions and clarifications. Alaska, like many other states, has now seen liability or threat thereof created where none existed previously.[311] Businesses are now using the UTPCPA to sue competitors and other unsophisticated smaller businesses as corporate retaliation for breach of contract or misrepresentation that should be regulated through other channels.[312]

305. The jury initially awarded Golden Valley damages arising from responding to the false claims *during the litigation*, but the Alaska Supreme Court reversed those portions of the damages award. *Id.* at *28–29.

306. *Id.* at *10–15.

307. *Id.* at *36–40 (citing W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc., 101 P.3d 1047, 1050–54 (Alaska 2004)).

308. *See, e.g.*, Parham v. McDonalds Corp., No. CGC-10-506178 (Cal. Super. Ct. filed Dec. 15, 2010) (class action suit brought under consumer protection laws against McDonalds because they include toys in children's "Happy Meals").

309. Schwartz & Silverman, *supra* note 8, at 37.

310. *See* Corneliussen v. Bridgestone/Firestone North Am. Tire LLC, No. 3AN-03-03558CI, 2005 WL 6399469, at *11–12 (Alaska Super. Ct. Mar. 31, 2005).

311. Schwartz & Silverman, *supra* note 8, at 3–4.

312. *See id*.

As the *Western Star Trucks* court alluded, Alaska's UTPCPA *is* intended to protect honest businessmen[313]—just not quite in the way the court suggested. The nature of the protection that an honest businessman *should* receive through CPAs is grounded in unfair competition, not consumer protection. The harmed business should have a right to regain sales lost from customers who were induced to buy from a dishonest merchant.[314] The honest businessman should have no action for, say, an allegedly deceptive sale sign posted by a competitor. Perhaps he may have a right under the federal Lanham Act, particularly if there was co-opting, infringement, or other mark misrepresentation, but he should have few if any unique rights in state courts under the guise of "consumer protection."[315] Furthermore, Alaska has robust state law trademark protection that may cover these cases in the absence of new causes of action under the UTPCPA.[316]

Constant creation of new causes of action also betrays the UTPCPA's supposed reliance on and deference to the federal FTC Act. If a business diligently followed the regulations of the FTC or other federal agencies in developing marketing, it should reasonably expect not to be hauled into court under a state law that mimics much of the language and all of the same policy goals.[317] Some of these problems would be alleviated in Alaska if the legislature made a few relatively simple changes to the text of the Act. The UTPCPA provides plaintiffs with a lower burden of proof through the absence of showing reliance, automatic increased damages, full attorneys' fees if they win, and a low likelihood of actually paying attorneys' fees if they lose. The combination of these incentives encourages plaintiffs to find creative ways to classify their actions as UTPCPA violations. Cabining at least some of these incentives would reduce the abuse of the UTPCPA.

The Alaska Supreme Court could limit creations of new actions under the UTPCPA by building on the requirement expressed in *Garrison v. Dixon*: that a plaintiff suffer an ascertainable loss of money or property as a result of another person's act or practice that violated the UTPCPA. The courts could require a plaintiff to demonstrate loss resulting from reliance on a misleading advertisement or statement. Adding an element of reliance to the ascertainable loss of money

313. 101 P.3d 1047, 1052–54 (Alaska 2004).
314. Gold & Cohan, *supra* note 158, at 954.
315. *See* Zaretsky, *supra* note 293, at 565–66.
316. *See* ALASKA STAT. §§ 45.50.10–45.50.205 (2010); *see also Filing an Alaska State Trademark*, ALASKA DEP'T OF COMMERCE, CMTY. & ECON. DEV., http://www.dced.state.ak.us/bsc/tmark.htm (last visited Oct. 18, 2011) (describing registration of trademarks in Alaska).
317. Schwartz, Silverman & Appel, *supra* note 128, at 104.

requirement would prevent artful pleading from turning contract claims between businesses into UTPCPA claims.

The UTPCPA explicitly defines only twelve terms, and merely three of those could be considered broadly relevant: "consumer," "goods or services," and "advertising."[318] The best way to tighten the belt on undesirable business versus business and business versus consumer actions is by tweaking the definitions of "consumer" and "goods and services," as those changes will have direct effects on standing. This idea has precedent, as many states did the opposite in order to expand these actions. If these actions are desired, then it should say so explicitly in the statute. Alaska is one of only four states that neither includes nor excludes businesses in its definitions of "consumer" and "person."[319] Further, Alaska uses "person" in its definition of "consumer" but does not define "person" for the purposes of the Act.[320] By defining person as "a private citizen of Alaska," the Act could limit businesses' standing in consumer protection actions. Alternatively the legislature could supplement the definitions of "consumer" and "goods or services" by clarifying that consumer transactions covered by the Act are "primarily intended for personal, family, or household use."[321] When Massachusetts wanted to include business versus consumer actions, it did the opposite, expanding its definition of "trade and commerce" to include essentially any business transaction.[322] Similarly, North Carolina expanded its definition of "commerce" to include "all business activities, however denominated."[323] Other states have limited actions to things like franchise agreements and agricultural transactions.[324] Although the UTPCPA needs to be broad in order to be flexible, courts need help with terms like these to ensure even application.

A similar clarification effort would help in the area of exemptions. If state agencies seem confused about what constitutes regulated and exempt conduct, how should private citizens looking to bring actions be expected to know?[325] Licensed professional exemptions are a realm

318. ALASKA STAT. § 45.50.561(a)(1–12) (2010). The defined terms are advertising, cemetery lot, chain distributor scheme, consumer, dealing in hearing aids, documentary material, examination of documentary material, fresh, goods or services, hearing aid, knowingly, and seconds. *Id.*

319. Flynn & Slater, *supra* note 276, at 88 n.48.

320. ALASKA STAT. § 45.50.561(a)(4) (2010) ("'[C]onsumer' means a person who seeks or acquires goods or services by lease or purchase.").

321. Dunbar, *supra* note 116, at 458.

322. Franke & Ballam, *supra* note 238, at 384.

323. *Id*. at 399; *see also* N.C. GEN. STAT. § 75–1.1(b) (2010).

324. Note, *supra* note 277, at 1635–36.

325. *See* Schwartz, Silverman & Appel, *supra* note 128, at 101.

where the Act is silent but clarification is desperately needed. As tort reform gains momentum nationwide, CPAs may well be the only way in the future to seek restitution from licensed professionals.[326] There is currently no exemption on the books in the UTPCPA, but state courts have also noted that this is not a settled issue. In *Yukon-Koyukuk School District v. Arneson*,[327] a school district filed UTPCPA claims against an attorney who had failed to provide promised services; the attorney claimed that he should be exempt as a licensed professional regulated by other bodies.[328] The court dismissed the UTPCPA claims on other grounds and stated there was no need to reach the question of licensed professional exemption.[329] While this demonstrated judicial restraint, the court left open a question that now should be answered definitively. Perhaps one option is to look to the FTC Act, which contains no such exemption of any kind.[330]

A final change that would help smooth out implementation of the Act would be to change the FTC Act from "guiding" authority worthy of "great weight," as it currently stands,[331] to the greatest weight: making it mandatory. In other states that have considered the same question, commentators have concluded that without making the FTC interpretations, consent orders, regulations, and decisions all mandatory, a substantial defect results.[332] If prospective defendants are supposed to know the law and federal decisions are not "law," but still can be used convincingly against them, how can they be fairly charged under a state CPA for violating a federal standard?[333] Incorporating the FTC Act into state law would alleviate this problem.[334]

The Alaska Supreme Court has already referenced one distinction between the FTC Act and Alaska precedent.[335] 15 U.S.C. § 45(n) codified changes to the FTC's definition of what constitutes an unfair act or

326. Bauer, *supra* note 14, at 131.
327. No. 3AN-01-3791 CI, 2002 WL 34119570 (Alaska Super. Ct. Dec. 2002).
328. *Id.* at *6.
329. *Id.*
330. Bauer, *supra* note 14, at 175.
331. ALASKA STAT. § 45.50.545 (2010) ("In interpreting [section 45.50.471 of the Alaska Statutes] due consideration and great weight should be given the interpretations of 15 U.S.C. 45(a)(1) (§ 5(a)(1) of the Federal Trade Commission Act).").
332. Norton, *supra* note 114, at 653.
333. *Id.* at 653–54.
334. *See* Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L. J. 1144, 1148–49 (1985).
335. ASRC Energy Servs. Power and Commc'ns, LLC v. Golden Valley Elec. Ass'n, Inc., No. S-12630, No. 6617, No. S-12989, 2011 Alas. LEXIS 118, at *28–30 (Alaska Nov. 4, 2011).

practice.[336] Those changes restricted the scope of what constitutes an unfair act or practice, resulting in a conflict with the current Alaska standard.[337] In maintaining its standard, the Alaska Supreme Court stated: "to provide broad protection to consumers and business people in Alaska and to achieve the uniformity that was the goal of the 1974 legislature, we will adhere to our precedent standards for unfairness and deception *until such time that the legislature sees fit to incorporate the limitations of 15 U.S.C. § 45(n) into Alaska's [UTPCPA].*"[338]

Some commentators have argued that making FTC Act provisions mandatory authority in state courts is a poor idea; incorporation would rob state court judges of flexibility in dealing with actions that might be unique to their state.[339] Others argue that the FTC Act is a poor model for states to follow, since the adjudication process at the agency is completely removed from state law issues and also vulnerable to political pressures, funding crunches, and firm requirements of broad public interest.[340] All CPAs by design look to the FTC because as the supreme consumer protection agency, the FTC will by default have the primary policymaking role in the field and will also define the continually evolving standard of what is unfair and deceptive.[341] The Alaska Legislature's easiest move would be to incorporate the FTC Act and allow the UTPCPA to become the "Little FTC Act" it was designed to be. A more difficult solution would be to create some artificial statutory substitute for the discretion that the FTC carefully employs.[342] Regardless, something must be done to give defendants notice of the law and to prevent consumer actions from deterring otherwise lawful, even desirable, conduct.

CONCLUSION

Application of the Alaska UTPCPA by Alaska state courts is currently falling short of the legislative mandate to protect Alaska citizens from unfair and deceptive actions. Adherence to attorneys' fees awards to all prevailing plaintiffs, treble damages provisions, and encouragement of business versus business and now even business versus consumer actions discourages legitimate suits, incentivizes "pile-on" suits, and suppresses otherwise desirable conduct. In order to best

336. 15 U.S.C. § 45(n) (2006).
337. *ASRC*, 2011 Alas. LEXIS 118, at *29.
338. *Id.* at *29–30 (emphasis added).
339. Mize, *supra* note 47, at 668–69.
340. *Id.* at 666–67; *see also* Sovern, *supra* note 25, at 452.
341. Schwartz, Silverman & Appel, *supra* note 128, at 99.
342. Sovern, *supra* note 25, at 462.

serve not only the citizens and consumers of Alaska, but also small businesses struggling in the worst economic climate in decades, the Alaska Legislature should take the initiative to revise the Act. By defining terms, making the federal FTC Act mandatory, and considering revising the balance between attorneys' fees and burdens of proof, the legislature can send a clear message that deceptive trade practices will not be tolerated, but they will be fairly and evenly adjudicated in Alaska state courts.