



**DEPARTMENT OF JUSTICE**  
CIVIL ENFORCEMENT DIVISION

**MEMORANDUM**

DATE: March 6, 2013

TO: Honorable Jeff Barker, Chair  
House Judiciary Committee

FROM: Aaron Knott, Legislative Director

SUBJECT: HB 2777 – Adds bona fide error defense to UTPA

**DOJ OPPOSES THIS BILL**

**BACKGROUND ON THE UNLAWFUL TRADE PRACTICES ACT**

- The Unlawful Trade Practices Act (UTPA) was passed in 1971 and amended in 1977. It was based on a model consumer protection law. Additional changes have been made since to expand the “laundry list” of conduct covered by the UTPA.
- The UTPA protects both consumers and honest businesses by promoting a level playing field and a fair marketplace.
  - The Attorney General has investigated, negotiated settlements and litigated violations of the UTPA in many different industries. Targets of enforcement actions run the gamut from telecommunications providers to lenders, debt relief services to major drug and food manufacturers, and motor vehicle dealers to internet and telemarketing sales. The Attorney General also uses the UTPA to attack scams targeting older Oregonians, those new to this country, and other vulnerable populations.
  - These types of investigations help law-abiding businesses stay competitive in a free and fair marketplace. Additionally, some enforcement actions directly benefit businesses. For example, the Attorney General has prosecuted companies for sending local businesses simulated invoices for unordered or undelivered office goods and supplies, often following a deceptive telemarketing solicitation.

## **HOW HB 2777 WILL HARM CONSUMERS**

- HB 2777 establishes an affirmative defense if a defendant did not “intend” to violate the UTPA or the Unlawful Debt Collection Practices Act (UDCPA) and the violation was the result of a “bona fide error.”
- Consumers who are injured by an unlawful act will have no means of recovery if a defendant successfully argues this “affirmative defense.”
  - The UTPA currently strikes a balance between protecting consumers and allowing businesses to operate within the established standards of conduct in the marketplace. HB 2777 would shift the balance so that a business can profit off of unlawful activity if it “did not mean to” violate the law.
  - In the handful of states that have some type of bona fide error exception for some portion of their consumer protection laws, only one state has an intent requirement. In the other six states – including one state where the bona fide error exception only applies to class actions – the defendant still needs to provide restitution and disgorge amounts it was unjustly enriched by the violation. Although even this type of standard is by far in the minority for “unfair and deceptive acts and practices” (UDAP) laws, it at least still provides that a consumer is entitled to restitution when the consumer is injured by unlawful conduct.
- There is no cap on how many times a defendant can claim this affirmative defense for the same conduct; a defendant can time and time again “forget” to follow its own procedures and never be held liable for violations of the UTPA or UDCPA.
- The Unlawful Trade Practices Act has served Oregon well for the past 42 years. There is no compelling reason to amend it as contemplated by HB 2777.

## **DOJ CONTACT**

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