

## Week 4 – UTPA

- 5:30 Today's agenda
  - Course review
  - Class actions (cont.)
  - Quiz
- 6:00 Break
  - UTPA elements chart
  - Fee shifting chart
  - Damages chart
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  - Statute of limitations chart
  - Parrott v. Carr Chevrolet*
  - Punitive damages
- 6:45 Speaker: Young Walgenkim

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*Parrott v. Carr Chevrolet*

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# Course Review

Group Discussions	Less	Same	More
Use of Multiple Choice Quizzes	Less	Same	More
Guest Speakers	Less	Same	More
Personal War Stories	Less	Same	More
Class Breaks	Less	Same	More
Substantive Case Law Readings	Less	Same	More
Use of Video News Stories from Local Cases	Less	Same	More
Use of Profanity	Less	Same	More
Liberal-Leaning Plaintiff-Lawyer Agenda	Less	Same	More
Suggestions:			

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# In re Hyundai (9th Cir. Jan. 23, 2018)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**IN RE HYUNDAI AND KIA FUEL  
ECONOMY LITIGATION,**

No. 15-56014  
D.C. No.  
2:13-mj-02424-  
GW-FFM

KEHLIE R. ESPINOSA; NICOLE MARIE  
HUNTER; JEREMY WILTON;  
KAYLENE P. BRADY; GUNTHER  
KRAUTH; ERIC GRAEWINGHOLT;  
REECE PHILIP THOMSON; ALEX  
MATURANI; NILUFAR REZAEI; JACK  
ROTTNER; LYDIA KIEVIT; REBECCA  
SANDERS; BOBBY BRANDON  
ARMSTRONG; SERGIO TORRES;  
RICHARD WOODRUFF; MARSHALL  
LAWRENCE GORDON; JOEL A.  
LIPMAN; JAMES GUDGALLS; MARY P.  
HOESSLER; STEPHEN M. HAYES;  
BRIAN REEVES; SAM HAMMOND;  
MARK LEGGITT; EDWIN NAYTHONS;  
MICHAEL WASHBURN; IRA D.  
DUNST; BRIAN WEBER; KAMNHEEL  
MAHARAJ; KIM KOCOVOSZ;  
HERBERT J. YOUNG; LINDA HASPER;  
LESLIE BAYARD; TRICIA FELLERS;  
ORLANDO ELLIOTT; JAMES  
BONSIGNORE; MARGARET SETSER;  
GUILLERMO QUIROZ; DOUGLAS  
KURASHI; ANDRES CARULLO; LAURA  
S. SUTTA; GEORGIA L. THOMAS;

IN RE HYUNDAI AND KIA FUEL ECON. LITIG. 19

SUMMARY\*

Class Action

The panel vacated the district court's order granting class certification in a nationwide class action settlement arising out of misstatements by defendants Hyundai Motor America, Inc. and its affiliate, Kia Motors, Inc., regarding the fuel efficiency of their vehicles; and remanded for further proceedings.

The district court had jurisdiction under the Class Action Fairness Act ("CAFA"). In June 2015, the district court gave its final approval of the class settlement. Objectors brought five consolidated appeals raising challenges to class certification, approval of the settlement as fair and adequate, and approval of attorneys' fees as reasonable in proportion to the benefit conferred on the class.

The panel held that the district court abused its discretion in concluding that common questions predominated, and in certifying the settlement class under Fed. R. Civ. P. 23(b)(3). The panel noted that Rule 23(b)(3)'s predominance inquiry was far more demanding than Rule 23(a)'s commonality requirement. The panel further noted that where plaintiffs bring a nationwide class action under CAFA and invoke Rule 23(b)(3), a court must consider the impact of potentially varying state laws. Finally, in determining whether predominance was defeated by variations in state law, the

\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Re: CenturyLink Alabama Leads



**Bonner Walsh**

to me ▾

Jan 26 (2 days ago) ☆



I personally know everyone in that and am playing damage control to the extent possible. Even know Jimmy Feinman who was the objector. It is a clusterfuck

**Bonner C. Walsh**  
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bonner@walshpllc.com

**WALSH**  
P L L C  
*Washington, Idaho, Texas*

**WALSH**  
L L C  
*Oregon*

On 1/26/2018 9:29 AM, Michael Fuller wrote:

I have to hop off the call for a DOJ conference soon.

FYI just in case you didn't see the 9th Circuit **Hyundai** opinion Tuesday:

<http://cdn.ca9.uscourts.gov/datastore/opinions/2018/01/23/15-56014.pdf>

Michael Fuller  
Partner  
Olsen Daines PC  
[503-201-4570](tel:503-201-4570)



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Under *Concepcion*, why was California's Discover Bank rule pre-empted by the Federal Arbitration Act?

## Under Concepcion, why was California's Discover Bank rule pre-empted by the Federal Arbitration Act?

All of the below

The rule permitted consumers to demand classwide arbitration ex post

The rule didn't fall under the FAA's saving clause

The rule interfered with arbitration



In ***BMS***, why couldn't the plaintiffs certify a national class action in California?

## In BMS, why couldn't the plaintiffs certify a national class action in California?

All of the below

There was no link between California and the non-California class members

Defendant was not a resident of California

The state court lacked general jurisdiction over the defendant

The state court lacked specific jurisdiction over the defendant



In *Pearson*, how did Philip Morris allegedly violate the UTPA?

## In Pearson, how did Philip Morris allegedly violate the UTPA?

by misrepresenting that  
Marlboro Lights deliver less  
tar than regular Marlboros

by misrepresenting the actual  
price of Marlboro Lights

by charging the same for  
Marlboro Lights as regular  
Marlboros



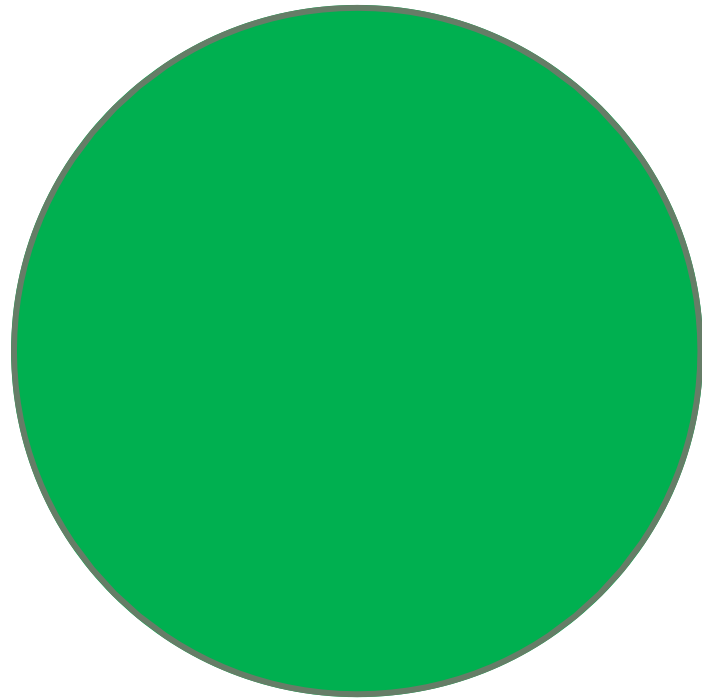
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Class Break  
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# UTPA Elements

To prevail on a claim under the UTPA, a plaintiff must prove (1) an unfair trade practice, (2) causation, and (3) ascertainable loss.

*Gomez v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 36564, \*26, (D. Or. Mar. 19, 2012)

# UTPA Elements Chart

## Unlawful Trade Practice

- Violation must be listed at ORS 646.608(1) or an OAR
- Violations must be “willful”

## Causation

- Damages must be directly caused by defendant’s unlawful trade practice

## Ascertainable Loss

- Plaintiff must usually suffer economic harm

# UTPA Elements

“**Willful**” means a defendant knew or should have known its conduct violated the UTPA.

*Adamson v. Worldcom Communs., Inc.* 190 Or App 215, 277 (2003)



# UTPA Elements

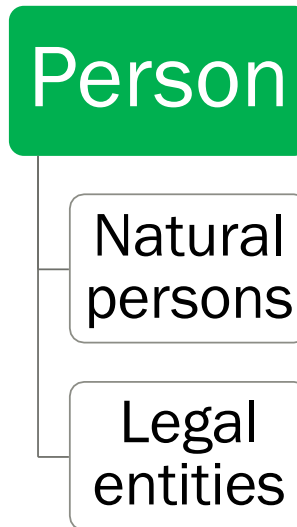
(1) A person engages in an unlawful practice **if in the course of the persons business, vocation or occupation** the person does any of the following:

ORS 646.608(1)

# UTPA Elements

(4) **Person** means **natural persons, corporations**, trusts, partnerships, incorporated or unincorporated associations and **any other legal entity** except bodies or officers acting under statutory authority of this state or the United States.

ORS 646.605(4)



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# Unlawful Trade Practices Act

“The court may award **reasonable attorney fees and costs** at trial and on appeal to a **prevailing plaintiff** in an action under this section. The court may award reasonable attorney fees and costs at trial and on appeal to a prevailing defendant only if the court finds that an objectively reasonable basis for bringing the action or asserting the ground for appeal did not exist.”

ORS 646.638(3)

# Fee Shifting Chart

CONSUMER LAW	STATUTORY AUTHORITY	AMERICAN RULE	PREVAILING PLAINTIFF	PREVAILING PARTY
UTPA	ORS 646.638(3)		✓	
FCRA	15 U.S.C. § 1681o(a)(2)		✓	
FDCPA	15 U.S.C. § 1692k(a)(3)		✓	
TCPA	47 U.S.C. § 227(b)(3)	✓		
ORLTA	ORS 90.255			✓

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# Damages Chart

CONSUMER LAW	STATUTORY AUTHORITY	EMOTIONAL HARM	ECONOMIC LOSS	STATUTORY DAMAGES	PUNITIVE DAMAGES
UTPA	ORS 646.638		✓	✓	✓
FCRA	15 U.S.C. § 1681n	✓	✓	✓	✓
FDCPA	15 U.S.C. § 1692k	✓	✓	✓	
TCPA	47 U.S.C. § 227(b)(3)		✓	✓	
ORTLA	ORS 90 et seq.		✓		

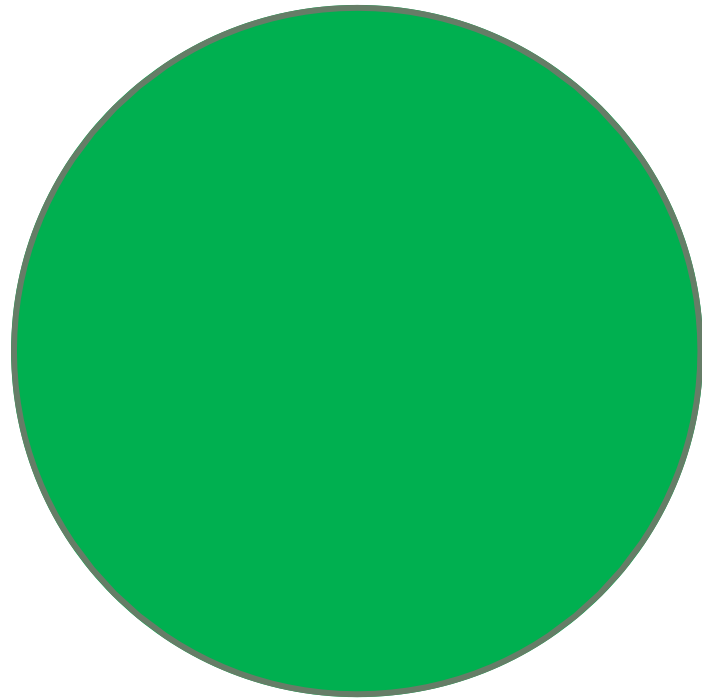
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# Statute of Limitations Chart

CONSUMER LAW	STATUTORY AUTHORITY	ONE YEAR	TWO YEARS	THREE YEARS	FOUR YEARS
UTPA	ORS 646.638	✓			
FCRA	15 U.S.C. § 1681n		✓		
FDCPA	15 U.S.C. § 1692k	✓			
TCPA	28 U.S.C. § 1658				✓
ORLTA	ORS 90 et seq.	✓			

# Statute of Limitations under the UTPA

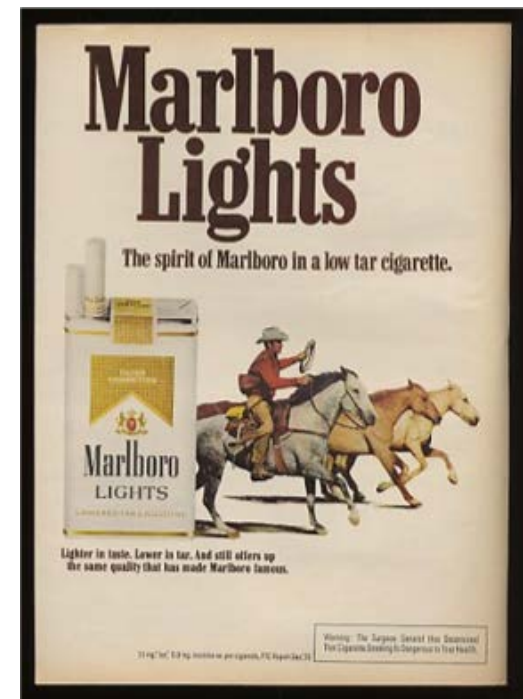
“Actions brought under this section must be commenced **within one year after the discovery** of the unlawful method, act or practice.”

ORS 646.638(6)



## *Pearson v. Philip Morris, Inc.*

- ✓ In 1971, a consumer bought a pack of Marlboro Lights. The pack falsely claimed light cigarettes were lower in tar than regular cigarettes.
- ✓ In 1980, she read a public report warning about tar levels in light cigarettes.
- ✓ In 1990, she read a warning on a pack of Marlboro Lights that tar delivery may vary.
- ✓ In 2002, she learned of a class action UTPA lawsuit against Marlboro based on tar levels.





When did the **statute of limitations**  
begin to run?

## When did the statute of limitations begin to run?



# UTPA Statute of Limitations

“As we have already described, ... a private UTPA action must be brought within one year from the discovery of the unlawful trade practice on which it is based. Because the limitation period is tied to the plaintiff's "discovery" of the unlawful conduct, it runs in this case **from when ... the plaintiff class either actually knew or should have known that the representation that Marlboro Lights were lower in tar and nicotine was not true.**”

*Pearson v. Philip Morris, Inc.*, 358 Or. 88, 137 (2015)

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Caution  
As of: January 28, 2018 8:58 PM Z

### Parrott v. Carr Chevrolet, Inc.

Supreme Court of Oregon

September 8, 1999, Argued and Submitted; January 11, 2001, Filed  
SC 543916, 543917 (Cases Consolidated For Argument And Decision)

#### Reporter

331 Ore. 537 \*, 17 P.3d 473 \*\*, 2001 Ore. LEXIS 1 \*\*\*

MARK PARROTT, Petitioner on Review, and CHARLES FORSHEY, Plaintiff, v. CARR CHEVROLET, INC., an Oregon corporation, Respondent on Review. MARK PARROTT, Respondent on Review, and CHARLES FORSHEY, Plaintiff, v. CARR CHEVROLET, INC., an Oregon corporation, Petitioner on Review.

Subsequent History: Reconsideration denied by Parrott v. Carr Chevrolet, Inc., 2001 Ore. LEXIS 223 (Or. Mar. 27, 2001).

Related proceeding at Carr Chevrolet, Inc. v. Am Hardware Mut Ins Co., 2003 U.S. Dist. LEXIS 25631 (D. Or. May 19, 2003).

Prior History: [\*\*\*1] CC C93-0873CV; CA A88512. On review from the Court of Appeals.

Parrott v. Carr Chevrolet, Inc., 158 Or. App. 257, 963 P.2d 440, 1998 Or. App. LEXIS 1560 (1998).

Disposition: The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court with instructions to reinstate the jury's \$ 1 million punitive damages award.

#### Core Terms

award of punitive damages, punitive damages, jury's, rational jury, trial court, judicial review, post-verdict, odometer, grossly, requirements, reviewing court, factors, notice, misconduct, guideposts, provides, new trial, discrepancy, re-examined, defendants conduct, no evidence, reprehensibility, inspection, disclose, damages, missing, ratio, motion for a new trial, federal constitution, emission control

\* Appeal from Washington County Circuit Court, Michael J. McElhinney, Judge, 158 Or. App. 257, 963 P.2d 440 (1998).

Michael Fuller

#### Case Summary

##### Procedural Posture

In an action brought by plaintiff against defendant in which plaintiff alleged defendant violated the Unlawful Trade Practices Act, both parties appealed a judgment of the Oregon Court of Appeals reversing trial court's reduction of \$ 1 million punitive damages award and remanding with instructions to enter judgment allowing defendant's motion for new trial unless plaintiff filed a remittitur of punitive damages in the amount of \$ 300,000.

##### Overview

This case arose from defendant's sale of a used motor vehicle to plaintiff. The jury returned a verdict for plaintiff and awarded \$ 11,496 in compensatory damages and \$ 1 million in punitive damages. The trial court reduced the punitive damages award to \$ 50,000, but the appellate court directed the trial court to grant defendant's motion for new trial unless plaintiff filed a remittitur of punitive damages in the amount of \$ 300,000. Defendant challenged the jury's \$ 1 million punitive damages award as excessive. The primary issue on review was the appropriate standard for post-verdict judicial review of a punitive damages award. The Oregon Supreme Court held that the jury's \$ 1 million award of punitive damages was within the range that a rational juror would have been entitled to award, it concluded that plaintiff established that defendant's misconduct was part of its day-to-day business dealings and was not limited to the sale of the vehicle to plaintiff and that defendant's conduct was highly reprehensible. The jury's punitive damages award was not grossly excessive in violation of the Due Process Clause of U.S. Const. amend. XIV.

##### Outcome

Judgment affirmed in part and reversed in part, and the case was remanded to the trial court with instructions to reinstate jury's \$ 1 million punitive damages award. Jury's punitive damages award was not grossly excessive, as the award was within the range that a rational juror would have been

331 Ore. 537, \*543; 17 P.3d 473, \*\*478; 2001 Ore. LEXIS 1, \*\*\*8

Page 9 of 18

pointed out that that statement was inconsistent with the missing air cleaner, defendant gave him a "we owe" statement for that missing piece of equipment. The Buyer's Order, in contrast, included a typewritten section stating that the dealership had not inspected the vehicle and had no knowledge of the vehicle's condition, the accuracy of the odometer, or Department of Environmental Quality (DEQ) certification. After he had completed all the paperwork, plaintiff drove the Suburban home.

Shortly thereafter, plaintiff discovered multiple problems with the Suburban, including several missing pieces of emission control equipment, not only the air cleaner. <sup>6</sup> Through his own investigation, plaintiff also discovered that it was [\*\*\*9] impossible to bring the Suburban into DEQ compliance because of the missing equipment and a difference in age between the Suburban and its engine. Plaintiff noticed that the Vehicle Identification Number (VIN) located on the door, which should have matched with the VIN in the glove box, had been removed. He also noticed that there were white lines between the numbers on the odometer. Plaintiff conducted his own title search and learned through the Department of Transportation, Driver and Motor Vehicle Services (DMV), that the Suburban previously had been damaged in California and that it had a "title brand," which meant that the Suburban's title had a notation indicating that it had been damaged severely, totaled, or stolen. Once plaintiff's insurer learned about the branded title, it no [\*\*\*44] longer would provide comprehensive insurance for the Suburban.

[\*\*\*10] When plaintiff complained to defendant, defendant's employees told plaintiff that repair was his problem because he had purchased the Suburban "as is." They also told him that the Suburban's engine did not require DEQ equipment and that, regardless of that fact, he should not worry about DEQ compliance, because the registration was valid for another two years. At one point, a salesperson told plaintiff that defendant would replace the engine, but with junkyard parts. Ultimately, negotiations between plaintiff and defendant for a replacement vehicle failed when one of defendant's salespeople yelled at plaintiff, telling him that the Suburban was "unfixable" and that he would have to "learn to live with it" unless he agreed to a refund of \$ 3,100 --an amount equivalent to his down payment but that did not include reimbursement for the value of his trade-in or his loan and insurance fees. Negotiations between plaintiff and defendant's attorney for rescission of the transaction also failed.

<sup>6</sup> One of plaintiff's expert witnesses testified that the emission control equipment missing from the Suburban included an air cleaner, an exhaust gas recirculation system, and an air pump.

Michael Fuller

As a result, plaintiff filed this action against defendant, alleging, among other things, that defendant had violated the UTPA by willfully selling the Suburban.

- \*1) Falsely claiming it [\*\*\*11] was equipped with proper emission controls;
- \*2) Falsely representing it had been driven 100,608 miles;
- \*3) With defaced or missing VIN numbers in violation of Oregon law;
- \*4) Without disclosing that the emission control equipment had been removed; and
- \*5) Selling the vehicle without disclosing it had previous out of state damage."

At trial, plaintiff proved that defendant had known about the condition of the Suburban when defendant sold it to plaintiff. When defendant had acquired the Suburban as a trade-in from Myers, Myers had provided defendant with a temporary registration form as proof of ownership. It was clear from examining Myers's temporary registration form [\*\*\*48] that someone had altered it in [\*\*\*479] an attempt to conceal that it had expired. Plaintiff's experts testified that no used car dealership would accept the expired document as proof of ownership without confirmation from DMV. The Monday after Myers had brought the Suburban to defendant, someone had requested and received a Basic Vehicle Information sheet from a DMV field office. That document confirmed that Myers was the registered owner of the Suburban, that the Suburban had an odometer discrepancy, and that the Suburban [\*\*\*12] had received "out-of-state damage - CA."

Preble, co-owner and chairman of the board of Carr Chevrolet, acknowledged at trial that, as proof of ownership, Myers's temporary registration form was a "flimsy document" and that, consequently, defendant had asked Myers to sign a "Secure Power of Attorney." A Secure Power of Attorney is a DMV form that dealers use when the owner of a vehicle has lost a title or the title is in the possession of a security interest holder. The form authorized defendant to transfer title from Myers to the new owner, in this case, plaintiff. One purpose of the form is to protect customers, like plaintiff, from an odometer discrepancy. Although Myers had filled out Part A of the Secure Power of Attorney, defendant never completed Parts B and C. Had defendant completed the Secure Power of Attorney when it sold the Suburban to plaintiff, plaintiff would have learned about the odometer discrepancy before completing the transaction.

In addition to the Secure Power of Attorney, Myers also had filled out, albeit incompletely, a "Secure Odometer Disclosure/Reassignment" form for his trade-in vehicles. Plaintiff's expert testified that the only reason that a



In *Parrott*, **which consumer law** provided for punitive damages?



## In Parrott, which consumer law provided for punitive damages?





In *Parrott*, **how did the defendant** violate the UTPA?

## In Parrott, how did the defendant violate the UTPA?

All of the below

lying about the Suburban's  
mileage

failing to disclose the  
Suburban's prior damage

lying about the Suburban's  
emission controls



In *Parrott*, what was the jury verdict?

## In Parrott, what was the jury verdict?

\$11,496 actual  
damages, \$1 million  
punitive damages

\$11,496 actual  
damages, \$50,000  
punitive damages

\$11,496 actual  
damages, \$300,000  
punitive damages



In *Parrott*, **what Constitutional authority** did defendant rely on?

## In Parrott, what Constitutional authority did defendant rely on?

5th  
amendment

9th  
amendment

10th  
amendment

14th  
amendment

# Punitive Damages

“Perhaps the most important indicium of the reasonableness of a punitive damages award is the **degree of reprehensibility of the defendant's conduct.**”

BMW v. Gore, 517 U.S. 559, 575 (1996)

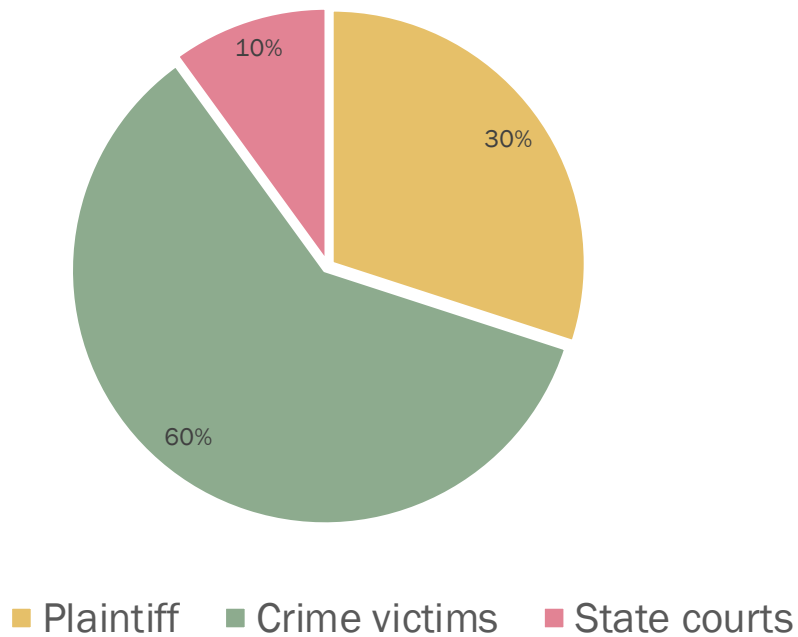


# Punitive Damages

“The ... three "guideposts" to consider when evaluating ... punitive damages ... (1) the **degree of reprehensibility** of the defendant's conduct; (2) the disparity between the punitive damages award and the **actual or potential harm inflicted**; and (3) the **civil and criminal sanctions** provided for comparable misconduct.”

*Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 550 (2001) (citing *BMW v. Gore*)

# Distribution of Punitive Damages



ORS 31.735

# Distribution of Punitive Damages

- In the **BP debit fee class action**, David Sugerman filed a UTPA action in state court and did not demand punitive damages from the jury.
- In **Miller v Equifax**, Justin Baxter filed a FCRA action in federal court and recovered \$18 million in punitive damages from the jury.
- Did **ORS 31.725** affect their decision-making process?

## Week 4 – UTPA

- 5:30 Today's agenda
  - Course review
  - Class actions (cont.)
  - Quiz
- 6:00 Break
  - UTPA elements chart
  - Fee shifting chart
  - Damages chart
- 6:30 Break
  - Statute of limitations chart
  - Parrott v. Carr Chevrolet*
  - Punitive damages**
- 6:45 Speaker: Young Walgenkim

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*Parrott v. Carr Chevrolet*  
Punitive damages
- 6:45 **Speaker: Young Walgenkim**

## Next Week – UTPA (cont.)

- 5:30 Today's agenda
  - Course review results
  - Punitive damages (cont.)
  - Pop quiz
- 6:00 Break
  - ORS 646.608
  - Common UTPA violations
- 6:45 Break
  - Speaker: Pilar French