

# 3

## THE MAINE UNFAIR TRADE PRACTICES ACT

### § 3. 1. Introduction

This consumer rights chapter describes Maine’s most important consumer law, the Maine Unfair Trade Practices Act (UTPA). It contains the following sections:

**§ 3. 2. Consumer Rights And The Maine Unfair Trade Practices Act**

**§ 3. 3. What Trade Practices Are Unfair?**

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**§ 3. 5. Statutory Violations Of The Unfair Trade Practices Act**

**§ 3. 6. Federal Unfair Trade Practices**

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### § 3. 2. Consumer Rights And The Maine Unfair Trade Practices Act

The Maine Unfair Trade Practices Act (UTPA)<sup>1</sup> is a consumer’s basic remedy against any *unfair* or *deceptive* trade practices by a business<sup>2</sup>. Consumers can bring their own private UTPA actions for relief in either Small Claims Court, District Court, or Superior Court.<sup>3</sup> To do so, a consumer must

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<sup>1</sup> 5 M.R.S.A. §§ 205-A - 214.

<sup>2</sup> *See Binette v. Dyer Library Ass’n*, 688 A.2d 898,907 (Me. 1996) (even though a non-profit charitable corporation acted improperly, it was not conducting a “trade or business” and therefore did not violate the UTPA).

<sup>3</sup> 5 M.R.S.A. § 213. The Attorney General may also bring an action to enforce the UTPLA when it believes it would be in the public interest (5 M.R.S.A. § 209). In a successful UTPA suit by the Attorney General the court can order an injunction, restitution (i.e., money back, including interest) for injured consumers, the Attorney General’s costs of suit and a civil penalty of up to \$10,000 for each intentional violation. *See State v. Shattuck*, 747 A.2d 174, 179 (Me. 2000) (innkeeper’s abuse of potential customers was so unfair as to violate UTPA). *See State v. Bob Chambers Ford*, 522 A.2d

prove both (1) a “loss of money or property” as the result of a violation of the UTPA, and (2) the transaction must primarily involve a personal, family, or household purpose. If a consumer cannot prove a specific loss of money or property, then UTPA remedies are *not* available.<sup>4</sup>

If a consumer brings a successful UTPA suit, he or she can receive the legal remedy of damages, or the equitable remedies of an injunction,<sup>5</sup> restitution, and other equitable relief<sup>6</sup> as may be necessary. Finally, if the court finds a UTPA violation it will award reasonable attorney fees.<sup>7</sup>

If a consumer decides to sue for damages, rather than canceling the contract and receiving back the purchase price (restitution), then the consumer must first inform the business and give the business an opportunity to make a settlement offer. *See* § 3.10 for a model letter demanding damages for a UTPA violation. If the consumer rejects the damages settlement, goes to court, and wins less than the settlement offer, then the court cannot award the consumer any attorney fees for work done after the settlement offer.<sup>8</sup> *See* § 3.11 for a model UTPA Court Complaint.

Pursuant to the Maine Statute of Limitations, a private unfair trade practice court action must be commenced within 6 years of the UTPA violation.<sup>9</sup> Consumers should argue that this period begins when a reasonable person would have been put on notice concerning the unfairness or the deception.

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362, 366 (Me. 1987). In this case, the court found that the Unfair Trade Practices Act allows the trial court considerable discretion to fashion an equitable remedy once an unfair trade practice finding has been made. For example, as a UTPA remedy, the court ordered re-rustproofing for car buyers who had received poor rustproofing jobs. Defendant Chambers argued that this remedy was beyond the restitution (money back) remedy authorized by the UTPA. The court disagreed:

The UTPA vests the trial court with considerable discretion to fashion an equitable remedy once a finding of unlawful trade practice has been made.... Once a court has taken jurisdiction of a cause in equity and reached a decision, the court should and must fashion appropriate remedies to do complete justice.

522 A.2d at 366. *See also Northview Motors, Inc. v. Commonwealth*, 562 A.2d 977, 980 (Pa. 1989) (dealer whose advertising misrepresented price of vehicle ordered to pay “restitution” of unfair price increases). *See generally* McKenna, J., *New Rights For Maine Consumers*, 9 Maine Bar Journal 78 (March, 1994).

<sup>4</sup> 5 M.R.S.A. § 213 (1). *See Parker v. Ayre*, 161 A.2d 1283, 1284-85 (Me.1992); *Tungate v. MacLean-Stevens Studios, Inc.*, 714 A.2d 792 (Me.1998). The Maine Supreme Judicial Court has also held that when seeking restitution the consumer must also prove that the business benefited from the UTPA violation. This is not required when the consumer is seeking damages but not restitution. *See Mariello v. Giguere*, 667 A.2d 588,590 (Me.1995). A Connecticut court has found that whenever a consumer receives something less than what the consumer bargained for, the consumer has suffered a “loss of money or property” within the meaning of the Connecticut UTPA. *Hinchliffe v American Motors Corp.*, 440 A.2d 810 (Conn. 1981).

<sup>5</sup> By specifically permitting the issuance of an injunction the statute suggests that an injured consumer can ask the court to prohibit a business practice that may cause injury to others who are similarly situated, but, as yet, uninjured.

<sup>6</sup> In addition to restitution, the consumer may also seek “other equitable relief” as may be “necessary and proper.” This could include reimbursement for the consumer’s costs (*See Bartner v. Carter*, 405 A.2d 194, 204, fn.10 (Me. 1979)) or other equitable remedies. For example, Small Claims Court can grant the equitable remedies of “orders to return, reform, refund, repair, or rescind (14 M.R.S.A. § 7481) and Superior Court (14 M.R.S.A. § 6015(3)) and District Court (4 M.R.S.A. § 152(5)(I)) can grant the equitable remedy of “specific performance of written contracts.” *State v. DeCoster*, 653 A.2d 891, 895 (Me.1995).)

<sup>7</sup> 5 M.R.S.A. § 213. *See Beaulieu v. Dorsey*, 562 A.2d 678 (Me. 1989) (the court awarded more than \$18,000 attorney fees in a dispute over a \$610 down payment on defective furniture); *See Courtney v. Bassano*, 733 A.2d 73, 995 (Me. 1999) (antique dealer’s failure to honor express warranties violates Maine Unfair Trade Practices Act and consumer awarded restitution and attorney fees). *VanVoorhees v. Dodge*, 679 A.2d 1077 (1996) (only attorney fees incurred pursuing UTPA claim can be awarded).

<sup>8</sup> 5 M.R.S.A. § 213(1-A).

<sup>9</sup> *Campbell v. Machias Savings Banks*, 865 F.Supp. 26, 34 (D.Me.1994) (UTPA statute of limitations not equitably tolled). This statute of limitations does not apply to a *State* UTPA action. *See State v. Crommett*, 116 A.2d 614, 615 (1955) (statutes of limitations do not run against the State; *nullum tempus occurrit regi* or “time does not run against the King”).

### § 3.3. What Trade Practices Are Unfair?

Consumer protection statutes such as the Maine Unfair Trade Practices Act should be liberally interpreted so as to achieve the Legislature's "beneficent purpose of protecting" consumers.<sup>10</sup> The U. S. Supreme Court in the case of *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, fn. 5 (1972) discussed the general criteria of an "unfair" trade practice. Violation of any one of these three criteria can constitute an unfair trade practice:

- A. Does the act or practice violate established public policy?
- B. Does the act or practice *substantially* injure consumers?<sup>11</sup>
- C. Is the act or practice immoral, unethical, oppressive or unscrupulous?<sup>12</sup>

More specifically, a federal court<sup>13</sup> has cited Crosswell, "The Identification of Unfair Acts and Practices By the Federal Trade Commission," 1981 Wisconsin Law Review 107, which identified four primary categories of practices which have been prohibited as unfair:

- A. Withholding material information (i.e., failing to state a material fact);<sup>14</sup>
- B. Making unsubstantiated advertising claims;
- C. Using high pressure sales techniques; and
- D. Depriving consumers of various post-purchase remedies.

A 1992 Maine Supreme Judicial Court decision concerning unfair trade practices is *Suminski v. Maine Appliance Warehouse, Inc.*, 602 A.2d 1173 (Me. 1992), in which the court stated that a retail seller's standard practice of refusing to honor Maine's implied warranty of merchantability law (see Chapter 5 of this Guide) could be so unfair as to violate the Maine Unfair Trade Practices Act. The Court also referred to a 1980 FTC policy statement which declared that a violation of the Unfair Trade Practices Act "must be substantial;<sup>15</sup> it must not be outweighed by any countervailing benefits to

<sup>10</sup> See *Tanguay v. Seacoast Tractor Sales, Inc.*, 494 A.2d 1364, 1367 (Me. 1985).

<sup>11</sup> When a company breaches a consumer contract the breach can be so serious as to constitute a violation of the UTPA. See *Orkin Exterminating Company v. F.T.C.*, 849 F.2d 1354 (11th Cir. 1988, cert. denied 109 S.Ct 865 (1989)); see also *Tierney v. Ford Motor Co.*, 436 A.2d 866, 873 (Me. 1981) (to be a violation of the Maine Unfair Trade Practices Act it is not enough that a warranty has been breached; the breach must also be significantly unfair or deceptive).

<sup>12</sup> E.g., price gouging; see 10 M.R.S.A. § 1105, Profiteering in Necessities. Additionally, a 1980 FTC policy statement set forth three elements essential to a finding of unfairness: an actionable consumer injury must be:

- A. substantial;
- B. not outweighed by any offsetting consumer or competitive benefits that the practice produces; and
- C. one which the consumer could not reasonably have avoided.

Letter from the Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983). The Law Court recently discussed this standard in *Suminski v. Maine Appliance Warehouse, Inc.*, 602 A.2d 1173, 1174-75 n.1 (Me. 1992).

<sup>13</sup> *American Financial Services v. FTC*, 767 F.2d 957, 979 (1985). The Maine UTPA states that courts should be guided by interpretations given by the FTC and federal courts in determining what constitutes an unfair or deceptive practice. 5 M.R.S.A. § 207(1) (1989). According to the National Consumer Law Center, most state courts in interpreting their UTPA statutes continue to use the *FTC v. Sperry & Hutchinson* standard and not the current FTC unfairness standard. See Sheldon, J., *Unfair and Deceptive Acts and Practices*, § 4.3.3.4 (2001).

<sup>14</sup> A material fact is a fact which would have changed your mind about purchasing the item. See *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 906-907 (Me. 1996); *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411, 417 (1st Cir. 1985) (even though the contract stated the sale was "as is," it was an unfair trade practice under Massachusetts law to fail to disclose a material fact). See Andrew Horton and Peggy McGhee, *Maine Civil Remedies*, §21.7(1994).

<sup>15</sup> A "substantial" injury cannot be trivial or merely speculative harm. It will usually involve monetary harm or serious health and safety risks. See *Tungate v. MacLean-Stevens Studios*, 714 A. 2d 792 (Me. 1998) (price differential as small as \$1.25 caused by undisclosed commission is not a substantial injury).

consumers or competition that the practice produces;<sup>16</sup> and it must be an injury that consumers themselves could not have avoided.”<sup>17</sup> *Id.* at 1174 n.1.

### § 3.4. What Trade Practices Are Deceptive?

The FTC has stated that illegal deception occurs if there has been “a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer’s detriment.” Representations are deceptive if necessary qualifications are not made, or if these disclosures or qualifications are too inconspicuous (*e.g.*, too small print or too quick statement). Actual consumer injury need not be shown.<sup>18</sup> Some examples of deceptive trade practices are:

- A. Statements by merchants that are “likely” to deceive;<sup>19</sup>
- B. Small print disclosures that contradict a general claim;<sup>20</sup>
- C. Misrepresentation of a product’s characteristics;
- D. Concealment of a contract provision;<sup>21</sup>
- E. Common Law fraud,<sup>22</sup> and
- F. Failure to disclose a product is not reasonably fit for its intended use or is not free of safety hazards.

A trade practice can be unfair or deceptive *even if the business had no intent to deceive*.<sup>23</sup> The standards of proof in an unfair trade practices suit are considerably more lenient than an action in tort (personal injury) for *fraudulent* misrepresentation.<sup>24</sup>

<sup>16</sup> A plaintiff considering an UTPA action should carefully evaluate the consumer costs and benefits of the questionable trade practice. *See FTC v. Crescent Publishing Group, Inc.*, 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (the fact that some customers are satisfied with defendant’s services does not outweigh the harm caused by defendant’s deceptive enrollment and billing practices).

<sup>17</sup> Consumers cannot reasonably avoid injury when the business creates or takes advantage of an unfair obstacle to the consumer decision-making process. For example, it is unfair to withhold material facts or to unduly coerce the consumer. Nor can consumers “avoid” an injury if they are not given a fair opportunity to do so. *See American Financial Services Ass’n v. FTC* 767 F. 2d (D.C. Cir. 1985) (injury could not be avoided when it was due to a provision in a standard form contract common to the whole industry).

<sup>18</sup> *See Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435-46 (9th Cir. 1986) *cert. denied* 107 S.Ct. 1090 (1986). *See generally*, National Consumers Law Center, *Unfair and Deceptive Acts and Practices*, § 4.2.11 (5<sup>th</sup> Ed. 2001).

<sup>19</sup> This current FTC standard departs from the established view that a practice must have a “tendency or capacity to deceive.” A practice is deceptive only if a consumer is deceived while behaving reasonably in the circumstances and the challenged claim is material to the consumer’s decision to purchase.

<sup>20</sup> *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C. Cir. 1985).

<sup>21</sup> A standard-form, printed contract presented to a consumer on a “take it or leave it” basis can be an “adhesion” contract that is so unfair as to be in violation of the Unfair Trade Practices Act. *See Dairy Farm Leasing Co. v. Hartley*, 395 A.2d 1135, 1139, fn. 3 (Me. 1978).

<sup>22</sup> *F.D.I.C. v. Rusconi*, 808 F.Supp. 30, 43 (D.Me. 1992) (under Massachusetts law, common law fraud can be a basis for unfair or deceptive practices).

<sup>23</sup> *Bartner v. Carter*, 405 A.2d 194, 200 (1979); *Binette v. Dyer Library Ass’n*, 688 A.2d 898, 906-907 (Me. 1996) (a good faith withholding of known or even unknown material information may constitute an unfair or deceptive act); *Courtney v. Bassano*, 733 A.2d 973, 976 (Me.1999) (antique dealer violated UTPA by breaching express warranties, withholding information, and failing to provide refund).

<sup>24</sup> *See Letellier v. Small*, 400 A.2d 371, 373 (Me. 1979) (tortious fraud or deceit must consist of (1) a material misrepresentation of a material fact which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without knowledge of its truth or falsity and (4) made with the intention that it shall be acted upon and (5) justifiably acted upon with resulting damage); see also Restatement (Second) of Torts § 552(1), which holds a party liable for tort of negligent misrepresentation if a party supplies false information and the consumer justifiably relies on it

## § 3.5. Statutory Violations Of The Unfair Trade Practices Act

Often, when enacting a statute that prohibits a particular commercial practice, the Maine Legislature will expressly state that violation of that statute is a violation (or is *prima facie* (presumptive) evidence of a violation) of the Unfair Trade Practices Act. Here are some examples:

- A. Telephone Automated Solicitations<sup>25</sup>
- B. Cable Television<sup>26</sup>
- C. Charitable Solicitations Act<sup>27</sup>
- D. Mobile Home Construction Warranties<sup>28</sup>
- E. Leases (Landlord-Tenant)<sup>29</sup>
- F. Leases (Consumer Transactions)<sup>30</sup>
- G. Used Car Information Act<sup>31</sup>
- H. Insulation Contracts<sup>32</sup>
- I. Home Construction Contracts<sup>33</sup>
- J. Solar Energy Equipment Warranties<sup>34</sup>
- K. Implied Warranties for Consumer Goods<sup>35</sup>
- L. Pyramid Sales<sup>36</sup>
- M. Odometers and Odometer Tampering<sup>37</sup>
- N. Law Enforcement Officers Solicitations<sup>38</sup>
- O. Telefacsimile Transmissions<sup>39</sup>
- P. Used Motor Vehicle Inspections<sup>40</sup>
- Q. Motor Vehicle Repairs<sup>41</sup>
- R. Mobile Home Parks<sup>42</sup>

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to the consumer's pecuniary detriment. *See also Mariello v. Giguere*, 667 A.2d 588, 590-91 (Me.1995); *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me.1995).

<sup>25</sup> 10 M.R.S.A. § 1498(8); *see* Chapter 28 of this Guide.

<sup>26</sup> 30-A M.R.S.A. § 3010(7); *see* Chapter 29 of this Guide.

<sup>27</sup> 9 M.R.S.A. § 5014; *see* Chapter 25 of this Guide.

<sup>28</sup> 10 M.R.S.A. § 1406; *see* Chapter 15 this Guide.

<sup>29</sup> 14 M.R.S.A. § 6030; *see* Chapter 16 of this Guide

<sup>30</sup> 11 M.R.S.A. § 2-1104; *see* Chapter 26 of this Guide.

<sup>31</sup> 10 M.R.S.A. § 1477; *see* Chapter 9 of this Guide.

<sup>32</sup> 10 M.R.S.A. § 1483; *see* Chapter 17 of this Guide.

<sup>33</sup> 10 M.R.S.A. § 1490(1); *see* Chapter 18 of this Guide.

<sup>34</sup> 10 M.R.S.A. § 1491; *see* Chapter 29 of this Guide.

<sup>35</sup> 11 M.R.S.A. § 2-316(5)(a); *see* Chapter 4 and 5 of this Guide.

<sup>36</sup> 17 M.R.S.A. § 2305; *see* Chapter 22 of this Guide.

<sup>37</sup> 29-A M.R.S.A. § 752; *see* Chapter 10 of this Guide.

<sup>38</sup> 25 M.R.S.A. § 3702; *see* Chapter 25 of this Guide.

<sup>39</sup> 10 M.R.S.A. § 1496(4); *see* Chapter 28 of this Guide.

<sup>40</sup> 29-A M.R.S.A. § 1754 (3); *see* Chapter 9 of this Guide

<sup>41</sup> 29-A M.R.S.A. § 180; *see* Chapter 11 of this Guide.

<sup>42</sup> 10 M.R.S.A. § 9100; *see* Chapter 15 of this Guide.

- S. Pawnshop Transactions<sup>43</sup>
- T. Hearing Aid Dealers<sup>44</sup>
- U. Door-to-Door Sales (Consumer Solicitation Sales Act)<sup>45</sup>
- V. Door-to-Door Home Repair Transient Contractors<sup>46</sup>
- W. Transient Sellers<sup>47</sup>
- X. Business Opportunities Sales<sup>48</sup>
- Y. Membership Camping Sales<sup>49</sup>
- Z. Timeshare Sales<sup>50</sup>
- AA. New Car Lemon Law<sup>51</sup>
- BB. Collection For Audiotext Service Charges<sup>52</sup>
- CC. Changes After Free Trial Period<sup>53</sup>

Further, if the Legislature has enacted specific consumer protection statutes (*e.g.*, the creation of Boards regulating such professions as lawyers, doctors, real estate brokers, plumbers, electricians, *etc.* (*see* Chapter 29 of this Guide), then a violation of such a statute (or rules promulgated pursuant to it) can be used as persuasive evidence that the consumer has also been a victim of a violation of the Unfair Trade Practices Act.<sup>54</sup>

The Attorney General can also issue legally enforceable *Rules* that define acts that are evidence of an unfair trade practice.<sup>55</sup> Currently, the Attorney General has issued rules regulating Lemon Law arbitration (*see* Chapter 7 of this Guide), the sale of home heating oil (*see* Chapter 19 of this Guide) and the sale of new cars (*see* Chapter 8 of this Guide). *See also* the Secretary of State's Rules dealing with window stickers when selling used cars (*see* Chapter 9 of this Guide).

## § 3. 6. Federal Unfair Trade Practices

The Maine Unfair Trade Practices Act is considered a state version of the Federal Trade Commission Act.<sup>56</sup> Thus, practices found by the F.T.C. to be unfair or deceptive are also likely to be

<sup>43</sup> 30-A M.R.S.A. § 3963(6); *see* Chapter 26 of this Guide.

<sup>44</sup> 32 M.R.S.A. §§ 1658(B)(C); *see* Chapter 21 of this Guide.

<sup>45</sup> 32 M.R.S.A. § 4670, § 4685-B; *see* Chapter 13 of this Guide.

<sup>46</sup> 32 M.R.S.A. §§ 14501-14512; *see* Chapter 13 of this Guide.

<sup>47</sup> 32 M.R.S.A. §§ 4681-4688; *see* Chapter 13 of this Guide.

<sup>48</sup> 32 M.R.S.A. § 4700(1); *see* Chapter 29 of this Guide.

<sup>49</sup> 33 M.R.S.A. § 589-C(1); *see* Chapter 29 of this Guide.

<sup>50</sup> 33 M.R.S.A. § 592(6); *see* Chapter 29 of this Guide.

<sup>51</sup> 10 M.R.S.A. § 1169(10); *see* Chapter 7 of this Guide.

<sup>52</sup> 35-A M.R.S.A. § 808; *see* Chapter 28 of this Guide.

<sup>53</sup> 10 M.R.S.A. § 1210.

<sup>54</sup> *See Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 461 A.2d 938, 943 (Conn. 1983) (the FTC had “unequivocally stated an official position that the state regulated professions, including the practice of law, are not and should not be exempt from coverage of the FTC Act”); *see also Gilmore v. Bradgate Associates, Inc.*, 604 A.2d 555, 557(N.H. 1992) (the challenged act or practice was not permitted by any regulatory board and, therefore, was not exempt from the Consumer Protection Act).

<sup>55</sup> 5 M.R.S.A. § 207(2). Legislatively authorized Rules have the force of law.

<sup>56</sup> 15 U.S.C. 45(a)(1). Maine's version is what's known as a “Little F.T.C. Act.”

violations of the Maine UTPA.<sup>57</sup> Among the consumer protection statutes or Rules enforced by the F.T.C. are:

- A. The Mail Order Rule, which requires companies to ship purchases made by mail when promised or to give consumers the option to cancel their order for a refund.
- B. The Negative Option Rule, which requires sellers who offer negative option purchase plans, such as book and record clubs, to disclose the terms of the plan and to give members at least 10 days to reject the monthly selection.
- C. The Octane Posting and Certification Rule, which requires the posting of octane ratings on gasoline dispensers.
- D. The Retail Food Store Advertising and Marketing Practices Rule, as amended, which requires advertised items to be available, unless a disclosure is made that supplies are limited, or the store offers a rain check, a comparable item or other compensation.
- E. The Franchise and Business Opportunities Rule, which requires sellers of franchises and business opportunities to give prospective buyers a disclosure document containing specific information about the franchise and any earnings claims.
- F. The Funeral Rule, which requires funeral directors to disclose price and other information about funeral goods and services.
- G. The Telemarketing Sales Rules, which prohibits deceptive phone sales.

Consumers wishing to contact the FTC can write to Correspondence Branch, FTC, Washington, DC 20580 (202-326-2000) (Web site: [www.ftc.gov](http://www.ftc.gov)).

### **§ 3. 7. UTPA Actions By Injured Consumers: Election Of Remedies**

When a consumer initiates a private unfair trade practice lawsuit<sup>58</sup> against a business, the consumer's complaint can seek either *equitable* remedies (e.g., canceling the contract and receiving back the purchase price), or the *legal* remedy of damages (see §§ 3.2, 3.9 (B)). But the consumer cannot win both of these remedies, and, if the suit is successful, may have to choose between equitable remedies and legal remedies.<sup>59</sup>

In providing an equitable remedy, the court may be voiding the contract and returning the parties to their original positions. In contrast, in ordering the legal remedy of damages, the court recognizes the basic validity of the contract, and is attempting to place the parties in the positions they would have been in had the contract been performed as agreed.

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<sup>57</sup> See 5 M.R.S.A. § 207(2), ("The Attorney General may make rules and regulations interpreting this section. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of . . . the Federal Trade Commission Act. . .").

<sup>58</sup> See generally McKenna, J., *New Rights For Maine Consumers*, 9 Maine Bar Journal 78 (March, 1994); The Private Cause of Action Under Maine's Unfair Trade Practices Act, 35 Maine Law Review 223 (1983). French, R.A., *Private Warranty Enforcement Under UTPA and Magnusson Moss Warranty Act*, 16 Maine Bar Bull.145 (1982).

<sup>59</sup> See *Harmony Homes Corp. v. Cragg*, 390 A.2d 1033 (Me. 1978) (a plaintiff may pursue inconsistent claims and recover on the basis of whichever claim produces the more favorable remedy).

Remember, in order to qualify for restitution relief under the private action portion of the UTPA, you must prove that the unfair or deceptive act (1) actually resulted in a loss of money or property and (2) a benefit was conferred on the person causing the UTPA violation.<sup>60</sup> If you are seeking only damages, you must be able to prove your actual dollar amount of damages but not that the business actually profited from its violation of the UTPA.<sup>61</sup>

## § 3. 8. Consumer Small Claims Court Action

If you are arguing your own case in Small Claims Court<sup>62</sup> (the contract must be for \$4,500 or less) and you believe you have been the victim of an unfair trade practice, you might want to show the judge a copy of this chapter and describe to him why you think your treatment has been so “unfair” or “deceptive” as to be illegal. A private UTPA action must be commenced within 6 years of the transaction.<sup>63</sup>

## § 3. 9. Selected Statutes

The Maine Unfair Trade Practices Act (UTPA) is found at 5 M.R.S.A. §§ 205-A -214. Below are portions of the statutory sections that define illegal unfair trade practices, authorize enforcement actions by the Attorney General, and allow consumers to bring private UTPA actions for restitution, other equitable relief, and their attorney fees and costs.

### A. 5 M.R.S.A. § 207(1-2). Unlawful Acts and Conduct

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.

- (1) **Intent.** It is the intent of the Legislature that in construing this section, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

<sup>60</sup> See *Parker v. Ayre*, 612 A.2d 1283, 1285 (Me. 1992) (even though the contractor used an illegal oral contract, the homeowner was not entitled to UTPA relief because the homeowner had not shown “that the materials claimed to have been furnished. . . were not in fact furnished, and that the prices therefore were not fair and reasonable”).

<sup>61</sup> See *Mariello v. Giguere*, 667 A.2d 588,590 (Me.1995).

<sup>62</sup> The Maine Unfair Trade Practices Act allows consumers to bring suits in District Court (including Small Claims Court) or Superior Court (5 M.R.S.A. § 213). Consumers can demand a jury trial in Superior Court; in Small Claims Court certain types of relief may not be available (see 14 M.R.S.A. § 7481 and Chapter 27 of this Guide).

<sup>63</sup> 14 M.R.S.A. § 752. But please note: if your claim involves a violation of the Uniform Commercial Code (e.g., a breach of the implied warranty), but the seller’s acts were not so unfair or deceptive as to also violate the UTPA you must start any court action within four years from the date of purchase (11 M.R.S.A. § 2-725; see Chapters 4 and 5 of this Guide).

- (2) **Rules and Regulations.** The Attorney General may make rules and regulations interpreting this section. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act) as from time to time amended. Evidence of a violation of a rule or regulation made by the Attorney General shall constitute *prima facie* evidence of an act or practice declared to be unlawful by this chapter in any action thereafter brought under this chapter.

### ***B. 5 M.R.S.A. § 209. Injunction Procedures***

Whenever the Attorney General has reason to believe that any person is using or is about to use any method, act or practice declared by section 207 to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice and the court may make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of any such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such act or practice.

At least 10 days prior to the commencement of any action under this section, the Attorney General shall notify the person of his intended action, and give the person an opportunity to confer with the Attorney General in person or by counsel or other representative as to the proposed action. [Excerpted]

### ***C. 5 M.R.S.A. § 213 (1-2). Private Remedies***

- (1) **Settlement offer.** At least 30 days prior to the filing of an action for damages, a written demand for relief,<sup>64</sup> identifying the claimant and reasonably describing the unfair and deceptive act or practice relied upon and the injuries suffered, must be mailed or delivered to any prospective respondent at the respondent's last known address. A person receiving a demand for relief, or otherwise a party to any litigation arising from the claim that is the subject of the court action, may make a written tender of settlement or, if a court action has been filed, an offer of judgment. If the judgment obtained in court by a claimant is not more favorable than any rejected tender of settlement or offer of judgment, the claimant may not recover attorney's fees or costs incurred after the more favorable tender of settlement or offer of judgment. The demand requirement of this subsection does not apply if the claim is asserted by way of counter claim or cross claim.

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<sup>64</sup> If a consumer fails to comply with the requirement for a "written demand for relief", it does not necessarily mean that a court will dismiss the UTPA action. See *Oceanside at Pine Point Condominium Owners Association v. Peachtree Doors, Inc.*, 659 A.2d 267, 272 (Me. 1995).

- (2) **Fees and Costs.** If the court finds, in any action commenced under this section that there has been a violation of section 207, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees,<sup>65</sup> and costs incurred in connection with said action. [Excerpted]

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<sup>65</sup> The National Consumer Law Center ([www.consumerlaw.org](http://www.consumerlaw.org)) has identified 10 consumer injuries that can lead to significant client recoveries and attorney fees:

1. **Attorneys letting collectors use their name in collection letters without first adequately reviewing the debtor's file.** Attorneys are now covered by the Fair Debt Collection Practices Act, and this and other violations can result in the collection attorney being liable for of up to \$1000 plus actual damages plus attorney fees.
2. **Credit bureaus' failure to prevent the same error from recurring in the consumer's file.** As many as 50 million consumers have inaccurate credit records, and a reporting agency's failure to take appropriate steps to permanently correct errors can result in a consumer's recovery under the FCRA for actual and punitive damages and attorney fees.
3. **Loan flipping and rip-off second mortgages.** Frequent flipping of consumers into new loans often makes a bad deal even worse. Second mortgages related to debt consolidation or home repairs may contain outrageous terms. Consumer attorneys are finding new ways to stop foreclosures cancel loans and recover hefty damages and attorney fees for these and others examples of lender overreaching.
4. **Sellers jacking up the cash price for high-risk debtors.** This and other types of hidden finance charges (such as junk fees, fictitious broker's fees, or bogus insurance) violate the Truth In Lending Act (TILA) and state credit statutes, and can lead to \$1000 or more in statutory damages, actual damages and attorney fees.
5. **Pursuing collection contacts, lawsuits, garnishments, or repossessions despite the bankruptcy stay or discharge.** Violations of the automatic stay or bankruptcy discharge can lead to actual and punitive damages and attorney fees.
6. **Car lessors withholding interest on security deposits or mis-disclosing early termination penalties, purchase options, trade-ins, taxes, or warranties.** These and related practices can all violate the Consumer Leasing Act and can result in \$1000 statutory damages, actual damages and attorney fees.
7. **Faulty notice of or commercially unreasonable conduct of a repossession sale.** These are just some of the wide array of defenses to an auto loan deficiency action that can result in a net recovery of thousands of dollars *for the consumer* and, in many cases, attorney fees for the consumer's attorney.
8. **An astonishing percentage of used car sales involve reset odometers, salvaged vehicles, or lemon laundering!** These violations can lead to \$1,500 minimum damages, treble damages, punitive damages, and attorney fees.
9. **Contracts providing that a lease, future service contract, or other transaction cannot be canceled or that a dealer is not subject to the oral promises of its employees.** These and similar attempts to limit consumer rights are unfair and deceptive, and can lead to consumer recoveries of multiple, statutory, or punitive damages and attorney fees under a state Unfair and Deceptive Acts and Practices (UDAP) statute.
10. **Requiring a spouse to co-sign a loan.** The Equal Credit Opportunity Act limits a lender's ability to require a spouse to co-sign a loan and also requires lenders to promptly notify the consumer of any denial of credit. Violations lead to actual damages (such as the amount of the co-signer's obligation), punitive damages, and attorney fees.

## § 3. 10. Sample UTPA Request For Damages From Seller<sup>66</sup>

Date

Name of Merchant

Merchant's Address

Dear Merchant:

Under the provisions of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 213, I hereby make written demand for relief as outlined in that statute.

On or about [date], the following breach of contract and unfair or deceptive act occurred:

[Explain what happened.]

I believe your actions in this matter violate the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207.

As a result of this unfair or deceptive act or practice, I suffered injury or loss of money or property [real or personal] as follows:

[Indicate injury or money or property loss.]

Therefore, I hereby demand the following relief:

[Indicate the relief, or payment for damages, which you seek.]

The Maine Unfair Trade Practices Act gives you the opportunity to make a good faith response to this letter within thirty (30) days. Your failure to do so could subject you to damages; attorney's fee and costs if I decide to institute legal action.

Sincerely,

Your name

Your address

Your telephone number

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<sup>66</sup> See *Oceanside at Pine Point Condominium Owners Association v. Peachtree Doors, Inc.*, 659 A.2d 267 (Me. 1995) (failure to comply with notice requirement did not necessarily preclude UTPA action).

## § 3.11. Sample UTPA Superior Court Complaint<sup>67</sup>

### A. *Robert Homeowner's Dispute with XYZ Home Construction*

On May 14, 1996 Robert Homeowner contracted with XYZ Home Construction to build an addition to his home. Homeowner had decided to add a large bedroom and complete bathroom. This addition was to be used during the coming winter by Homeowner's mother-in-law, who was taking up residence with his family.

After discussing in detail the construction plans, XYZ presented Homeowner with a written contract that set forth the total price, a description of the work, and an estimated completion date of September 1, 1996. The written contract also provided the following express warranty:

XYZ Home Construction warrants the quality of its workmanship and materials for 12 months following completion of this contract. The parties agree that if this warranty is breached, XYZ will provide all necessary materials at no cost to customer while the homeowner will pay the total cost of any XYZ labor. This warranty and remedy is the only warranty provided the customer. Any implied warranty is hereby disclaimed.

The contract also required that at the completion of the work that the customer must carefully inspect all aspects of the work and certify that the workmanship and materials were acceptable in every way.

During the summer of 1996, Homeowner was recovering from various ailments suffered as a catcher for Not My Fault, a team in the local YMCA softball league. Mr. Homeowner discussed with XYZ the possibility of replacing the addition's shower with a bathtub/whirlpool. After checking with local suppliers XYZ explained to Homeowner that such a change would cost him an additional \$2,000.00 due to the cost of the whirlpool and necessary strengthening of the floor.

In September 1996, the addition was completed and Homeowner carefully inspected the work and certified it as acceptable. His mother-in-law shortly thereafter moved in. A few weeks later, Homeowner received the final bill from XYZ. He noticed immediately that the whirlpool was billed at a total cost of \$3,000.00 as opposed to the agreed upon \$2,000.00.

Homeowner angrily called up XYZ and demanded a reduction. XYZ refused, telling Homeowner that the whirlpool was so heavy it had required an additional \$1,000.00 worth of work in strengthening the floor. He stated that he had mentioned to Homeowner that this problem might occur but, apparently, Homeowner had ignored his warning.

Homeowner demanded that they seek a neutral arbitrator to resolve the difference, but XYZ refused. Faced with a possible lien, Mr. Homeowner paid XYZ's bill but promised that this matter was not resolved. He was going to seek legal advice.

In a meeting with his lawyer, Homeowner was advised that the \$1,000.00 dispute could best be resolved in Small Claims Court and that Homeowner would not need to hire a lawyer. At about the same time, however, Homeowner's mother-in-law began complaining about how cold and drafty the addition was.

Homeowner then hired John H., a professional home inspector, to examine XYZ's work. Upon close inspection, John H. found that only one half of the agreed upon insulation had been placed between the walls. John H. estimated it would cost an additional \$4,000.00 to adequately insulate the addition.

Upon hearing this news, Homeowner's attorney decided that Small Claims Court was no longer a viable option and suggested that Homeowner hire him to write to XYZ Home Construction and demand both the cost of repairing the insulation and the \$1,000.00 Mr. Homeowner was overcharged for the whirlpool. Homeowner agreed and the damages demand letter was sent (*see* § 3.10).

XYZ adamantly refused to provide any relief, claiming that Homeowner had ignored his warning on the bathtub/whirlpool and that Homeowner had already certified the insulation as acceptable. Homeowner then directed his lawyer to research and draft a legal complaint. Here is the lawyer's proposed complaint:

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<sup>67</sup> Please note: while not developed in this hypothetical case, the Home Construction Contracts Act also requires certain disclosures concerning insulation and energy standards. *See* 10 M.R.S.A. § 1487 (11-12).

***B. Robert Homeowner’s UTPA Court Complaint Home Construction***

STATE OF MAINE  
KENNEBEC, SS.

ROBERT HOMEOWNER,	*	
Plaintiff	*	COMPLAINT
v.	*	(Illegal Contract and Unfair Trade Practice)
XYZ HOME CONSTRUCTION,	*	
Defendant	*	

NOW COMES the Plaintiff through his attorney, and states as follows:

**INTRODUCTION**

1. This is an action under the Maine Unfair Trade Practices Act, 5 M.R.S.A. §§ 206-214 (1989 and Supp. 1996) and the Maine Home Construction Contracts Act, 10 M.R.S.A. §§1486-1490 (Supp.1996).

**STATUTORY BACKGROUND**

**Maine Unfair Trade Practices Act**

2. The operative provision of the Maine Unfair Trade Practices Act (UTPA), 5 M.R.S.A. § 207, renders it unlawful to engage in any unfair or deceptive action practices in the conduct of any trade or commerce. The UTPA authorizes a private action pursuant to 5 M.R.S.A. § 213 if the plaintiff has purchased “goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal as a result” of an unfair trade practice. The UTPA allows injured consumers both equitable remedies and damages. Damages are allowed pursuant to 5 M.R.S.A. § 213(1-A), which required that the Plaintiff make a written demand for relief before commencing a court action.

**Maine Home Construction Contracts Act**

3. The Maine Home Construction Contracts Act, 10 M.R.S.A. §§ 1486-1490, requires a builder who has contracted to build, remodel or repair a residence for more than \$1,400 to use a written contract, and, if necessary, change orders that have specific consumer protection provisions, including, (A) a mandatory express warranty, (B) an optional section allowing the parties to agree to resolve disputes through arbitration or mediation, and (C) a statement which requires the contractor to use a separate written Change Order if the parties agree to an alteration in the contract that will change the originally agreed upon contract price. Violation of this Act is prima facie evidence of a violation of the Maine Unfair Trade Practices Act.

## FACTS

4. On May 15, 1996 the Plaintiff contracted with the Defendant to build an addition to his home. A copy of the parties' contract is attached as Appendix A.

5. The parties entered into a written contract that set forth the total price, a description of the work, and an estimated completion date of September 1, 1996.

6. The written contract also provided the following express warranty:

XYZ Home Construction warrants the quality of its workmanship and materials following the completion of this contract. The parties agree that if this warranty is breached, XYZ will provide all necessary materials at no cost to the customer while the homeowner will pay the total cost of any XYZ labor. This warranty and remedy is the only warranty provided the customer. Any implied warranty is hereby disclaimed.

7. On or about July 6, 1996, the Plaintiff and the Defendant orally agreed to a change in the construction contract. This agreed upon change was that the Defendant would replace the addition's shower with a bathtub/whirlpool, at an additional cost of \$2,000. No written Change Order was executed. On September 1, 1996 the addition was completed and the Plaintiff inspected the work and certified it as acceptable.

8. Within two weeks of acceptance of the addition, the Plaintiff received his final bill from the Defendant. This final bill charged \$3,000 for the bathtub/whirlpool, instead of the agreed upon \$2,000.

9. The Defendant refused to reduce the price and the Plaintiff demanded that they seek a neutral arbitrator to resolve their differences; however, the Defendant refused.

10. On September 28, 1996, the Plaintiff paid to the Defendant his final bill, including the contested \$1,000 increase in the cost of the bathtub/whirlpool.

11. On October 15, 1996, in response to complaints concerning poor insulation in the new addition, the Plaintiff hired John H., a professional home inspector to examine the insulation used in the addition. John H. concluded that only one-half of the agreed upon insulation had been placed between the walls and that to repair this substantial defect would cost an additional \$4,000.

12. On October 25, 1996, the Plaintiff, through his attorney, sent a letter to the Defendant requesting his damages for the above breaches of contract and unfair trade practices and declaring that failure to pay would result in a lawsuit for breach of contract and violation of the Maine Unfair Trade Practices Act. A copy of this letter is attached as Appendix B.

## COUNT I

### Unfair Trade Practice Act Violation

13. Plaintiff repeats, re-alleges and incorporates herein by reference paragraphs 1 through 12 of this Complaint.

14. The Defendant's failure to adequately insulate the addition was a significant breach of contract and has cost the Plaintiff loss of money and property.

15. The Defendant's conduct as described in this Count constitutes an unfair trade practice in violation of 5 M.R.S.A. §207.

## COUNT II

**Violation of Home Construction Contracts Act Violation**

16. Plaintiff repeats, re-alleges, and incorporates herein by reference paragraphs 1 through 15 of this Complaint.

17. The Defendant's written construction contract is in violation of the Maine Home Construction Contract Act in that, in violation of 10 M.R.S.A. §1487, it fails to provide in its written contract the provisions required by this statute, including:

A. An express warranty statement which reads:

In addition to any additional warranties agreed to by the parties, the contractor warrants that the work will be free from faulty materials; constructed according to the standards of the building code applicable for this location; constructed in a skillful manner and fit for habitation or appropriate use. The warranty rights and remedies set forth in the Maine Uniform Commercial Code apply to this contract.

B. A resolution of dispute section which allows the parties to adopt one of three methods of resolving contract disputes: binding arbitration, non-binding arbitration, or mediation.

C. A change order statement which reads:

Any alteration or deviation from the above contractual specifications that results in a revision of the contract price will be executed only upon the parties entering into a written change order.

D. A statement as to whether the building will meet state minimum energy efficiency standards for new residential construction.

18. The Plaintiff has suffered a loss of property or money due to the Defendant's failure to use a contract that meets the requirements of the Maine Home Construction Contracts Act for the following reasons:

A. The parties agreed to a change in the contract but the contractor did not execute a written Change Order as required by 10 M.R.S.A. § 1488 and as a result, the Plaintiff paid \$1,000 more than he had orally agreed to pay.

B. The Defendant's contract warranty is significantly inferior to the statutory warranty that the Plaintiff would have received if the contractor had adhered to the Maine Home Construction Contract Act.

C. The Plaintiff has had to spend considerable funds in order to prosecute this matter through the courts when the Plaintiff could have utilized, at much less expense, either arbitration or mediation, to resolve this dispute.

19. The Plaintiff did not agree to exempt himself and the Defendant from the rights and obligations of 10 M.R.S.A. §§ 1486-1490.

20. The Defendant's conduct, as described in this Count, constitutes an unfair trade practice in violation of 5 M.R.S.A. § 207 and 10 M.R.S.A. §§ 1487 and 1488.

**COUNT III****Construction Fraud and Unfair Trade Practice**

21. Plaintiff repeats, re-alleges and incorporates herein by reference paragraphs 1 through 20 of this Complaint.

22. The Defendant knowingly misrepresented to the Plaintiff that insulation had been installed as required by the contract.

23. In fact, the Defendant installed only 50% of the insulation required by the contract and thereby caused a substantial defect.

24. The Plaintiff relied on the Defendant's representations concerning the insulation with the result that it will cost the Plaintiff at least \$4,000 to install insulation that will meet the requirements agreed to in the contract.

25. By refusing to properly install the insulation, the Defendant has breached implied warranties and the statutory warranty of good workmanship created by 10 M.R.S.A. § 1487(7).

26. The Defendant's conduct, as described in this Count, constitutes both illegal fraud and an unfair trade practice in violation of 5 M.R.S.A. § 207.

**REQUEST FOR RELIEF****Plaintiff requests this court to enter the following relief:**

1. Order the Defendant to provide restitution of \$1,000 for the amount he overcharged the Plaintiff for a bathtub/whirlpool, in violation of their oral change order of their construction contract.

2. Order the Defendant to install, at no cost, the amount of insulation agreed upon in the parties' contract or pay the Plaintiff \$4,000 in damages.

3. Find that the Defendant's act and practices are in violation of the Home Construction Contracts Act, 10 M.R.S.A. §§ 1486-1490 and the Maine Unfair Trade Practices Act, 5 M.R.S.A. §§ 207, 213 and order the Defendant to pay the Plaintiff costs of this action, including reasonable attorney's fees.

4. Order the Defendant to henceforth use, when appropriate written contracts that meet the requirements of the Maine Home Construction Contracts Act, 10 M.R.S.A. §§ 1486-1490.

5. Order such other relief as may be necessary to ameliorate the effects of the Defendant's unfair and deceptive practices.