

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

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INTRODUCTION

Motivated by a desire to protect consumers, states enact statutes

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small actual damages would not ordinarily lead a consumer to file a lawsuit.<sup>7</sup>

Unfortunately, some provisions in Oregon's consumer protection

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

#### BACKGROUND

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

Consumer protection legislation varies among the states. Some states simply outlaw unfair or deceptive practices<sup>14</sup> and leave the interpretation of their statutes to the courts.<sup>15</sup> Other states specifically prohibit certain enumerated trade practices.<sup>16</sup> States also vary in the extent to which they encourage enforcement of their statutes by private attorneys general. States have tools at their disposal to encourage private causes of action. Arguably, the most effective tool

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

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

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

13. 12 ROBERT M. LANGER, JOHN T. MORGAN & DAVID L. BELT, UNFAIR TRADE PRACTICES - CONNECTICUT PRACTICE SERIES App. L (2003 & Supp. 2009). Iowa was the last state to enact a private cause of action; it became effective July 1, 2009. *Consumer "Private Right of Action": What Consumers Need to Know*, [http://www.state.ia.us/government/ag/latest\\_news/releases/july\\_2009/private\\_right\\_of\\_action.html](http://www.state.ia.us/government/ag/latest_news/releases/july_2009/private_right_of_action.html) (last visited May 3, 2011); see IOWA CODE 714H.5 (2009). Oregon authorized a private cause of action in 1971. 1971 Or. Laws 2009, now codified as OR. REV. STAT. § 646.638; see also J. Britton Conroy, Comment, *The Private Remedy Under Oregon's Unlawful Trade Practices Act*, 56 OR. L. REV. 490, 495 (1977).

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

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is attorney fee awards for prevailing consumers. Nearly all states allow attorney fee awards for successful prosecution of unfair trade practices claims.

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

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

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same value in the general market if not as represented, it is worth less to the consumer who



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

### III. COMPARING OR UTPA WITH CUTPA

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

#### A. *Unlawful versus Unfair*

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

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

49. PRIDGEN, *supra* note 2, § 2:10.

50. *Id.*

51. *Id.*

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

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

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

55. PRIDGEN, *supra* note 2, § 2:10.

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

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

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

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

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

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

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

59. See *id.*

60. *Id.*

61. *Id.*

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

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

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

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

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

### 1. OR UTPA’s “Laundry List”

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

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

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

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

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

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

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

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

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

## 2. *CUTPA's "Little FTC"*

CUTPA is a "Little FTC Act."

### *B. Attorney Fee Awards*

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *D. Remedies*

OR UTPA provides for a minimum damages award of \$200 if the court finds that the defendant engaged in unlawful trade practices.<sup>99</sup> This means that a successful claimant will receive a \$200 damages award if the amount of actual damages is less than \$200.<sup>100</sup> Connecticut has no minimum damages award.<sup>101</sup> Both states allow for punitive damages.<sup>102</sup> The court has sole discretion over punitive damages awards in a CUTPA action,<sup>103</sup> but juries may determine punitive damages awards in an OR UTPA suit.<sup>104</sup> Both OR UTPA and CUTPA authorize equitable relief at the discretion of the trial court.<sup>105</sup>

#### IV. WHAT IS RIGHT WITH OR UTPA?

OR UTPA contains numerous provisions to help achieve its goal of protecting Oregon consumers. Oregon's private cause of action helps remedy problems with government-only enforcement. Oregon has a very successful self-sustaining Financial Fraud/Consumer Protection Section at the Department of Justice,<sup>106</sup> but this is not enough to truly protect consumers. Oregon's Consumer Protection Section educates consumers and attempts to inform

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

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

## V. WHAT IS WRONG WITH OR UTPA?

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

### A. Give Courts Discretion

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

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

110. *Id.*

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

112. *Id.* at 671-72.

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

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

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

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

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

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

116. *Id.* at 687.

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

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

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

120. *Id.*

either.<sup>121</sup> The claimant moved to drop its OR UTPA claim entirely.<sup>122</sup> The court allowed the claimant to dismiss the claim, but required dismissal with prejudice.<sup>123</sup> The defendant then sought attorney fees because it prevailed on the OR UTPA claim.<sup>124</sup> The court required

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

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

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

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

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

### *B. Only Award Attorney Fees to Prevailing Plaintiffs*

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

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

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

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

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

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

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from suits for innocent misrepresentations or mistakes in advertising.<sup>136</sup>

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

On the other hand, awarding attorney fees to prevailing plaintiffs serves several important functions.<sup>140</sup> It allows plaintiffs who could not otherwise afford to pay attorney fees to bring a cause of action and encourages attorneys to accept their cases.<sup>141</sup> Attorney fee awards also encourage claimants to pursue claims that may not otherwise be financially worth the trouble because doing so furthers social goals beyond simply a remedy for that particular plaintiff.<sup>142</sup> [(defendants on unfairhe oalco

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



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

#### *D. Increase Statutory Minimum Damages Award*

The statutory minimum damages award should be increased to reflect the value of today's dollar. OR UTPA allows a claimant to recover the greater of \$200 or actual damages;<sup>155</sup> the statutory minimum damages award remains the same as when the statute was first enacted in 1971.<sup>156</sup> One scholar has suggested that in order to keep up with inflation, the legislature should have increased the amount to approximately \$720 fifteen years ago.<sup>157</sup> The comparative amount in today's dollars is approximately \$1100.<sup>158</sup>

In 2009, House Bill 3111 proposed increasing the minimum statutory damages award to \$500, but that portion of the bill did not make it into the final version that passed.<sup>159</sup> House Bill 3169, introduced in the same legislative session, would have completely removed the statutory damages award and required a claimant to prove actual damages.<sup>160</sup> Fortunately for consumers, this bill died in committee. These bills indicate that the legislature has been thinking about consumer protection legislation and realizes that an increase in the statutory minimum damages award is a possibility. It is



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