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THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT AND THE VOID-FOR-VAGUENESS DOCTRINE

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INTRODUCTION

The South Carolina Unfair Trade Practices Act (UTPA)[1] is South Carolina's version of model legislation developed by the Federal Trade Commission (FTC) and adopted by the Committee on Suggested State Legislation of the Council on State Governments.[2] The UTPA has its roots in the Federal Trade Commission Act (FTC Act).[3] Both prohibit unfair methods of competition and "unfair or deceptive acts or practices" in commerce.[4]

No private cause of action exists under the federal act.[5] The FTC encourages state adoption of legislation such as the UTPA ("Little FTC Acts") because it does not have the resources to police unfair acts or practices. Thus, the FTC Act and individual state acts are designed to be complementary. State acts provide private causes of action for abusive commercial practices at the local level, referring to the federal act for guidance. The operative portion of the UTPA provides:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are

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1. S.C. CODE ANN. §§ 39-5-10 to -160 (Law. Co-op. 1976).

2. *See generally* Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?*, 33 S.C.L. REV. 479 (1982).

3. 15 U.S.C.A. § 45 (West 1973 & Supp. 1988).

4. The federal act prohibits unfair or deceptive acts or practices "in or affecting commerce," *id.* § 45(a)(1), while the UTPA prohibits such activity "in the conduct of any trade or commerce." S.C. CODE ANN. § 39-5-20 (Law. Co-op. 1976).

5. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973).

> hereby declared unlawful.
> (b) It is the intent of the legislature that in construing paragraph (a) of 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.[6]

The words of proscription are broad, potentially encompassing a wide range of conduct, including conduct not yet examined by any court. The language of section 39-5-20 arguably is too broad to apprise potential violators that their conduct is unlawful. Defendants frequently argue that a lack of sufficient notice deprives them of their right to due process.

The purpose of this article is to examine the UTPA, particularly the "unfair or deceptive acts or practice" language, in light of the void-for-vagueness doctrine. Further, it is argued that the UTPA is unconstitutional.

I. Comparison of FTC Act and the UTPA

The South Carolina Supreme Court disposed of the vagueness issue in a remarkably summary fashion in *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*[7] The entire text of the court's opinion on this issue is as follows:

> Dealer [Defendant] challenges the constitutionality of the UTPA, [section] 39-5-20, which provides:
>
> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> Dealer contends this prohibition is unconstitutionally vague because it does not specify what acts are unlawful.
>
> We reject this contention. The federal act, upon which our state UTPA is based, has long been upheld against this challenge. The United States Supreme Court has held the determination of what acts constitute "unfair methods of competition" is a matter of law for the courts to decide. Unfair trade practices are defined by common law. We hold [section] 39-5-20 is not unconstitutionally vague.[8]

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6. S.C. Code Ann. § 39-5-20 (Law. Co-op. 1976).
7. 294 S.C. 240, 363 S.E.2d 691 (1988).
8. *Id.* at 243, 363 S.E.2d at 693 (citations omitted).

Not included in the court's analysis are a number of significant due process considerations. Most important, perhaps, is the fundamental procedural difference between the FTC Act and the UTPA.[9]

The FTC Act dictates a procedure by which the FTC may issue a complaint to offending business entities to protect the public's interest. Next, the party complained of has the opportunity to show cause why a cease-and-desist order should not be issued by the FTC.[10] The order is reviewable in a circuit court of appeals and is subject to review by the Supreme Court upon writ of certiorari.[11] Each violation of the order carries a civil penalty of $10,000, recoverable in a civil action brought by the United States Attorney General in a district court.[12] A defending business entity is liable only when it violates a cease-and-desist order with actual knowledge that its activity is unlawful under subsection (a)(1) of the FTC Act.[13]

In contrast, the UTPA, South Carolina's "Little FTC Act," embodies three avenues of enforcement: (1) judicial proceedings by the state attorney general seeking injunctive relief; (2) direct action by the state attorney general seeking a civil penalty; and (3) a private cause of action by individuals.

Under section 39-5-50, the South Carolina Attorney General is required to give three days' notice to a party against whom proceedings are contemplated. The notice allows the defendant an opportunity to show cause why the attorney general should not seek a temporary restraining order, temporary injunction, or permanent injunction against the allegedly offensive act or practice.[14] Any violation of one of these orders may subject the violator to a $15,000 civil penalty.[15]

The civil penalties section of the UTPA also provides for a lesser penalty, $5,000, for "any person [who] is willfully using or

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9. In *Inman* the South Carolina Supreme Court cited Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919), as authority supporting the constitutionality of this FTC Act, which was attacked on vagueness grounds. *See id.*

10. *See* 15 U.S.C.A. § 45(b) (West 1973 & Supp. 1988) (FTC has authority to issue cease-and-desist order).

11. *See* 15 U.S.C.A. § 45(c) (West 1973).

12. *See* 15 U.S.C.A. § 45(11) (West 1973 & Supp. 1988).

13. *See* id. § 45(m)(1)(B).

14. *See* S.C. CODE ANN. § 39-5-50 (Law. Co-op. 1976).

15. *See id.* § 39-5-110(b).

has willfully used a method, act or practice declared unlawful."[16] Under this penalty provision, different procedural precautions apply. The penalty is recoverable by the state attorney general upon petition to the court if the court finds the violation "willful."[17] A willful violation occurs "when the party committing the violation knew or should have known that his conduct was a violation" of the prohibition of unfair or deceptive acts or practices.[18] Nevertheless, the structure of the Act indicates that violation of an injunction is not necessary for the attorney general to recover a civil penalty.[19]

Section 39-5-140 provides a private cause of action.[20] If a court finds that the violation of the prohibition of deceptive acts or practices was "willful," the plaintiff may recover treble damages. As under the federal statute, a willful violation occurs "when the party committing the violation knew or should have known that his conduct was a violation" of the prohibition of unfair or deceptive acts or practices.[21]

The latter two avenues of enforcement of the UTPA raise due process concerns; in both actions a defendant may be called on to account for his conduct when that conduct may not have been clearly unlawful.

The UTPA prohibitions are intentionally vague, to include untried inventive schemes to deceive consumers. The constitutionality of an action to enforce the UTPA is questionable because the defendant is subjected to a fine that arguably is penal in nature. This fact notwithstanding, the virtually identical language of the FTC Act withstood this constitutional attack in 1919 in *Sears, Roebuck & Co. v. Federal Trade Commission.*[22] Because there has been no further challenge since this case, apparently the vagueness of the language alone does not create a burning issue. The UTPA, however, contains the same proscriptive words *without* the procedural precautions found in the FTC Act. Arguably, therefore, the vagueness of the UTPA's proscription is not cured by procedural precautions.

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16. *Id.* § 39-5-110(a).
17. *Id.*
18. Id. § 39-5-110(c).
19. *See* Day, *supra* note 2, at 506.
20. *See* S.C. CODE ANN. § 39-5-140 (Law. Co-op. 1976).
21. *Id.* § 39-5-140(d).
22. 258 F. 307 (7th Cir. 1919).

The UTPA allows recovery of punitive awards only on a showing of willful violation. This requirement possibly cures the vagueness of the proscription, but the point is certainly open to controversy, especially as long as "willful" requires something less than actual knowledge.

Thus, there are three troublesome characteristics of the UTPA that must be examined together to reach a conclusion regarding the statute's constitutionality. The three factors are: (1) the intentionally broad language; (2) the punitive treble damages provision; and (3) the lack of procedural precautions. Part II of this article will examine how other jurisdictions have ruled on the constitutionality of statutes similar to the UTPA. Part III will discuss the void-for-vagueness doctrine.

II. PRECEDENT

In *Sears, Roebuck* the Seventh Circuit disposed of the vagueness issue by noting that the challenged phrase "unfair methods of competition" was no more indefinite than "due process of law."[23] The court of appeals indicated concern that a finding of vagueness would invalidate a number of similarly vague statutory terms and concluded that those terms "are sufficiently accurate measures of conduct."[24] Cases testing the UTPA's sister acts in other jurisdictions generally uphold their constitutionality. In many cases, however, important variations in the structure of the statutes should be noted.[25]

One of the earliest state cases deciding the vagueness issue is *State v. Reader's Digest Association*[26] in which the Washington Supreme Court ruled that the state Consumer Protection Act[27] was not void for vagueness.[28] The *Reader's Digest* court relied primarily on the existence of established federal trade regulation precedent, despite the court's observation that the

23. *Id.* at 311.

24. *Id.*

25. The South Carolina Court of Appeals stated in Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986), "Our research has not shown that any state has an unfair trade practices act identical to our own."

26. 81 Wash. 2d 259, 501 P.2d 290 (1972), *cert. dismissed*, 411 U.S. 945 (1973).

27. WASH. REV. CODE ANN. §§ 19.86.010-.920 (1978 & Supp. 1989).

28. 81 Wash. 2d at 275, 501 P.2d at 301.

Washington Act did not *adopt* federal precedent, but merely instructed courts to be *guided* by federal precedent. Significantly, the court in *Reader's Digest* recognized the argument that the challenged act differed from the FTC Act procedurally because the Washington Act arguably did not provide a defendant with sufficient notice of his unlawful conduct before assessing a civil penalty. The court noted: "We do not reach the question of whether the imposition of a 'civil penalty,' prior to a judicial determination that an activity constitutes . . . an 'unfair or deceptive act or practice,' denies procedural due process."[29]

The Washington Supreme Court, however, reached the issue a year later in *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*[30] After authorizing suit for penalties "alone and separate" from injunctions, the court found the Washington statute to have a sufficiently established meaning "to meet *any* constitutional challenge of vagueness."[31]

At first glance *Ralph Williams*, read together with *Reader's Digest*, appears to be significant authority favoring the constitutionality of the UTPA. Both cases found virtually identical words not to be overly vague, and procedural precautions like those in the FTC Act were deemed unnecessary to support that conclusion. The words of the Washington Act were not strictly construed under the standards for penal statutes, however, since the court in *Ralph Williams* ruled that the statute was remedial rather than penal.[32] Thus, the Washington Act was upheld as against two of the three characteristics that may make application of the South Carolina UTPA objectionable.

In *Pennington v. Singleton*[33] the Texas Supreme Court construed language similar to that of the UTPA and upheld its constitutionality. Texas's Deceptive Trade Practices-Consumer Protection Act (DTPA)[34] prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce."[35] Section 17.46(b) of the DTPA lists a variety of prohibited acts

29. *Id.* at 272, 501 P.2d at 299.
30. 82 Wash. 2d 265, 510 P.2d 233 (1973), *appeal dismissed*, 430 U.S. 952 (1977).
31. *Id.* at 279, 510 P.2d at 242 (emphasis added).
32. *See id.* at 278, 510 P.2d at 242.
33. 606 S.W.2d 682 (Tex. 1980).
34. 4 TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987).
35. *Id.* § 17-46(a).

and practices.[36] The appellant in *Pennington* claimed that the statute was unconstitutionally vague because many of the acts listed in that "laundry list" resulted in treble damage liability without a showing that the defendant intended to deceive or knowingly made false representations. The *Pennington* court acknowledged that most of the subdivisions of section 17.46(b) did not require a showing of intent. The court nonetheless reasoned that intent was not a constitutional requirement because imposing an intent requirement would not make the proscribed conduct more definite.[37]

The UTPA differs from the DTPA because it does not include the twenty-three item nonexclusive laundry list found in the Texas statute.[38] For this reason, the UTPA is less specific. The UTPA, however, allows treble damages only upon proof of an intentional violation.[39] Thus, comparing the UTPA with the DTPA, the UTPA is stronger on the intent requirement although weaker on the enumeration of specifically prohibited practices.

The Supreme Court of Alaska also dealt with the vagueness issue in *State v. O'Neill Investigations, Inc.*[40] The court upheld the constitutionality of Alaska's Unfair Trade Practices and Consumer Protection Act,[41] whose operative words are identical to the UTPA. The Alaska statute is similar to the Texas statute in that it includes a nonexclusive laundry list of prohibited practices[42] and refers to the FTC Act for guidance.[43] The *O'Neill Investigations* court found the statute's reference to the FTC Act very persuasive. The existence of the FTC Act, reasoned the court, gave the words a "fixed meaning."[44] Further, FTC adjudication made up for the state attorney general's failure to pro-

36. *See id.* § 17-46(b) (listing 24 prohibited acts).

37. *See* 606 S.W.2d at 689.

38. The UTPA, however, does enumerate two types of acts specifically designated as unfair trade practices in §§ 39-5-30 and -35. Those sections do not mention intent because these practices, like any other, are actionable under § 39-5-140, which specifically imposes an intent requirement.

39. *See* S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1976).

40. 609 P.2d 520 (Alaska 1980).

41. ALASKA STAT. §§ 45.50.471-.561 (1986 & Supp. 1988).

42. *See* ALASKA STAT. § 45.5.531 (1986).

43. *Id.* § 45.50.545.

44. 609 P.2d at 532.

mulgate guiding regulation.[45]

The requirement of intent to violate the statutory proscription was not at issue in *O'Neill Investigations*. Actual damages are trebled under the Alaska statute only "in cases of wilful violation,"[46] as under the UTPA. The list of proscribed practices in *O'Neill Investigations* was not relevant to the decision because the debt collection practices at issue were not among those specifically proscribed practices.[47]

The Illinois Supreme Court upheld the constitutionality of the Illinois Consumer Fraud and Deceptive Business Practices Act[48] in *Scott v. Association for Childbirth at Home, International.*[49] *Scott* was an appeal from an action brought by the Illinois Attorney General. The statutory provisions authorizing action by the state's attorney general are less objectionable than those of the UTPA because proceedings by the Illinois Attorney General include procedural precautions similar to those available under the FTC Act. *Scott*, therefore, did not test the Illinois statute to the limits of its applicability.

The Illinois statutory scheme does provide a private cause of action under which a court "may award actual damages or any other relief which the court deems proper."[50] An Illinois appellate court, however, may not follow *Scott* when the action is brought by an individual with no prior notice and punitive damages are awarded.[51] For that reason, *Scott* is not persuasive precedent for interpretation of the UTPA.

In Wisconsin the legislature did not enact that state's prohibition against unfair trade practices in the same format as in other states.[52] In *State v. Lambert*,[53] however, parties tested the

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45. *See id.* at 533. In a footnote, the court recommended adopting regulations "to fill in the interstices of the Alaska Act rather than relying exclusively on adjudication." *Id.* at n. 49.

46. ALASKA STAT. § 45.50.531 (Supp. 1988).

47. *See also* Watkins v. Roach Cadillac, Inc., 7 Kan. App. 2d 8, 637 P.2d 458 (1981) (finding the Kansas Consumer Protection Act constitutional, with little discussion, and citing *O'Neill Investigations*).

48. ILL. REV. STAT. ch. 121½, paras. 261-272 (Supp. 1988).

49. 88 Ill. 2d 279, 291-92, 430 N.E.2d 1012, 1018-19 (1981).

50. ILL. REV. STAT. ch. 121½, para. 270a(a) (Supp. 1988).

51. The Illinois Court of Appeals held that punitive damages were assessed properly in Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, 451 N.E.2d 1385 (1983). That case, however, included a misrepresentation claim, along with an alleged violation of the Illinois statute. The statute's constitutionality was not contested.

52. *See* WIS. STAT. §§ 100.18, -.20 (1988); *see generally* Jeffries, *Protection for Con-*

constitutionality of the words "unfair trade practices in business," the same language found in the UTPA. The *Lambert* court expressed concern with the statute's vagueness, but upheld it against constitutional attack because of the delegation technique of "filling up the details" of what is prohibited. The court stated: "[Appellant] argues, however, that [the Wisconsin statute] is unconstitutionally vague. . . . While that may well be true in respect to the statute when considered alone, the technique employed by the legislature . . . is designed to give specificity . . . ."[54]

A number of other state decisions generally support their state's consumer protection acts as constitutional, but these cases are not directly on point. The decisions are distinguishable because they test more specific words of proscription,[55] intertwine the vagueness issue with first amendment issues,[56] or treat the vagueness issue too summarily to be helpful.[57]

III. VAGUENESS ANALYSIS

A. *The Void-for-Vagueness Doctrine in the Supreme Court*

The void-for-vagueness doctrine in criminal cases arose from decisions construing statutes that provided no standard by which criminality could be ascertained.[58] Whether a statute adequately identifies proscribed conduct is not amenable to such clear-cut analysis; no matter how particularly words of a statute describe the prohibited conduct, marginal situations that are open to interpretation will always exist. Thus, the vagueness inquiry requires judicial line drawing. The Supreme Court ob-

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sumers Against Unfair and Deceptive Business, 57 MARQ. L. REV. 559 (1974) (describing statutory framework and legislative actions).

53. 68 Wis. 2d 523, 229 N.W.2d 622 (1975).

54. *Id.* at 530, 229 N.W.2d at 625.

55. *See, e.g.*, State *ex rel.* People v. Witzerman, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972); People *ex rel.* Dunbar v. Gym of Am., Inc., 177 Colo. 97, 493 P.2d 660 (1972); State *ex rel.* Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971); Sanborn v. Koscot Interplanetary, Inc., 212 Kan. 668, 512 P.2d 416 (1973); Kugler v. Market Dev. Corp., 124 N.J. Super. 314, 306 A.2d 489 (Ct. Ch. Div. 1973).

56. *See, e.g.*, Carpets by the Carload, Inc. v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973).

57. *See, e.g.*, State v. Fey, 87 Misc. 2d 987, 386 N.Y.S.2d 549 (N.Y. Sup. Ct. 1976); Commonwealth v. Pennsylvania APSCO Sys., 10 Pa. Commw. 138, 309 A.2d 184 (1973).

58. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 n.2 (1939).

served: "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense."[59] Further, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[60] The definition must come from the usual process of "judicial inclusion and exclusion,"[61] since attempts to articulate a general rule result in unhelpful statements such as that originating in *Connally v. General Construction Co.*:[62] "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[63]

The Supreme Court provides little guidance that is helpful outside the facts of the particular case before it. The standard of specificity is stated in very broad terms, often borrowed from cases testing criminal statutes.[64] For instance, the Court applied the standard enunciated in *Grayned v. City of Rockford*[65] in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[66] which found a drug paraphernalia ordinance sufficiently specific to survive a vagueness challenge. The Court set forth the following test: "[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . [Further,] laws must provide explicit standards for those who apply them."[67]

Thus, *Hoffman Estates* evinces a fluid test for vagueness with no sharp lines drawn between statutes establishing criminal, quasi-criminal, or civil penalties.[68] Rather, a variety of fac-

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59. Roth v. United States, 354 U.S. 476, 491-92 (1957) (quoting United States v. Petrillo, 332 U.S. 1, 7 (1947)).

60. Nash v. United States, 229 U.S. 373, 377 (1913).

61. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

62. 269 U.S. 385 (1926).

63. *Id.* at 391.

64. *See generally* 40 L. Ed. 2d 823 annot. at 826 (1975) (titled *Supreme Court's Application of Vagueness Doctrine to Noncriminal Statutes or Ordinances*).

65. 408 U.S. 104 (1972) (upholding anti-noise statute against a vagueness attack).

66. 455 U.S. 489, *reh'g denied*, 456 U.S. 950 (1982).

67. *Id.* at 498 (quoting *Grayred*, 408 U.S. at 109).

68. "The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less

tors must be considered, including whether the contested law involves economic regulation,[69] a scienter requirement,[70] or the exercise of constitutionally protected rights.[71]

Absent a particular fact situation, analysis of the constitutionality of the UTPA must be made on the facial validity of the statute. *Hoffman Estates*, a facial challenge on vagueness grounds, established an almost insurmountable standard for facial challenges to economic, remedial regulation: "To succeed . . . the complainant must demonstrate that the law is impermissibly vague in *all* of its applications."[72] Thus, although the defendant, Flipside, admittedly was not apprised of whether the ordinance's proscriptions applied to some of its retail items, its vagueness challenge failed because the ordinance did apply to some of the items.

The Supreme Court commented on the vagueness requirements in *Kolender v. Lawson*,[73] which invalidated a California loitering statute requiring "credible and reliable"[74] identification upon police request. In *Kolender* the Court recognized two dangers in the overly vague statute: the lack of notice to potential defendants and arbitrary enforcement.[75] The clear danger of such arbitrary enforcement as found in *Kolender* is not as signif-

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severe." *Id.* at 498-99.

69. "[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* at 498 (footnote omitted). Interestingly, this statement suggests less-than-strict adherence to the legal fiction that all are presumed to know the law. *See infra* notes 153-155 and accompanying text.

70. "[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." 455 U.S. at 499.

71. "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.*

72. *Id.* at 497 (emphasis added). The Court addressed the argument that the ordinance "warrant[ed] a relatively strict test" because it was "quasi-criminal" in nature. *Id.* at 499-500. The Court did not rule on the question because the plaintiff conceded that point. *Id.* at 500 n.16. Significantly, the court ruled that defendant Flipside's claim of vagueness failed "under the test appropriate to either a quasi-criminal or a criminal law." *Id.* at 500.

73. 461 U.S. 352 (1983).

74. CAL. PENAL CODE § 647(e) (West 1970).

75. *See* 461 U.S. at 355, 361.

icant a consideration in quasi-criminal statutes such as the UTPA, which is enforced by the wronged individual. Although the state attorney general's office also has the right to prosecute UTPA claims, state resources are too scarce to cover any but the most egregious violations.[76]

If the UTPA is found to be penal, thereby justifying strict scrutiny, it should be found unconstitutional. Hearing an appeal from the District Court of South Carolina, the Supreme Court demonstrated just how strictly a penal statute should be construed.[77] *Bouie v. City of Columbia* involved South Carolina's criminal trespass statute.[78] Although the Court noted that the statute was "admirably narrow and precise"[79] by prohibiting "entry upon the lands of another . . . after notice . . . prohibiting such entry,"[80] it held that the defendants, who previously had been asked to leave the complainant's premises, did not have notice that the refusal was unlawful.[81] One should note, however, that *Bouie* arose from a lunch counter sit-in demonstration during the civil rights movement of the early 1960s. Therefore, its rigid standard of specificity perhaps is limited to the Civil Rights conflict.

Analysis of ad hoc determinations of vagueness is not especially helpful in determining whether the particular words of the UTPA are overly vague. Cases such as *Bouie*, for example, give only general guidelines concerning the constitutional requirement of specificity.[82] State court decisions are more helpful when they construe very similar words,[83] but even these decisions do not analyze the words alone on their face. The questions, then, are: (1) Do the words "unfair or deceptive acts or practices . . . give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden"?[84] (2) Are they so vague that "men of common intelligence must necessarily guess

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76. *See* Day, *supra* note 2, at 509.

77. *See* Bouie v. City of Columbia, 378 U.S. 347 (1964).

78. *See* S.C. CODE ANN. § 16-11-600 (Law. Co-op. 1976) (previously codified as S.C. CODE ANN. § 16-386 (Law. Co-op. 1962)).

79. 378 U.S. at 351.

80. S.C. CODE ANN. § 16-11-600 (1976).

81. *See* 378 U.S. at 363.

82. *See, e.g., id.* at 351.

83. *See supra* text accompanying notes 22-50.

84. United States v. Harriss, 347 U.S. 612, 617 (1954).

at [their] meaning and differ as to [their] application"?[85] (3) Do they require persons "to speculate as to [their] meaning"?[86]

B. FTC Reference

The intentionally broad language of the UTPA is the most important characteristic of the Act that compels close scrutiny. The words "unfair or deceptive acts or practices" alone may not be sufficient to provide a defendant with notice of the unlawfulness of his conduct as required by the due process clauses of the federal and state constitutions.[87] For this reason, the UTPA instructs South Carolina courts to be guided by FTC and federal court interpretations of the FTC Act.[88] This reference, however, does not clearly cure any vagueness problems with the general proscription.

The critical defect in relying on the reference to the FTC Act is the fact that the FTC interpretations are not binding on South Carolina courts. The UTPA does not attempt to incorporate federal case law because under section 39-5-20(b), courts are merely "guided" by federal case law. Notably, this weak link is the *only* connection between the UTPA and the FTC and federal court interpretations. The UTPA cannot or does not envelop federal case law as binding precedent because to do so might result in an unconstitutional delegation of legislative power.[89] That being so, an appealingly straight-forward argument can be made that the reference to federal case law fails to augment the statute properly: (1) We are presumed to know the law; (2) federal case law does not acquire the force of state consumer protection law; (3) therefore, a potential defendant cannot be charged with knowledge of the federal case law for purposes of alleged UTPA violations.

Additionally, federal precedent is not helpful if the defendant's conduct involves some novel scheme. No precedent will be squarely on point; indeed, an avowed purpose of the broad stat-

85. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

86. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

87. *See, e.g.*, FTC v. Gratz, 253 U.S. 421, 427 (1920) (recognizing that the words "unfair methods of competition" were in dispute).

88. *See* S.C. CODE ANN. § 39-5-20(b) (Law. Co-op. 1976).

89. *See, e.g.*, South Carolina State Highway Dep't v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955).

utory language is to encompass new and inventive schemes.[90] Therefore, existing federal cases will be of no value in defining the proscriptions of the UTPA. Basing a finding of constitutionality solely on the UTPA's reference to federal precedence is an empty genuflection.

C. Penal/Remedial Distinction

If reference to the FTC Act fails to provide supporting definition to general prohibitions of the UTPA, the words of proscription are left to stand alone against the challenge of vagueness. The degree of scrutiny applied in a vagueness analysis depends on whether the statutory damages recoverable under the UTPA are classified as punitive or remedial. Remedial causes of action require less stringent tests of vagueness than punitive causes of action.[91]

A band of "gray area" always will exist between permitted and unpermitted conduct. The constitutional question is: How wide may that gray area be? If the statute is penal, the band of gray area must be very narrow; if remedial, the gray area may be wider.

The UTPA can be regarded as remedial because it gives a remedy where none existed previously. Simultaneously, it can be regarded as penal because it establishes a standard of conduct. One must not underestimate the importance of whether the damage provision is characterized as penal or remedial. As noted in one commentary on South Carolina law:

> A penal . . . statute sets up a standard of conduct; establishing a line of demarcation between that which is legal and illegal. Such line should, at all times, be unwavering and steady, for it is necessary that the people be clearly apprised of the point at which the right ends and the wrong begins.[92]

The Constitution does not require exemplary damages to be characterized as punitive. Moreover, the Supreme Court has

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90. *See* FTC v. Colgate-Palmolve Co., 380 U.S. 374, 384-85 (1965).

91. *See* Lund v. Gray Line Water Tours, Inc., 277 S.C. 447, 289 S.E.2d 404 (1982); South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978).

92. Case Comment, *STATUTES — Construction of — Both Remedial and Penal*, 2 S.C.L.Q. 188, 189 (1949) (comment on Francis v. Mauldin, 215 S.C. 374, 55 S.E.2d 337 (1949)).

never ruled that the award of punitive damages should be accompanied by the due process guarantees of criminal proceedings, although commentators and lower courts certainly have considered this issue.[93] Recently, in *Bankers Life & Casualty Co. v. Crenshaw*[94] the Supreme Court declined to address the issue of whether a punitive damages award violated the due process, contract, and excessive fines clauses of the Constitution. In her concurring opinion, however, Justice O'Connor noted that "because of the punitive character of such awards, there is reason to think that this [law permitting unlimited punitive damages] may violate the Due Process Clause."[95]

In *Rex Trailer Co. v. United States*[96] the Supreme Court considered the characterization of a trebled damages provision in the context of a double jeopardy challenge. The Court ruled that the provision was "civil" rather than penal in nature, deferring to Congress's description of the remedy.[97] The Court similarly relegated the issue to one of statutory construction in *United States v. One Assortment of 89 Firearms*.[98] The Court held that an owner of firearms could be subject to an in rem forfeiture proceeding despite having been acquitted of unlawful trading in firearms because the forfeiture proceeding was civil in nature.[99] The owner of the firearms objected to the second proceeding on double jeopardy grounds. The Court observed:

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the monetary penalty] imposes a criminal sanction. That question is one of statutory

93. *See, e.g.*, Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

94. 108 S. Ct. 1645 (1988).

95. *Id.* at 1655 (O'Connor, concurring). Justice O'Connor cited two reasons for the constitutional concern: that the amount of damages was unpredictable and that punitive damages are already forbidden in defamation suits and some labor suits. *See id.*

96. 350 U.S. 148 (1956).

97. *Id.* at 151.

98. 465 U.S. 354 (1984).

99. The Court applied a two-prong test of statutory construction: (1) whether Congress indicated a preference for one label (penal or remedial) or the other and (2) whether the statutory scheme was so punitive in purpose or effect as to negate that intention. *See id.* at 362.

interpretation.[100]

The real reason that courts hesitate to identify the issue as implicating constitutional rights is that punitive damages masquerading as "civil" penalties have crept gradually into the law. These penalties have become so pervasive that to draw the line now might be considered too much an impingement on the states' police powers. The Third Circuit Court of Appeals recognized this rationale in *Irey v. Occupational Safety & Health Review Commission.*[101] The employer-petitioner in *Irey* objected to application of a "civil penalty" for willful violations of OSHA regulations without the protections afforded criminal defendants. The court of appeals reasoned:

> In the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a "willful" violation, are far more apparent than any "remedial" features. . . . In any event, we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy.[102]

The UTPA's trebled damages provision should not be accepted so readily as "civil" for purposes of due process scrutiny. Courts impose criminal penalties primarily to punish and deter — the same reasons they impose punitive damages.[103] Perhaps blurring the distinction between damages awarded in civil and criminal cases is inconvenient, but this may be constitutionally necessary if there is no analytical difference.

A chief consideration in characterizing a remedy is whether the wrong sought to be remedied is a public wrong or a private wrong. "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be addressed is a wrong to the public, or a wrong to the individual . . . ."[104] As

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100. *Id.* at 359 (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (bracketed words included in Court's quote)).

101. 519 F.2d 1200 (3d Cir. 1975), *cert. denied sub nom.* Intercounty Constr. Co. v. Occupational Safety & Health Review Comm'n, 423 U.S. 1072 (1977).

102. *Id.* at 1204.

103. *See* Gertz v. Welch, Inc., 418 U.S. 323, 350 (1974) (punitive damages awarded "to punish reprehensible conduct and to deter its future occurrence").

104. Huntington v. Attrill, 146 U.S. 657, 668 (1892). *See also* Mendygral v. City of New Haven, 21 Conn. Supp. 397, 156 A.2d 479 (Super Ct. 1959); Dotty v. State, 197 So. 2d 315 (Fla. Dist. Ct. App. 1967); State *ex rel.* Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971); Overmyer v. Eliot Realty, 83 Misc. 2d 694, 371 N.Y.S.2d 246

with other private causes of action, the private wrong nudges the individual to take up the mantle of private attorney general. It was the potential harm to the *public*, however, that initially prompted the legislature to allow private causes of action.

Exemplary damages under the UTPA may be more objectionable than ordinary exemplary damages because no cause of action exists without a public, as well as private, interest in the outcome. The entire social context of consumer-protection legislation suggests this public interest dimension.[105] Similarly, the South Carolina Court of Appeals held that impact upon the public interest was a necessary element for recovery under the UTPA.[106] Public interest is a necessary element under corresponding acts[107] in Massachusetts,[108] Georgia,[109] Illinois,[110] Washington,[111] and North Carolina.[112] FTC actions also require a clear impact on the public interest.[113] Infusion of a public interest requirement into the UTPA cause of action thereby renders the cause of action inapplicable unless there is a public, as well as a private, wrong. Therefore, since the wrong sought to be redressed is a public wrong, the UTPA is more properly characterized as penal than remedial.

(N.Y. Sup. Ct. 1975).

105. *See* Note, *Consumer Protection and the Proposed "South Carolina Unfair Trade Practices Act,"* 22 S.C.L. REV. 767 (1970).

106. *See* Noack Enters. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986). The South Carolina Supreme Court alluded to the requirement in State *ex rel.* McLeod v. Brown, 278 S.C. 281, 285, 294 S.E.2d 781, 782 (1982) (citing with approval United States Retail Credit Ass'n v. FTC, 300 F.2d 212, 221 (4th Cir. 1962)). *See also Business Law, Annual Survey of South Carolina Law*, 40 S.C.L. REV. 22 (1988).

107. *See* Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash. 2d 778, 719 P.2d 531 (1986); *see also* Annotation, *Practices Forbidden by State Deceptive Trade Practices and Consumer Protection Acts*, 89 A.L.R.3D 449(1979).

108. *See* Begelfer v. Najarian, 381 Mass. 177, 409 N.E.2d 167 (1980).

109. *See* Zeeman v. Black, 156 Ga. App. 82, 84, 273 S.E.2d 910, 915 (1980).

110. *See* Evanston Motor Co. v. Mid-Southern Toyota Distrib., 436 F. Supp. 1370, 1374 (N.D. Ill. 1977).

111. *See* Lightfoot v. MacDonald, 86 Wash. 2d 331, 334, 544 P.2d 88, 90 (1976).

112. North Carolina authority for this proposition is not as solid as in the other jurisdictions cited. *Compare* United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981), *cert. denied*, 454 U.S. 1054 (1983) *with* Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), and Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980). North Carolina interpretations of its Unfair Trade Practices Act may be particularly persuasive in South Carolina, however. *See infra* text accompanying note 102.

113. *See* FTC v. Klesner, 280 U.S. 19, 27 (1929).

D. South Carolina Statutory Construction

South Carolina's Unfair Trade Practices Act is one "whose legislative heritage and judicial interpretation closely parallel North Carolina's."[114] The North Carolina Court of Appeals in *Holley v. Coggin Pontiac, Inc.*[115] held that North Carolina's version of the Unfair Trade Practices Act (NCUTPA) had multiple objectives, of which only one was penal in nature. Therefore, according to the court, the statute could not be deemed penal in nature. In *Holley* the court identified three major objectives of the trebled damages provision of the NCUTPA and UTPA: (1) to provide individuals with an incentive to pursue private causes of action, thus assisting the State in enforcement; (2) to provide a remedy to injured parties; and (3) to serve as a deterrent to future violations.[116] In North Carolina the distinguishing characteristic of a penal statute is that it is *solely* penal in nature.[117] The NCUTPA was held remedial in *Holley* for the purpose of determining what statute of limitations should apply, but presumably the statute also would be considered remedial for purposes of constitutional analysis.

In other jurisdictions similar acts generally are held to be remedial rather than penal. For instance, in *Commonwealth v. Monumental Properties, Inc.*[118] the Supreme Court of Pennsylvania authorized a liberal construction of the state's consumer protection law, which employs language identical to the UTPA. In doing so, the Pennsylvania court trotted out the Supreme Court's classic explanation of the distinction between remedial and penal:

> In one sense, every law imposing a penalty or a forfeiture may be deemed a penal law; in another sense, such laws are deemed, and truly deserved to be called, remedial. The [upper court] judge was therefore strictly accurate, when he stated that "it must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law

114. Itco Corp. v. Michelin Tire Corp., 722 F.2d 42, 48 (4th Cir. 1983), *aff'd on rehearing*, 742 F.2d 170 (1984).

115. 43 N.C. App. 229, 237, 259 S.E.2d 1, 6-7 (1979).

116. *See id.* at 237, 259 S.E.2d at 6.

117. *See* State *ex rel.* Edmisten v. J.C. Penney, Co., 292 N.C. 311, 319, 233 S.E.2d 895, 900 (1977).

118. 459 Pa. 450, 329 A.2d 812 (1974).

> which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense, penal acts, although they may inflict a penalty for violating them."[119]

Because the articulated standards on vagueness are themselves vague, the only guidance to be found on the proper level of scrutiny comes from analysis of cases interpreting various versions of the Model Act in other jurisdictions. Three decisions, *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*,[120] *Scott v. Association for Childbirth at Home, International*,[121] and *State v. O'Neill Investigations, Inc.*,[122] held the challenged acts to be remedial rather than penal. Accordingly, in all three cases the state courts rejected constitutional challenges. Whether the courts would have reached a different conclusion by scrutinizing the statute by more stringent standards is an open question. In *O'Neill Investigations*, a decision that is particularly helpful in construing the UTPA, the court devoted extensive discussion to whether the Alaska Act was penal or remedial.[123]

Pennington v. Singleton[124] is particularly relevant authority because the court began its analysis with the premise that the statute was penal. Under the *Pennington* court's analysis, the language of an act similar to the UTPA survived the even more stringent standards of specificity required of criminal statutes. The penal characterization, however, was only one of several factors considered. Furthermore, the statute was one regulating business activity, and an intent or knowledge requirement was not material to the vagueness inquiry.[125]

When drawing the line on the specificity requirement, courts certainly are swayed by the determination that a statute

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119. 459 Pa. at 459 n.10, 329 A.2d at 816 n.10 (quoting Taylor v. United States, 44 U.S. (3 How.) 197, 210 (1844)).

120. 82 Wash. 2d 265, 510 P.2d 233 (1973). *See supra* notes 30-32 and accompanying text.

121. 88 Ill. 2d 279, 430 N.E.2d 1012 (1982). *See supra* notes 49-51 and accompanying text.

122. 609 P.2d 520 (Alaska 1980). *See supra* notes 40-45 and accompanying text.

123. *See id.* at 525-28.

124. 606 S.W.2d 682 (Tex. 1980).

125. *See id.* at 689.

regulates business activity.[126] The reasoning behind this latitude in interpretation is that businesses are more capable than individuals of becoming acquainted with the regulating law.[127] Acts similar to the UTPA have been regarded as business regulation,[128] and a South Carolina court construing the UTPA likely would reach a similar result. Nevertheless, it is a dangerous proposition to accept *Pennington* as authority for approving UTPA language under penal standards merely because it is a form of business regulation. The rationale for liberal interpretation does not fit the facts of *Pennington*. The defendant in that case was not a business but, rather, an individual selling his boat to another individual. He had never sold a boat previously and was not in the business of selling boats.[129] Perhaps removing the business-regulation factor from the analysis would have changed *Pennington*'s result.

Aside from constitutional grounds, the chief argument against characterizing the damages as remedial is that statutorily created awards that exceed compensatory damages are in derogation of common law and, therefore, should be strictly construed.[130] South Carolina courts are free to choose whether to construe the UTPA strictly or liberally, since it is not clear whether the Act is remedial or penal.

The public versus private wrong distinction probably would be of little analytic value since the securities laws in general have been regarded as remedial,[131] and those laws seem to have the same public interest aspect as the UTPA. The South Carolina Court of Appeals indicated a willingness to defer to a liberal reading of the portion of the UTPA authorizing civil penalties, even where such imposition accumulates to result in a heavy fine.[132]

In *Francis v. Mauldin*[133] the South Carolina Supreme Court

126. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

127. *See id.* at 162.

128. *See* Scott v. Association for Childbirth at Home, Int'l, 88 Ill. 2d 279, 430 N.E.2d 1012 (1982); Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980); State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 82 Wash. 2d 265, 510 P.2d 233 (1973).

129. *See* 606 S.W.2d at 685.

130. *See* Jones v. Sportelli, 166 N.J. Super. 383, 399 A.2d 1047 (Ct. Law Div. 1979).

131. *See* McGaha v. Mosley, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984).

132. *See* State *ex rel.* McLeod v. C & L Corp., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984) (eleven separate $5,000 fines imposed for a total of $55,000).

133. 215 S.C. 374, 55 S.E.2d 337 (1949).

resolved the classification issue regarding statutes providing causes of action against gambling winners. The court held that the statute, which provides the loser a cause of action against the winner, was remedial and, therefore, liberally construed.[134] The court also held a related statute that provided a cause of action for "any other person" with trebled damages to be penal in nature.[135] *Francis* is helpful because it implicitly emphasizes the distinction between private and public wrongs. Nevertheless, the statutes disputed in *Francis* differ from the UTPA; therefore, this case is not conclusive of the issue in South Carolina. The cause of action provided to the gambling loser does not authorize trebled damages,[136] presumably on the theory that the loser is not entirely innocent himself. The cause of action provided to "any other person," while it does authorize trebled damages, also requires the successful plaintiff to remit half the judgment to the county where the gambling occurred.[137]

South Carolina courts acknowledge the blurred distinction between penal and remedial statutes. In *State ex rel. Moody v. Stem*[138] the South Carolina Supreme Court strictly construed a statute imposing a penalty for failure to keep tobacco warehousing statistics.[139] This statute characterized violations as misdemeanors. Those found guilty, however, were "punish[able] within the discretion of the court and, in addition thereto, [were] subject to a penalty of five hundred dollars, to be sued for in the county in which the offender resides."[140] Although the action in *Stem* was a civil proceeding, the court noted, "[I]t is immaterial, for the purpose of the application of the rule of strict construction, whether the proceedings for the enforcement of the penal law, be criminal or civil."[141] The five-hundred-dollar penalty is included in a statute characterizing violations as mis-

134. *See id.* at 381, 55 S.E.2d at 240.

135. *See* S.C. CODE ANN. §§ 32-1-10, -20 (Law. Co-op. 1976).

136. *See id.* § 32-1-10.

137. *See id.* § 32-1-20. This, of course, could still be a substantial windfall to a party who has incurred no loss himself.

138. 213 S.C. 465, 50 S.E.2d 175 (1948).

139. The South Carolina Legislature repealed the statute in issue in *Stem*. *See* S.C. CODE ANN. § 39-19-280 (Law. Co-op. 1976 & Supp. 1988). For the purposes of this article, however, *Stem* still stands for the propositions discussed in the text accompanying this note.

140. S.C. CODE ANN. § 39-19-280 (Law. Co-op. 1976 & Supp. 1988) (repealed 1986).

141. 213 S.C. at 468, 50 S.E.2d at 176.

demeanors, but the penalty itself is not clearly criminal or civil. In this context, normally "civil" penalties are assessed. *Stem* appears to be authority for the proposition that statutes authorizing criminal penalties in the guise of civil penalties will be construed strictly. Closer examination and comparison to other cases, however, indicates that *Stem* is authority only for the proposition that the courts will defer to legislative characterization of statutes without further investigation.

The argument that statutes authorizing civil penalties are actually penal is strengthened in *Lund v. Gray Line Water Tours, Inc.*[142] The trial court in *Lund* authorized a double rent assessment against a holdover tenant. The South Carolina Supreme Court disapproved the double assessment because the plaintiff did not plead the statute authorizing the award. The court reasoned, citing *Stem*, that the strict construction of penal statutes dictated this result.[143] The statute authorizing the double award does not characterize the penalty as civil or criminal. Rather, it requires the holdover tenant to "forfeit double the value of the use of the premises, recoverable by action."[144] Thus, like the penalties under the UTPA, the penalty under the *Lund* statute appears to be clearly "civil."

Following *Francis* and *Stem*, a South Carolina court probably would defer to the legislative characterization of UTPA trebled damages as civil, classify the statute as remedial, and construe it liberally. *Lund*, however, is strong authority to the contrary. Cases from other jurisdictions, construing statutes other than the UTPA, provide little guidance in determining how a South Carolina court will resolve the penal-remedial distinction.

The South Carolina Supreme Court in *State v. Standard Oil Co.*[145] invalidated a statute prohibiting discriminatory pricing among different sections of a city or town. The court held the statute unconstitutional because it failed to define by breadth or type the term "section."[146] The court's analysis centered on whether persons potentially affected by the statute

142. 277 S.C. 447, 289 S.E.2d 404 (1982).
143. *See id.* at 451, 289 S.E.2d at 406.
144. S.C. CODE ANN. § 27-35-170 (Law. Co-op. 1976).
145. 195 S.C. 267, 10 S.E.2d 778 (1940).
146. *See id.* at 283, 10 S.E.2d at 786.

must "necessarily guess at its meaning and differ as to its application."[147]

An infinite variety of representations or schemes could be regarded as deceptive to one person but descriptive to another. A person's perception will change as he views the scheme or representation prospectively (before losing money) and then retrospectively (after losing his shirt). A given practice might be regarded favorably at first as an innovative business approach. Later, the same practice might be regarded by a money loser as deceptive because the approach was unfamiliar. Business persons may be dissuaded from engaging in practices within the gray area, which includes both innovative, laudable business practices as well as criminally deceptive practices. The question remains whether, as a matter of economics, the net benefit to society is greater when the law attempts to reach so far ahead to quash as yet unconceived plans.

E. Notice

The void-for-vagueness doctrine has two purposes: (1) to assure that potential defendants have notice of the unlawfulness of their conduct and (2) to prevent arbitrary enforcement.[148] The willfulness requirement of the UTPA may fulfill the notice aspect of this doctrine, but it does not affect the opportunity for arbitrary enforcement. The arbitrary enforcement component alone, however, is not grounds for ruling the UTPA void for vagueness.

Prevention of arbitrary enforcement certainly is a desirable public policy.[149] Note, however, that this public policy is not as soundly rooted in the Constitution as is the notice rationale of the void-for-vagueness doctrine. The Court noted in *Smith v. Goguen*[150] that "[w]here inherently vague statutory language permits . . . selective law enforcement, there is a denial of due

147. *See id.* (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

148. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357 (1983).

149. "[T]he more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

150. 415 U.S. 566 (1974).

process."[151] This concern over arbitrary enforcement is not as clearly a part of due process as the essentials of notice and hearing. Courts tolerate a certain amount of arbitrariness — most noticeably regarding prosecutorial discretion,[152] and implicitly with the approval of statutes that generally encourage private attorneys general.[153]

The private-plaintiff UTPA cause of action does not create the same arbitrariness concerns as police-enforced criminal statutes. Arguably, the arbitrariness portion of the void-for-vagueness doctrine has no constitutional foundation at all. Striking down a statute on the public policy ground of arbitrary enforcement is inappropriate because the legislature is presumed already to have weighed the conflicting public policies. Thus, under the UTPA, the only constitutional component of the void-for-vagueness doctrine is the notice component.

Due process requires notice to potential defendants that their conduct is unlawful. The UTPA fails to give this notice because it is vague and lacks procedural safeguards similar those found in the FTC Act. Proponents of the state acts allege that the willfulness requirement cures these defects in the "Little FTC" acts. Proponents further argue that, by definition, a defendant has notice of a willful violation that occurs "when the party committing the violation knew or should have known that his conduct was a violation of [the general proscription of the UTPA]."[154] This is an appealingly straightforward argument, but it requires closer examination. If the words "unfair" and "deceptive" fail to identify prohibited conduct because they are vague, how can one "willfully" engage in the prohibited conduct? Defendants only would be subject to trebled damages liability when they actually knew their conduct clearly violated the Act, for example, when a court previously found identical conduct objectionable and the defendant had actual knowledge of that particular decision. Undoubtably, the legislature did not intend so restrictive a definition of "willful."

The primary constitutional attack on the UTPA centers on

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151. *Id.* at 576.

152. *See* United States v. Goodwin, 457 U.S. 368 (1982).

153. *See* Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906) (antitrust private cause of action).

154. S.C. Code Ann. § 39-5-140(d) (1976).

the legal fiction that all are presumed to know the law. Even if the UTPA's reference to federal precedents provides meaningful guidance, a potential defendant realistically cannot be expected to realize the unlawfulness of his conduct, particularly when no federal decisions are factually on point. There is no avoiding the fact that conduct will continue to be measured by no other standard than that of the words "unfair" or "deceptive."

Civil defendants frequently are found to be negligent and are required to pay punitive damages. A finding of "unfair," however, seems qualitatively different. A person's perception of what is negligent is probably more in line with common understanding. There is no such common understanding for "fairness" or "deceptiveness." Individuals are less likely to agree.

The words "unfair" or "deceptive" might be considered sufficient based on the principle that we generally know right from wrong, good from bad, honest from dishonest, and, therefore, fair from unfair. The common law has developed on this principle. Indeed, as in many other areas of civil and criminal law, the difference between right and wrong is drawn on an external standard to which all are held. As Justice Holmes observed:

> [W]hen we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions. The conclusion follows directly from the nature of the standards to which conformity is required. . . . They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height.[155]

The common law implicitly recognized the concept of defining one's conduct according to an external standard "at his peril." Explicitly, the Supreme Court observed, "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[156]

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155. O. W. HOLMES, THE COMMON LAW 50 (1923). This quotation comes from Justice Oliver Wendell Holmes's discussion of the criminal law. Justice Holmes made similar comments on torts, trespass, and negligence. *See id.* at 107-13.

156. Nash v. United States, 229 U.S. 373, 377 (1913).

The principle that all are held to an external standard of conduct also rests on the assumption that all are presumed to know the law. When the law, the standard to which we are held, is as difficult to perceive as the "fairness" requirement of the UTPA, the fiction needs re-examination.

Inroads have been made into the legal fiction, but by implication only. For example, the Supreme Court in *Hoffman Estates* commented that business regulation statutes required a lesser standard of specificity because businesses could be expected to consult relevant legislation to ensure compliance.[157] Obviously, the Court is willing at least to inquire into the ability of a class of potential defendants to know the law. Another way of stating the reasoning of *Hoffman Estates* is that individuals have a lesser burden of defining the applicable standard of conduct than businesses. It is reasonable to take into account the ability of those subject to the law to understand it when scrutinizing a particular statute for vagueness.

Regarding the UTPA, the meaning of the words "unfair" and "deceptive" are particularly open to dispute. The words do not immediately call to mind a standard, however subjective, by which to measure one's conduct. The direction that courts "are to be guided" by federal precedent is of little help even for businesses, since it is unlikely that any case is factually on point. Thus, a stricter standard of scrutiny is appropriate in a vagueness challenge to the UTPA.

V. Conclusion

Although the South Carolina Supreme Court upheld the UTPA against a vagueness challenge, this ruling deserves re-examination. The UTPA allows (1) trebled damages with (2) no prior judicial order for (3) violation of a statute that is very broad on its face. Even though each of these three characteristics alone may be unobjectionable, together they raise the concern that a person or a business may conduct its activities in good faith only to be slapped with a punitive fine. The UTPA is not constitutionally sound.

157. 455 U.S. 489, 498 (1982).