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CONSUMER LAW GUIDE



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The Judge Advocate General's School
United States Army
Charlottesville, Virginia

JUNE 1994

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PREFACE

This publication is one of a series prepared and/or distributed by the Legal Assistance Branch of the Administrative and Civil Law Division of The Judge Advocate General's School (TJAGSA). Legal assistance attorneys should find this series useful in the delivery of legal assistance. The information contained herein is as current as possible as of the date of publication. Legal assistance attorneys are reminded that the law is subject to legislative amendment and judicial interpretations that occur much more rapidly than this publication can be updated and distributed. For this reason, this publication should be used only as a guide and not final authority on any specific law or regulation. Where appropriate, legal assistance attorneys should consult more regularly updated references before rendering legal advice.

The series contains summaries of the law, guidance, and sample documents for handling common problems. The sample documents are guides only. Legal assistance attorneys should ensure that the samples are adapted to local circumstances and are consistent with current format provisions in Army Reg. 25-50 prior to reproduction and use.

While forms can save time for both attorneys and clerk-typists, indiscriminate use of such forms is inherently dangerous. Standard form language may not be fully appropriate for the particular client's situation. Also, the use of a form detracts from the personalized, individual service attorneys strive to give their clients. Nonetheless, the careful, selective use and editing of forms can enhance an attorney's service to clients by reducing document-drafting time and helping remind the attorney of important requirements in drafting legal documents.

The series is part of the continuing effort to improve and expand the resources available to legal assistance practitioners. As you use this publication, if you have any recommendations for improvement, please send your comments and suggestions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

Legal assistance attorneys are encouraged to maintain this publication in a three-ring binder until a replacement is issued. In future years, specific page changes may be published instead of reprinting the entire publication.

Each year, the Legal Assistance Branch receives many requests for its publications. Because of limited budgetary and personnel resources, however, additional outside distribution of these materials in printed format may not be possible.

There are, however, several ways to obtain many of these publications. First, the Defense Technical Information Center (DTIC) makes some of these publications available to government users. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (703) 274-7633.

Second, many of the Legal Assistance Branch publications have been converted to ASCII word processing documents, compressed for file storage and transmission, and uploaded on to the Legal Automation Army Wide System Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. After signing on to the LAAWS BBS, the desired publication can be downloaded to the user's computer. Consult The Army Lawyer for current information on new publications available through the LAAWS BBS. Questions concerning LAAWS BBS should be directed to the OTJAG LAAWS office at (703) 805-2922.

Finally, those individuals who are unable to access DTIC or the LAAWS BBS may send a written request for Legal Assistance Branch publications to TJAGSA, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781. The request must be accompanied by a formatted floppy disk (one per requested publication) to obtain a compressed or "zipped" version of the publication. The compressed file (having the ".ZIP" extension) will be copied onto the floppy and mailed back to the requestor.

The following Legal Assistance Branch publications are currently available in "zipped" format:

Number	Title
JA 260	Soldiers' & Sailors' Civil Relief Act
JA 261	Legal Assistance Real Property Guide
JA 262	Legal Assistance Wills Guide
JA 263	Legal Assistance Family Law Guide
JA 265	Legal Assistance Consumer Law Guide
JA 267	Legal Assistance Office Directory
JA 268	Legal Assistance Notarial Guide
JA 269	Legal Assistance Federal Income Tax Information Series
JA 271	Legal Assistance Office Administration Guide
JA 272	Legal Assistance Deployment Guide
JA 274	Uniformed Services Former Spouses' Protection Act - Outline and References
JA 275	Model Tax Assistance Program
JA 276	Preventive Law Series

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This publication does not promulgate Department of the Army policy and does not necessarily reflect the views of The Judge Advocate General or any government agency.

LEGAL ASSISTANCE CONSUMER LAW GUIDE

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CONSUMER LAW GUIDE

INTRODUCTION

Consumer problems are not unique to the civilian sector; military members often seek consumer advice from attorneys providing legal assistance. Perhaps the greatest challenge for military practitioners is the complexity of law with which they must deal. Our clients come from diverse locations and we must be familiar not only with federal consumer protection statutes and regulations, but also states' and territories' laws, as well. Oftentimes, federal and state consumer protection is complementary, allowing access to a variety of remedies for our clients.

Consumer protection is a rapidly expanding area of the law and one which can not be adequately covered in this Guide. It is our intent that this Guide be a "starting point" for research into particular consumer problems. Much of the material is from TJAGSA teaching outlines which are continuously updated throughout the year.

Several points should be kept in mind in almost every consumer case:

(1) Look not only at the federal, but also the state law;

(2) State Attorneys General have consumer protection divisions which can be very helpful resources;

(3) If the transaction involves an "unfair or deceptive" act or practice, it probably is prohibited;

(4) Many times various statutes address different issues of the problem and must be used in conjunction;

(5) Many consumer problems can be resolved through negotiations provided the military attorney knows the law and can articulate it to the opposing party; and

(6) It is a good bet that other attorneys have handled similar problems - contact them.

CHAPTER 1

CONSUMER LAW FROM A PREVENTIVE LAW PERSPECTIVE

"An ounce of prevention is worth a pound of cure."

Nothing could be truer in Legal Assistance.

The more educated our service members are about consumer issues, the less likely they are to need our services. With this in mind, Legal Assistance offices should be actively engaged in "preventive law" practice.

What attorney has not asked a client, "Why didn't you seek advice from an attorney **before** you did this?" Practically speaking, if every service member heeded this advice, Legal Assistance offices would be overwhelmed. Instead of individual appointments, the best way to provide general information on a wide range of topics is to publish preventive law handouts and news articles.

JA 276, Preventive Law Series, is a handy Guide containing readily reproducible handouts on consumer issues. These may be used in the Legal Assistance waiting room or as handouts to reinforce general legal advice. Included in this Deskbook is a reference list containing offices from which consumer information pamphlets may be ordered.

Legal Assistance attorneys should be pro-active in their programs, but careful of copyright restrictions and vigilant in avoiding plagiarism in articles they publish.

REFERENCES:

Arquilla, "The New Army Legal Assistance Regulation," The Army Lawyer, May 1993, at 3.

Eveland, Professional Responsibility Opinion 93-1 (re: plagiarism and copyright violations by legal assistance attorney), The Army Lawyer, Jun. 1993, at 55.

Sullivan, "Preventive Law by Handout," The Army Lawyer, May 1984, at 29 and "Preventive Law: The Genuine Article," The Army Lawyer, Sep. 1984, at 35.

Preventive Law in the Army Legal Assistance Program

(excerpts from Arquilla, "The New Army Legal Assistance Regulation," The Army Lawyer, May 1993, at 3).

Preventive law once was a separate program with its own Army regulation.[1] The "program" and its regulation then was incorporated in the previous legal assistance regulation.[2] AR 27-3 discusses preventive law as an important area in the Army Legal Assistance Program, but dispenses with much of the verbiage that was used to describe it in previous regulations.[3]

Preventive law is not peculiar to legal assistance, despite its close association with legal assistance in the past.[4] For government practitioners, preventive law is an effective method to practice law, whether the area of law is legal assistance, contract law, environmental law, claims, administrative law, or criminal prosecution. Preventive law saves time, effort, and expense by preventing problems instead of solving them.

AR 27-3 requires commanders to sponsor preventive law initiatives,[5] and makes them responsible for ensuring that preventive law services are provided in their commands.[6] SJAs, on the other hand, are required to seek "command support and involvement" on their own preventive law initiatives,[7] and are encouraged to be aggressive and innovative in their preventive law efforts.[8]

Preventive law remains an important area in the Army Legal Assistance Program. Keeping a client out of legal trouble is more important to a client than helping him or her with damage control after the mistake is made. AR 27-3 directs that the common legal problems of soldiers and their families be examined for ways in which those problems can be avoided, that regulatory or statutory "fixes" be recommended, and that these solutions be shared with other attorneys providing legal assistance.[9] AR 27-3 also requires that "[l]ocal print and electronic media and training and education programs" be used to inform soldiers and their families of their legal rights and entitlements; local legal problems and ways to avoid them; and the location, telephone numbers, and hours of operation of the legal assistance office.[10]

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1. DEP'T OF ARMY, REG. 600-14, PERSONAL GENERAL: PREVENTIVE LAW PROGRAM (30 Sept. 1965).

2. AR 27-3 (1989), supra note 3, chap. 4.

3. Preventive law is no longer a program within a program. Cf. id.

4. Although AR 27-1, supra note 72, para. 5-3, suggests that preventive law is limited to legal assistance, DRAFT REVISION TO AR 27-1, supra note 69, para. 5-3, clearly indicates that it is not so limited.

5. AR 27-3, supra note 1, para. 1-4f(3).

6. Id. para. 3-3a.

7. Id. para. 1-4g(8).

8. Id. paras. 1-4g(9), 3-3b.

9. Id. para. 3-4a(1), (5).

10. Id. para. 3-4b.

CHAPTER 2

UNFAIR AND DECEPTIVE ACTS AND PRACTICES (UDAP)

REFERENCES.

A. The Federal Trade Commission (FTC) Act, 15 U.S.C. § 45 (1973) with 1994 Cummulative Supplement.

B. Federal Trade Regulations, Rules, Guides, and FTC Advisory Opinions, 16 C.F.R. (1993).

C. National Consumer Law Center, The Consumer Credit and Sales Legal Practice Series, Unfair and Deceptive Acts and Practices (3d ed. 1991) with 1993 Supplement.

D. Craft, "State Consumer Protection Enforcement: Recent Trends and Developments," 59 Antitrust L.J. 997 (1990/1991).

E. Tufo, "How Federal and State Governments Can Share Consumer Protection Power," 43 Admin. L. Rev. 495 (Summer 1991).

F. Gardner and Sheldon, "See Dick and Jan Sue: A Primer on State Consumer Protection Laws," ALI-ABA Course of Study (Mar. 4, 1993).

G. Brown, "Florida Legislature Broadens the Scope of the Little FTC Act," Fla. Bar J., Oct. 1993, at 50.

DISCUSSION.

State consumer protection statutes that provide private remedies (except for a limited number of states) for unfair and deceptive acts and practices are called UDAP statutes. All states (including D.C.) have enacted at least one UDAP statute.[1] They apply to most consumer transactions and provide widespread consumer remedies for many sales abuses.[2] UDAP violations are easier to prove than common law fraud. Generally, there is no requirement to prove a seller's fraudulent intent or motive. In some cases, consumer reliance, damage or even actual deception is not prerequisite for action. Where a practice does not fall precisely under another consumer statute, UDAP statutes can provide an all-purpose remedy. Almost any abusive business practice is arguably a UDAP violation. These UDAP statutes are referred to in various states as: Consumer Protection Acts, Consumer Sales Acts, Unfair Trade Practices Acts, Deceptive and Unfair Trade Practices Acts, Deceptive Consumer Sales Acts, and Consumer Fraud Acts.

Where a private UDAP action is authorized, most statutes provide for private remedies beyond mere actual damages. Some jurisdictions authorize treble damages in certain situations, such as when the seller's conduct is willful or the seller refuses to make a reasonable settlement. Some UDAP statutes explicitly authorize punitive damages, and such damages may be available in other states through the court's inherent authority. Some UDAP statutes authorize minimum statutory damages ranging from $25 to $2,000. Most common among these are $100 and $200 minimum damages. Every state UDAP statute that permits a private right of action also permits the award of attorneys' fees. Injunctions are explicitly authorized by a majority of statutes and may be allowed, even if not explicitly mentioned, where the UDAP statute refers to "other equitable remedies."

---

1. The Federal Trade Commission (FTC) Act is the federal law upon which most state UDAP statutes are patterned. "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45. There are no private remedies, only FTC enforcement.

2. For an excellent discussion of UDAP statutes see, National Consumer Law Center, "Unfair and Deceptive Acts and Practices," The Consumer Credit and Sales Legal Practice Series, (3d ed. 1991 with 1993 cumulative supplement). The discussion which follows comes from this publication.

CHAPTER 3

FAIR CREDIT BILLING ACT
15 U.S.C. § 1666

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MAJ Hostetter
Jun 1994

FAIR CREDIT BILLING ACT
15 U.S.C. § 1666

OUTLINE OF INSTRUCTION

I. **REFERENCES.**

A. 15 U.S.C. § 1601 et. seq. (1982).

B. 15 U.S.C. § 1666 (1982).

C. 12 C.F.R. § 226.13 (1993).

D. National Consumer Law Center, Truth in Lending (2d ed. 1989) and Cumulative Supplement.

E. Alperin and Chase, Consumer Law: Sales Practices Credit Regulation, Vol. I & II, (West Publ. Co. 1986) with Supplements.

II. **INTRODUCTION.**

III. **PURPOSE AND SCOPE.**

A. The Fair Credit Billing Act (FCBA) is part of the federal Truth in Lending Act.

1. FCBA establishes procedures for complaining about billing errors and requires creditors to respond to such complaints, either by correcting the error or by explaining any rejection of the billing error complaint.

2. Regulation Z, 12 C.F.R. § 226.13 (promulgated by The Federal Reserve board) implements the FCBA.

B. **FCBA applies:**

1. **To open-end consumer credit transactions involving billing errors.**

   (i.e., credit cards, store charge accounts)

2. **Billing errors (mistakes) include** (12 C.F.R. § 226.2):

   a. Bills for transactions that never occurred.

   b. Transactions by unauthorized people.

   c. Bills for erroneous amounts.

   d. Bills for goods/services that were not delivered or were not accepted.

   e. Failure (to) properly to apply credit to your accounts.

   f. Computation errors.

   g. Bills sent to incorrect addresses, provided that the creditor received notice of the change of address at least 20 days before the end of the billing cycle for which the statement was sent out.

   (Note: disputes over "quality" of goods must be raised as a claim or defense - it is not a billing error).

C. **Billing Error Resolution Procedures.**

1. Consumer must notify creditor of error <u>in writing</u> within 60 days of creditor's transmittal of bill to consumer.

   a. If the error was failure to transmit the billing statement, then the 60 days runs from the time when the creditor should have sent it.

   b. If the error is failure to credit a payment, 60 days begins to run when the credit should have appeared on the statement.

2. The consumer's billing error notice must include sufficient information to enable the creditor to identify the consumer and his/her account number and to understand the nature of the complaint.

   a. The creditor may specify of the statement that the consumer should not transmit the notice of error on the payment medium.

   b. The creditor must disclose on the billing rights statement or on the periodic statement an address for billing error inquiries. The notice must be received at that place for notice to be effective.

3. After the consumer gives notice, he/she may withhold payment of the disputed amount or pay the amount without waiving billing error rights.

   a. However, paying the disputed amount does waive assertion of claims and defenses against a credit card issuer (see below).

   b. For example, if there is a dispute over the "quality" of goods and the consumer pays the bill, he or she has no remedy against the card issuer because payment of the amount precludes asserting the claim or defense and poor "quality" is not considered a billing error.

D. Procedures creditors must follow upon receipt of the notice.

1. Creditor must conduct a reasonable investigation, unless creditor corrects the account as requested or the consumer withdraws the complaint.

2. The creditor shall mail or deliver written acknowledgement of the complaint to the consumer within 30 days of receiving a billing error notice, unless the creditor has complied with appropriate resolution procedures within that 30 day period.

3. The creditor must comply with the resolution procedures within two billing cycles (but in no event later than 90 days) after the creditor's receipt of the debtor's notice of error.

4. Resolution procedures:

   a. If creditor determines that error has occurred, creditor shall, within the time limits above:

      (1) Correct the error and credit the consumer's account with any disputed amount and associated finance charges, and

      (2) Mail or deliver a correction notice to consumer.

   b. If, after conducting investigation, creditor determines no billing error occurred or that a different error occurred from that asserted, the creditor shall, within time limits above:

      (1) Mail or deliver to consumer an explanation setting forth reasons creditor believes alleged error is incorrect in whole or part.

      (2) Furnish copies of documentary evidence of consumer's indebtedness, if consumer so requests.

      (3) If a different billing error occurred, correct the error and credit the consumer's account.

5. Until the billing error is resolved under the FCBA procedures, the following rules apply:

   a. Creditors may not:

      (1) Take any action to collect the amount in dispute.

         (a) Creditor may seek collection of unpaid, undisputed amounts.

         (b) If the consumer keeps a deposit account with the creditor and has direct payment deducted automatically, the creditor may not deduct any part of the disputed amount or related finance charges if the notice of error is received any

time up to 3 business days before the scheduled payment date.

(2) Restrict or close the account in issue based on the debtor's failure to pay the disputed amount.

- Creditor may decrease credit limit by amount in dispute.

(3) Report or threaten to report adversely on the debtor's credit rating based on the disputed amount.

b. If, after the creditor follows resolution procedures, and the consumer still claims there is an error, the creditor may report the delinquency to a credit reporting agency provided:

(1) Creditor also reports that the amount is in dispute.

(2) Mails or delivers to consumer the name and address of each person to whom creditor made the report, and

(3) Promptly reports any subsequent resolution of reported delinquency to all persons to whom creditor made the report.

c. A creditor who has fully complied with FCBA procedures is under no further responsibilities if consumer reasserts same billing error.

IV. CARDHOLDER LIABILITY FOR UNAUTHORIZED USE.

A. Credit card holders are liable for unauthorized use of the card only up to $50. 15 U.S.C. § 1643.

1. Truth in Lending Act limits liability for unauthorized use.

2. A cardholder shall be liable for the unauthorized use of a credit card only if:

a. The card is an accepted credit card (accepted by the consumer),

b. The liability is not in excess of $50.00 * (but see note below),

c. The card issuer gives adequate notice to the cardholder of the potential liability,

d. The card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card,

e. The unauthorized use occurs **before** the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise, and

f. The card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

3. Except as provided above, the cardholder incurs no liability from the unauthorized use of a credit card.

Therefore, if cardholder notifies issuer before unauthorized charges are made, the cardholder is not liable for anything.

* Note: Pending S. 265 (introduced 1/28/93) would amend the TILA [15 U.S.C. 1643(a)] re: liability for unauthorized use of credit cards - "A cardholder shall be liable for the unauthorized use of a credit card if the liability is in excess of $50 and the cardholder fails to notify the card issuer of the unauthorized transaction which appears on the statement of the cardholder's account ... within 60 days of the receipt of such statement." (Related bill H.R. 59)

4. In action to enforce liability, **the burden of proof is upon the card issuer to show that the use was authorized or, if the use was not authorized, then issuer must show the conditions of liability for unauthorized use have been met** (and then liability is only up to $50.00).

B. "Authorized" versus "unauthorized" use.

1. **Unauthorized use of card occurs only where there is no actual, implied, or apparent authority for such use by the cardholder.**

2. **Many states interpret Act's definition of "unauthorized use" to protect cardholders only against theft, loss, or similar wrongdoing.**

3. A problem arises when the card holder originally authorizes the use (or there is implied authority for another to use the card) and subsequent misuse occurs.

   a. Fact that card holder orally limited spending amount to $500 did not mean charges made by other person over $500 were "unauthorized" and cardholder was liable for all charges. Martin v. American Express, Inc., 361 So.2d 597 (Ala. Civ. App. 1978).

   b. Use of card by person authorized to use it for specific purpose, but who used it otherwise, was not an "unauthorized" use limiting credit cardholder's liability. Master Card v. Town of Newport, 396 N.W. 2d 345 (Wis. 1986).

   c. Letter to credit card issuer to limit credit limit did not shield cardholder from liability for excess charges by an apparently authorized person. Martin v. American Express. The court remarked: "We are unaware of any requirement...which would compel a credit card issuer to undertake a policy whereby the issuer would see to it that charges on a cardholder's account do not exceed a specified amount."

   d. "Notification to card issuer has no bearing whatsoever on whether the use is authorized, so as to entitle a cardholder to statutory limitation of liability." Walker Bank and Trust Co. v. Jones, 672 P.2d 73 (Utah 1983).

   e. State law imposes no duty on issuer to mitigate despite cardholder notification that an authorized user is making unauthorized charges. American Express v. Web, 1991 W.L. 124625 (Ga. July 3, 1991).

f. But see Standard Oil Co. v. Steel, 489 N.E. 2d 842 (Ohio Misc. 1985). Cardholder who voluntarily gave her card to a friend liable for all charges friend made before she notified card issuer of unauthorized use, but not for charges made after notification.

g. See also Blaisdell Lumber Company Horton, N.J. Super. Ct. App. Div. 1990). Woman not liable to merchant for boyfriend's charges because once she reported to issuer that card was missing, his use was unauthorized. Mere use of card by someone else not sufficient to find apparent authority. "Plaintiff did not establish that (he) was (her) agent and acting on her behalf by express, implied or apparent authority." General principles dealing with liability of owner to the issuer apply to merchants, as well.

h. See also Universal Bank v. McCafferty, 1993 WL 407953 (Ohio Ct. App. 1993). Cardholder directed issuer to send card to a friend's address so his wife would not find out he had the card. He told friend to inform him when card came. Friend did not and used the card. Universal claimed friend had implied authority to use card. Court held McCaffrey liable for only up to $50 of friend's charges. State law interprets whether the use is "authorized" or "unauthorized."

C. Credit Card Issuer Must Police Participating Merchants.

Citicorp Credit Services, Inc., FTC File No. 892 3033 (Nov. 10, 1992)(consent order). Credit card issuer continued to process credit card sales when it knew or should have known that seller engaged in deceptive sales practices (UDAP case).

1. Credit card issuer should have known about fraud due to high volume of consumer complaints, ongoing government investigations, and 25% charge-back rate (about 20 times national average). "Charge-back" is where credit charge removed from consumer's account and charged back to merchant.

2. Consent order included ways Citicorp could investigate a merchant, including reviewing merchant's advertising, sales scripts, promotional materials, goods and services offered, and truth of claims being made.

3. NCLC Report suggests that case provides a third remedy for defrauded consumers (in addition to claims and defenses and error resolution procedures under FCBA discussed above): "That a card issuer is liable under a UDAP statute for aiding and abetting a deceptive scheme by not adequately investigating the merchant."

V. **REMEDIES (effect of noncompliance).**

A. Because the FCBA is part of TILA, it carries the same remedies as TILA, except that the remedy of rescission is not available for failure to comply with billing requirements. 15 U.S.C. § 1640.

1. Actual damages in all cases.

2. Attorneys' fees and court costs for successful enforcement and rescission actions.

3. Statutory damages.

B. In addition to the remedies available for TILA violations, a specific remedy is available to the debtor if the creditor fails to comply with the FCBA. If the creditor violates the billing error resolution procedures, the consumer nonetheless recovers from creditor the disputed amount and any finance charges thereon up to $50. 15 U.S.C. § 1666(e).

C. Also, consider UDAP action.

VI. **CARDHOLDERS' CLAIMS AND DEFENSES (15 U.S.C. § 1666i).**

A. Claims and defenses may include:

1. Unauthorized use of the card,

2. Dispute as to quality of merchandise.

3. Nondelivery of goods,

4. Claims which can be asserted under the billing error resolution procedures.

B. A consumer has right to assert against card issuer claims or defenses concerning property or services purchased with a credit card, if:

1. The consumer has made a good faith effort to resolve the problem with the merchant honoring the card;

2. The amount of the initial transaction exceeds $50;

3. The initial transaction was in the same state as the cardholder's designated address or within 100 miles of such address; and

   a. Location of transaction is matter of state law; states differ on whether mail or telephone order occurred at consumer's home or seller's place of business.

   b. See Lincoln First Bank v. Carlson, 426 N.Y.2d 433, 103 Misc.2d 467 (1980) (no presumption that consumer gives up all defenses if transaction takes place at distance greater than 100 miles).

4. The merchant is not controlled by or the same as the card issuer.

C. Once the criteria have been met, the consumer may withhold payment of the disputed amount to the extent of the credit outstanding on that transaction and finance charges attributable thereto.

Payment of the disputed amount waives right to assert claims or defense as to the card issuer.

1. Payments already made shall be applied in the following order:

   a. Late charges in the order of their entry.

   b. Finance charges in the order of their entry.

   c. Other debits in the order of their entry.

2. If only part of a single transaction is disputed (i.e., multiple purchases at the same time), payments shall be prorated according to prices and applicable taxes.

D. **Relationship to Billing Error Resolution procedures.**

1. Even though certain merchandise disputes, such as nondelivery of goods, may also constitute "billing errors," the protections operate independently. For example:

   a. A cardholder who asserts billing error involving undelivered goods may institute error-resolution procedures, but whether or not the card issuer has done so, the cardholder may assert claims or defenses, as well.

   b. Conversely, the consumer may pay a disputed balance and thus have no further right to assert claims or defense, but still may be able to assert a billing error if notice of the error is given in the proper time and manner.

   c. An assertion that a transaction resulted from "unauthorized" use of a credit card could also be both a "defense" and a billing error.

   d. A dispute over "quality" may only be asserted as a claim or defense, not a billing error, since it is not within the billing error provisions.

2. State statutes may be more favorable to consumers. See Mass. G.L.A. c. 255, § 12F, which makes credit card issuers subject to all defenses a consumer may have arising from a sale or lease transaction without any condition or limitation.

VII. CONCLUSION.

CHAPTER 4

ELECTRONIC FUND TRANSFER ACT (EFTA)
15 U.S.C. § 1693

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MAJ Hostetter
Jun 1994

ELECTRONIC FUND TRANSFER ACT (EFTA)
15 U.S.C. § 1693.

OUTLINE OF INSTRUCTION

I. REFERENCES.

A. 15 U.S.C. § 1601 et. seq.

B. 12 C.F.R. Part 205 (1992).

C. Pointer, "The Electronic Fund Transfer Act", The Army Lawyer, p.3, August 1990.

D. Copies of "Alice in Debitland: Consumer Protections and the Electronic Fund Transfer Act" can be obtained upon request by writing: Publications Services, Division of Support Services, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

II. INTRODUCTION.

III. PURPOSE AND SCOPE.

A. EFTA establishes rights, liabilities, and responsibilities of consumers who use electronic money transfer services and of financial institutions that offer these services.

B. 12 C.F.R. Part 205 implements EFTA.

C. Electronic Transfer: Any transfer of funds, other than a transaction by check, draft, or similar paper instrument, that is initiated through an electronic terminal, telephone, or computer or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account.

1. The term includes, but is not limited to:

a. Point of sale transfers,

b. Automated Teller Machine transfers,

c. Direct deposit or withdrawal of funds, and

d. Transfers initiated by telephone.

2. The term includes all transfers resulting from debit card transactions.

D. The Act does not apply to the following:

1. Check guarantee or authorization services that do not result directly in a debit or credit to consumer's account.

2. Wire transfers used primarily for transfers between financial institutions or businesses.

3. Certain automatic transfers. Any transfer under an agreement between consumer and financial institution which provides the institution will initiate individual transfers without specific request from consumer

a. Between consumer's accounts within the institution, such as a checking account to savings account,

b. Into a consumer's account by the institution, such as the crediting of interest to a savings account,

c. From a consumer's account to an account of another consumer who is a family member and whos account is within the same institution.

4. Certain telephone-initiated transfers that are

a. Initiated by telephone conversation between consumer and employee of institution, and

b. Are not under a telephone bill-paying or other prearranged plan or agreement in which periodic transfers are contemplated.

IV. ISSUANCE OF ACCESS DEVICES.

A. "Access device" means a card, code, or other means of access to a consumer's account.

B. Financial institutions may only issue access devices to consumers

1. In response to an oral or written request or application, or

2. As a renewal of, or substitute for, an accepted access device.

3. Except, may distribute access device to consumer on unsolicited basis if

a. Access device is not validated,

b. Distribution is accompanied by

(1) A complete disclosure of consumer's rights and liabilities that will apply if device is validated,

(2) A clear explanation that access device is not validated and how consumer may dispose of it if validation not desired, and

4. Access device is validated only in response to consumer's oral or written request or application and after verification of consumer's identity by any reasonable means such as:

a. photo,

b. fingerprint,

c. personal visit, or

d. signature comparison.

C. Access device considered validated when financial institution has performed all procedures necessary to enable consumer to use it to initiate an electronic transfer.

V. PROTECTION FROM UNAUTHORIZED USE.

A. Unauthorized use:

1. An electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit.

2. Does not include:

a. Transfers initiated by one furnished with the access device to the consumer's account by the consumer, unless the consumer has notified the financial institution involved that the transfers by that person are no longer authorized.

b. Transfers initiated with fraudulent intent by the consumer or a person acting in concert with the consumer.

c. Transfers initiated by the financial institution or its employees.

B. Consumer liability for unauthorized transfers (15 U.S.C. § 1693g(a)).

1. Maximum liability of $50 * (see note below) if the consumer reports the loss or theft of the debit card within 2 business days of discovering the loss/theft.

2. Maximum liability of $500 if consumer fails to notify institution within 2 business days and institution can show it could have stopped the unauthorized use if it had been notified.

3. Unlimited liability if consumer fails to report within 60 business days and institution can show it could have stopped the unauthorized use if it had been notified.

4. The consumer cannot waive these limitations or any other protections provided by the Act.

   a. Financial institutions cannot attempt to circumvent the Act's protections by adding "fault" language in ATM agreements.

   b. For example, the financial institution MAY NOT try to limit its liability if the consumer is negligent in co-locating the ATM card with the PIN number and both are stolen and used.

* Note: Pending S. 1124 (introduced 6/17/93) would add "fault" language to liability protections of the Act [15 U.S.C. 1693g(a)(1)], increasing monetary liability to $500 "where the cardholder has substantially contributed to the unauthorized use by writing a personal identification or other security code on the card..." (the language differs in H.R. 962 (introduced 2/18/93): "where the cardholder has substantially contributed to the unauthorized use, including writing on or keeping with the card or other means of access a personal identification....")

VI. ERROR RESOLUTION PROCEDURES.

A. "Error" means

1. An unauthorized electronic fund transfer,

2. An incorrect electronic fund transfer to or from consumer's account,

3. Omission from a periodic statement of an electronic fund transfer to or from consumer's account that should have been included,

4. Computational or bookkeeping error made by financial institution relating to an electronic transfer,

5. Consumer's receipt of an incorrect amount of money from an electronic terminal,

6. An electronic fund transfer not identified in accordance with regulations, or

7. A consumer's request for any documentation required to be given by the financial institution, or additional clarification concerning an electronic transfer. Does not include routine inquiry about the balance of account.

B. In order to limit liability, the consumer must furnish to the financial institution written or oral notice of the error within 60 days of the erroneous statement's transmittal.

Notice should include:

1. Consumer's name and account number.

2. Consumer's belief that an error exists and the amount of the error.

3. The reasons for the consumer's belief.

C. Upon notification:

1. The institution has 10 business days (20 days if the consumer is overseas) to investigate and report the results of the investigation to the consumer.

2. The institution, at its option, may extend the report period by provisionally re-crediting the account within 10 business days of the consumer's notice. Re-crediting gives the bank 45 days (90 days if the consumer is overseas) to investigate and report the results of the investigation to the consumer.

D. Following completion of the investigation, the institution shall:

1. Correct any errors within 1 business day.

2. If no errors are found, so notify the consumer within 3 business days and forward copies of all documents relied upon if requested by the consumer.

3. If there was no error discovered, and upon debiting a provisionally recredited amount, the financial institution

   a. Shall orally report or mail notice to consumer of date and amount of debiting and fact they will honor checks, drafts, or similar paper instruments to 3rd parties and preauthorized transfers from consumer's account for 5 business days after transmittal of notice.

b. Institution need only honor items that it would have paid if the provisionally recredited funds had not been debited.

VII. PRE-AUTHORIZED TRANSFERS FROM CONSUMER'S ACCOUNT.

Consumer's right to stop payment.

A. Consumer must notify financial institution orally or in writing at any time up to 3 business days before the scheduled day of transfer.

B. Financial institution may require written confirmation of the stop-payment order to be made within 14 days of an oral notification is made if, the requirement is disclosed to consumer along with address to which confirmation should be sent.

C. If consumer does not provide written confirmation, stop-payment order ceases to be binding 14 days after it has been made.

VIII. REMEDIES.

A. Actual damages.

B. Statutory damages of $100 to $1,000.

C. Court costs and reasonable attorney's fees.

D. Criminal penalties of up to 1 year's imprisonment and a $5,000 fine for knowing and willful noncompliance.

E. Criminal penalties of up to 10 years' imprisonment and a $10,000 fine for violations affecting interstate or foreign commerce.

F. Treble damages (3 times the consumer's actual damages) if:

1. The account is not properly provisionally recredited.

2. The institution fails to conduct a good faith investigation.

3. The institution knowingly and willfully concludes that no error exists contrary to the available evidence.

IX. CONCLUSION.

CHAPTER 5

FAIR CREDIT REPORTING ACT (FCRA)
15 U.S.C. §§ 1681-1682t

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FAIR CREDIT REPORTING ACT (FCRA)
15 U.S.C. §§ 1681-1682t

I. REFERENCES.

A. 15 U.S.C. §§ 1681-1682t (1982 with 1993 Pocket Part).

B. Consumer Reporting Reform Act of 1994.

S. 783, introduced 4/7/93; hearings completed by Senate Banking, Housing & Urban Affairs Committee on 5/27/93; submitted to Senate 12/9/93 (Rept. No. 103-209) [see 140 Cong. Rec. S54-02 (Jan. 25, 1994)]; passed Senate with amendments on 4 May 1994 (see CCH, Consumer Credit, Rpt. 682, May 10, 1994).

H.R.1015 went to House Banking, Finance and Urban Affairs Committee's Consumer Credit and Insurance subcommittee on Oct. 20, 1993; Nov. 19, 1993, approved for full committee action amended H.R. 1015 [see 139 Cong. Rec. D1349-01 (Nov. 19, 1993)]; approved by Committee 3 March 1994 (see CCH, Consumer Credit, Rpt. 682, May 10, 1994).

C. Federal Trade Commission Act Amendments of 1993 (H.R. 2243/ S. 1179) - § 18: Credit Repair/Loan Brokers (See CCH, Consumer Credit, Rpt. 667, Oct. 12, 1993). Senate adopted committee amendment and substituted text of H.R. 2243, Nov. 22, 1993.

D. National Consumer Law Center, Fair Credit Reporting Act (2d ed. 1988) and Cumulative Supplement.

E. Alperin and Chase, Consumer Law: Sales Practices Credit Regulation, Vol. I & II, (West Publ. Co. 1986) with Supplements.

F. National Consumer Law Center, "When the Phone Company is not the Phone Company: Credit Reporting in the Postdivestiture Era," Clearinghouse Review (June 1990).

G. Feldman, "The Current Status of the Law Governing Prescreening, Including Permissible Postscreening Practices," 46 Bus. Law. 1113 (May 1991).

H. Nehf, "Legislative Framework for Reducing Fraud in the Credit Repair Industry," 70 N.C. L. Rev. 781 (1992).

I. Prentice Hall Law and Business, "Lawmakers Unveil 1993 Version of Fair Credit Reporting Legislation," 12 No. 6 Banking Pol'y Rep. 2 (March 15, 1993).

J. Jacquez and Friend, "The Fair Credit Reporting Act: Is It Fair for Consumers?," 5 Loy. Cons. L. Rep. 81 (Spring 1993).

II. INTRODUCTION.

The credit reporting industry in this country is a multi-billion dollar industry that involves the sale and use of personal and financial data on millions of Americans. Consumer reports are routinely used to make decisions about whether to offer a job or lease an apartment, whether to extend a mortgage or issue a credit card or whether to underwrite insurance or provide a checking account. Where the ability of an individual to obtain a job, a mortgage, or insurance turn on the contents of his or her consumer report, it is essential that consumer reports be reasonably free of errors, that consumer reporting agencies be responsive to consumer complaints about mistakes, and that consumers have some control over the use of their confidential information.... [T]he FCRA meets none of these objectives.

> Jacquez and Friend, "The Fair Credit Reporting Act: Is It Fair for Consumers?," 5 Loy. Cons. L. Rep. 81 (Spring 1993).

In Privacy for Sale, Jeffrey Rothfeder describes how he surreptitiously obtained the credit report and charge-card data, among other items, of CBS Evening News anchor DAN RATHER. Rothfeder says he collected Rather's data to make a point: that it is too easy for just about anyone to obtain such information, using ordinary PC's....For a 1989 article he obtained a copy of Vice-President Dan Quayle's credit report....

> "Snooping on Behalf of the Right to Privacy," Business Week, June 19, 1992, p.39.

Rosenfield was arrested in 1991 after hatching a plot to build and sell IBM computers. He and some pals bought nearly $1M worth of computer parts using credit-card numbers from strangers' credit reports. A Secret Service raid on (his home) uncovered 176 credit reports stolen from TRW, a leading credit-rating company. He says he sold 'thousands' of such reports to private investigators.

Behar, "Surfing Off The Edge," Time Magazine (Feb. 8, 1993)

Between 1991 and 1992, Equifax mistook municipal lien certificates recorded at local registry of deed office for conventional liens. (A municipal lien certificate is filed as a matter of course in Mass. when real estate changes hands; it does not necessarily reflect a tax delinquency). Equifax characterized them as liens in consumers' credit files and the firm disseminated reports with the misleading information for nearly 3,000 consumers. Massachusetts v. Equifax Credit Inform. Serv., Inc., NO. 93-7234B (Super. Ct. Mass. 1993). Settled for $240,000 restitution.

BNA Antitrust & Trade Reg. Daily (Jan. 10, 1994).

It's been about a year since the major credit bureaus -- TRW, Equifax and Trans Union -- responded to (FTC) criticism and pledged to be more responsive to the public. How well are (they) serving you today? Still not very well....Money concludes (they) deserve no more than a grade of 'C.' (Ms.) Skelly...has been trying to get another woman's credit data off her reports since September 1990. Because the bureau reports mistakenly insist that she has been bankrupt, Skelly and her fiance were rejected for a mortgage. 'I can't even get overdraft protection from my bank,' she laments.

Garrett, "Why You Still Can't Rely on Credit Bureaus," Money Magazine (March 1993).

The 1970 law has been substantially amended only once in the last 24 years.... Since 1970, however, the size and nature of the industry have changed drastically. Over $700 billion in consumer installment credit is now outstanding. The consumer reporting industry maintains 450 million credit files on individual consumers and processes almost 2 billion pieces of data per month.

As the industry has grown, the number of problems associated with consumer reports has escalated. A Consumer's Union survey of consumer reports on 57 consumers from the three major credit bureaus found that 48 percent of the reports contained inaccurate information. Many reports contained more than one inaccuracy, and 19 percent contained an inaccuracy that could adversely affect a consumer's eligibility for credit. From 1990 to 1993, the Federal Trade Commission (FTC) received more complaints regarding consumer reporting agencies than any other industry. Almost one-fifth of all complaints filed with the Commission concerned consumer reporting.

Excerpt from Report of the Senate Committee on Banking, Housing, and Urban Affairs, Consumer Reporting Reform Act of 1994, Oct. 28, 1993.

III. DEFINITIONS.

[Note: Throughout this outline are included amendments proposed by the Consumer Reporting Reform Act of 1994 (CRRA), which was marked-up and submitted to the Senate (S. 783) on 12/9/93] The Act passed with amendments on 4 May 1994; however, that text was not available when this outline was printed. The House version differs slightly.

A. **Credit (Consumer) Reporting Agencies** (CRAs) are:

1. Those "who for monetary fees, dues, or on a cooperative nonprofit basis, <u>regularly engage in</u> ... the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties, and [who use] any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f). (e.g., TRW, Trans Union Credit Corporation).

2. Agencies or persons may become credit reporting agencies if they <u>regularly</u> furnish information beyond their own transactions to others for use in consumer transactions. (FTC Commentary, 16 C.F.R. Part 600, May 4, 1991).

   a. Creditors that report information about their own experiences with consumers are not credit reporting agencies nor are they issuing a "consumer report."

   b. If the creditor reports any information other than that obtained in its own dealings with consumer, then it may meet definition of "consumer reporting agency."

B. **Users:**

1. Those receiving the "consumer report" information and applying it to a consumer. (Refer back to definition of consumer report).

2. **Users are permitted to receive consumer reports if the reporting agency has reason to believe the information will be used for credit, insurance, employment, or "legitimate business needs" (also, if court ordered).**

C. **Consumer Credit Reports are:**

1. **Any written, oral or other communications of information**

2. **Collected by a consumer reporting agency bearing on the consumer's credit worthiness, credit standing, general reputation, personal characteristics, or mode of living**

3. **Which is used or expected to be used in establishing the consumer's eligibility for:**

a. **Credit or insurance to be used primarily for personal, family, or household purposes, or**

b. **Employment purposes, or**

c. **Other purposes authorized by the Act.**

[Note: CRRA would amend definition].

D. **Investigative Consumer Reports:**

1. Consumer report or portion thereof in which information on consumer's character, living style, and reputation obtained through personal interviews (subjective evaluations).

a. Used primarily by insurance companies and employers.

b. Some consumer reporting agencies specialize in investigative reports (Equifax).

2. Investigative reports are in a subcategory of consumer reports.

3. CRAs must verify information, and reverify information over 3 months old.

4. **Users of investigative reports must:**

   a. Within 3 days, give notice to consumer that investigative report was requested,

   b. That the report will concern the consumer's character, reputation, mode of living, and personal characteristics, or whichever are applicable and may include interviews with acquaintances, and

   c. That consumer has the right to request within a reasonable time, a complete and accurate description of the nature and scope of investigation being conducted.

      But see, Houghton v. New Jersey Mfrs. Inc. Co., 795 F.2d 1144 (3rd Cir. 1986). Report on injured party which tort-feasor's insurer sought to obtain from investigative agency and which contained request for general financial information, activities since date of accident, and past health history was concerned only with genuineness of injured party's claim rather than her eligibility for credit or insurance or employment and, hence, was not an "investigative consumer report" as to which insurer was required by FCRA to provide notice to injured party.

E. **Pre-screening Services:**

   1. Mailing lists compiled by consumer reporting agencies using criteria specified by the user.

   2. User must certify it is considering and will offer to enter into, a credit relationship with each consumer on the pre-screened list.

      See: In re Matter of Trans Union Corp. (FTC Release, Aug. 26, 1993, FTC Docket No. D-9255) - Settlement with FTC of charges that Trans Union's practice of providing prescreened lists of consumers meeting certain criteria to credit grantors failed to require the grantors to make a firm offer of credit to each person on the lists as required by the FCRA.

[CRRA: "Opt-out" allowing consumers to notify CRA and prohibit release of information from their reports for either pre-screening or direct marketing].

IV. PURPOSE AND SCOPE OF FCRA.

A. Fair Credit Reporting Act applies to Credit Reporting Agencies and Users of Credit Reports (not to those furnishing information from their own dealings with the consumer; i.e., creditors).

[Note: CRRA would bring furnishers of information under the jurisdiction of the FCRA for the first time. On May 27, 1993, the FTC's Director of Credit Practices testified:

> The expansion of the FCRA's coverage makes particular sense because it is creditors and other furnishers of information, not consumer reporting agencies, that have direct access to the facts of a given credit transaction. Ordinarily, the creditor is best situated to determine whether the information it reported was inaccurate or incomplete and to ensure its correction].

[Note: The Senate Committee bill adds Title II: the "Credit Repair Organization Act," which addresses credit repair fraud. The FTC's testimony on May 27, 1993:

> Fraudulent companies that lead consumers to believe that the companies can "repair" bad credit histories have bilked consumers of millions of dollars in the past several years, have caused consumer reporting agencies to waste time and money reinvestigating spurious disputes, and have been the focus of numerous enforcement actions by the FTC.

Title II prohibits any credit repair organization from charging or receiving money prior to completion of the services that it has agreed to perform for the consumer. They are prohibited from making, or advising the consumer to make, any statement that is misleading or untrue concerning that consumer's credit history. The bill also requires credit repair organizations to provide disclosures to consumers that indicate the consumers' rights under the FCRA and under Title II of the Committee bill before signing any contract].

B. Purpose of FCRA: To require Consumer Reporting Agencies (CRAs) adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information

1. In a manner which is fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy, and proper use of the information,

2. By placing various obligations on persons who use or disseminate credit information about consumers.

a. **CRAs must adopt reasonable procedures to ensure that information they disseminate:**

(1) **Is accurate, up-to-date, and**

(2) **Furnished only to users with certain permissible purposes.**

See, Ladner v. Equifax, 1993 WL 300653 (S.D. Miss. 1993) - Test is whether CRA follows "reasonable procedures" to assure maximum accuracy of information reported, not whether the information in the report is accurate (no strict liability).

b. **There are disclosure obligations for both CRAs and users, designed to inform the consumer when adverse action is taken based on the report.**

(1) If the information is used for credit, insurance, or employment, then "user" must notify consumer if adverse action taken as result of information in the consumer report.

(2) Federal Trade Commission action:

(a) Complaint, Docket No. C-3342, Electronic Data Systems Corp., Aug. 21, 1991. Corporation violated FCRA when denying applications or rescinding employment offers based on consumer reports and not advising consumers that the reports contributed to the adverse action and by not then providing name and address of consumer reporting

agency supplying reports. See also, underlying Consent Order to Cease and Desist, File No. 912-3096 Electronic Data Systems Corp., Mar. 18, 1991.

(b) Consent Order to Cease and Desist, File No. 912 3099, McDonnell Douglas Corp., Jul. 12, 1991. Order to cease and desist from failing, whenever employment is denied because of a consumer report from a consumer reporting agency, to disclose to applicant that fact. Provides letter format to use in corresponding with consumer.

(c) Complaint, Docket No. C-3309, Nationwide Acceptance Corp., Oct. 18, 1990. Corporation violated FCRA when denying applications for credit or increasing charge for credit based on information from consumer reporting agency and not advising consumers of that fact or giving them name and address of reporting agency. Provides Appendix C: FCRA and ECOA information to the consumer.

(3) Excluded from disclosure requirements:

(a) Users of reports for employment purposes for which the consumer has not applied; i.e., an employer considering employee for promotion, unbeknownst to employee.

(b) If information is used for "legitimate business need" other than one involving credit, insurance, or employment, then "user" is under no obligation to inform consumer that a report has been used. [See Houghton v. New Jersey Manufacturers Ins. Co., 795 F.2d 1144 (3rd Cir. 1986) discussed below].

c. CRAs have obligation to reinvestigate information which consumer disputes and inform users of the dispute. (See discussion below)

V. PERMISSIBLE PURPOSES FOR RELEASING REPORTS.

A. CRAs may furnish consumer reports only (15 U.S.C. § 1681b):

1. In response to a court order or subpoena issued in connection with proceedings before federal grand jury, or

2. With the consent of the consumer to whom the report relates, or

3. To a person who the CRA "has reason to believe":

a. Intends to use the report in connection with a credit transaction involving the consumer,

See e.g., Cotto v. Jenney, F. Supp. 5 (D. Mass. 1989) (a report requested by a landlord seeking information as to the credit worthiness of a prospective tenant was a consumer report subject to the FCRA).

See also, Dobson v. Holloway (Ga 1993) (car dealer could get credit report on prospective purchasers)

b. Intends to use the report for employment purposes, or

c. Intends to use the report in connection with the consumer's insurance, or

d. Intends to use the report in connection with the consumer's eligibility for a license or other benefit conferred by the government, or

e. Has another legitimate business need for the information in connection with a business transaction involving the consumer.

(1) Houghton v. New Jersey Manufacturers Ins. Co., 795 F.2d 1144 (3rd Cir. 1986) - The business transaction must relate back to one of the other specifically enumerated transactions, i.e., credit insurance eligibility, employment, or licensing.

(2) Arcidiacono v. American Express, 1993 WL 94327 (D.N.J. 1993) - American Express sold lists of categories of consumers to merchants. Categories included descriptive labels: "low-end, value-oriented, fashion conscious, Fifth Avenue sophisticated, Rodeo Drive chic." Court: list was not a "consumer report," citing Houghton. Reports were not compiled or used as consumer reports, rather to target potential customers with promotional mailings.

See Complaint, Docket No. C-3423, April 14, 1993, CDB Infotek and Rozar, consent agreement with FTC to cease and desist from violating Act. Infotek (a credit reporting agency) gave reports for impermissible purposes to attorneys, insurance and private investigators. FTC alleged as UDAP in violation of FTC Act, pursuant to FCRA.

See also, Complaint, Docket No. 9258, W.D.I.A. Corp., May 4, 1993 - Credit reporting agency required to perform periodic checks on its subscribers to ensure reports being used for permissible purposes under FCRA.

[Note: CRRA imposes affirmative obligation on users to identify a permissible purpose prior to accessing the report and to certify that purpose].

B. **If the user applies the information to a credit, insurance, or employment situation, then the <u>user</u> must:**

1. **Notify the consumer when any adverse information has been taken as a result of the report, and**

2. **Provide the consumer with the name and address of the CRA furnishing the report.**

[Note: CRRA defines "adverse action." A definition is lacking in the FCRA. Also, the CRRA requires creditors to furnish consumers with the principal reasons for the adverse action. If the adverse action involves employment, the employer must provide the consumer a copy of the report and a reasonable opportunity to respond].

VI. OBSOLETE INFORMATION.

A. Unless otherwise specified, the following information is considered "obsolete" and cannot be included in a CRA's consumer report (Note: this is adverse information; favorable information that is old may be included in the report):

1. Bankruptcy adjudications which antedate the consumer report by more than 10 years.

2. Paid tax liens which antedate the consumer report by more than 7 years.

3. Accounts placed for collection or charged to profit and loss which antedate the consumer report by more than 7 years.

4. Records of criminal arrest, indictment, or conviction which, from the date of disposition, release, or parole, antedate the consumer report by more than 7 years.

5. Suits and judgments which, from date of entry, antedate the consumer report by more than 7 years or until the governing statute of limitations has expired, whichever is the longer period.

6. Any other <u>adverse</u> item of information which antedates the consumer report by more than 7 years.

B. Inclusion of "adverse" obsolete information.

"Obsolete" information **CAN** be included in the consumer report IF the report is intended for use involving (15 U.S.C. § 1681c):

1. The consumer's participation in a credit transaction of $50,000 or more.

2. Issuance of life insurance coverage on the consumer of $50,000 or more.

3. Employment of the consumer at an annual salary of $20,000 or more.

VII. CONSUMER'S RIGHTS.

A. **Upon request**, the consumer can obtain (15 U.S.C. § 1681g):

[Note: CRRA would enable consumers to request and obtain one copy of their credit report free of charge from any CRA during a 2-year period. Consumers would be entitled to a free report for a full year following a dispute that results in the correction or deletion of information from their report.]

1. A summary of the nature and substance of the information in the CRA's files.

[Note: CRRA would require CRA to disclose all information in the consumer's file at the time of the request.]

2. The identities of those who have received the report:

   a. Within the past 2 years for employment purposes.

   b. Within the past 6 months for other purposes.

B. If the consumer disputes the completeness or accuracy of the report, the CRA must investigate (within a reasonable time) and record the current status of the disputed information unless the CRA has reason to believe that the dispute is frivolous or irrelevant. 15 U.S.C. § 1681i.

[Note: CRRA would require CRAs to reinvestigate disputed information and to record the current status of the information within the later of 30 days after receipt of the initial notice of the dispute from the consumer or 15 days after receipt of additional relevant information from the consumer concerning the dispute.]

Stevenson v. TRW, 987 F.2d 288 (5th Cir. 1993) - In a reinvestigation of the accuracy of a credit report, the credit bureau must bear some responsibility for evaluating the accuracy of information obtained from subscribers. TRW argued at trial that where fraud has occurred (accounts were fraudulently opened in Stevenson's name), then it is up to the consumer to resolve the problem with the creditor. It argued that its only responsibility is to publish a "victim of fraud' statement at the end of the credit report. Court disagreed. Court found also that TRW took too long to investigate Stevenson's complaints. Award: $30,000 actual damages based on mental anguish; $20,700 attorney's fees.

1. If the investigation does not resolve the dispute, the consumer may file a statement of not more than 100 words. In future reports, the CRA must note that the entry is disputed by the consumer and provide the consumer's statement.

2. If the investigation reveals that the disputed entry is inaccurate or can no longer be verified, the CRA must delete the information.

3. Following either correction of the report or receipt of a consumer's statement in rebuttal, the CRA must furnish a copy of the annotated report (and consumer's statement, where appropriate) to "any person specifically designated by the consumer" who has received the report:

   a. Within the past 2 years for employment purposes.

   b. Within the past 6 months for other purposes.

C. See Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151 (11 Cir. 1991).

1. Credit Reporting Agency did not report "inaccurate" information under the FCRA, where bad debt entry correctly reflected status of account at the time, even though consumer disputed debt and later entered into settlement with creditor.

2. Creditor's instructions to CRA to change rating to favorable did not erase historical fact that creditor previously reported the account was a bad debt and nothing in creditor's letter to CRA told them to erase creditor's own past characterization of the account from future credit reports.

VIII. REMEDIES.

A. Civil liability for willful noncompliance (15 U.S.C. § 1681n) - actual damages, punitive damages, and court costs and reasonable attorney's fees if the consumer prevails.

Stevenson v. TRW, 987 F.2d 288 (5th Cir. 1993) - Although malice or evil motive not necessary to satisfy punitive damages provision of FCRA, there must have been willful violation. Must have acted in conscious disregard for tights of others. Plaintiff entitled to recover damages for mental anguish.

See also, Comeaus v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) (knowingly and willfully obtaining information on consumer from CRA under false pretenses gives rise to civil liability).

B. Civil liability for negligent noncompliance (15 U.S.C. § 1681o) -actual damages plus court costs and reasonable attorney's fees if the consumer prevails.

1. FCRA does not make reporting agencies strictly liable for all inaccuracies.

2. Agencies escape liability by proving an inaccurate report was generated following reasonable procedures designed to preclude errors.

2 Approaches:

a. "Technical Accuracy" - an agency satisfies its duty if it produces a report containing factually correct information about a consumer that might nonetheless be misleading or incomplete in some respects. See Cahlin v. General Motors Acceptance Corp.

b. Credit Reporting Agency must show it generated a report containing information of "maximum accuracy". See Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984).

[Note: CRRA exempts furnishers of information from civil liability for providing information that the furnisher knows or should have known is incorrect or inaccurate. Actions under this provision may only be brought by state law enforcement or the FTC.] This provision was added to relieve the fear that threat of civil liability may prevent furnishers from providing information to CRAs in the future, thus hindering extensions of credit to the consumers for whom the Act was designed to help. *At the same time, however, furnishers will be subject to civil liability for a failure to reinvestigate disputed information or a failure to update information that has been determined to be incorrect or inaccurate.* The furnisher would be shielded from liability for the initial provision of inaccurate information, but would face liability for failure to correct it once the inaccuracy is discovered.

3. Statute of Limitations (15 U.S.C. § 1681p).

2 years from date liability arises (with limited exceptions)

a. Limitations period for FCRA suit alleging negligence commences when report issued to user causes injury to consumer;

b. Limitations period for suit asserting intentional violation of Act begins at same time or, if consumer is not aware of issuance of report, when consumer later discover it. Hyde v. Hibernia Nat. Bank, 861 F.2d 446 (5th Cir 1988), cert. denied 109 S.Ct. 3199.

4. Consumer has burden to prove inaccurate credit report is causal connection to denial of credit or

employment or other consumer benefit. Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151 (11 Cir. 1991).

But see, Fischl v. General Motors Acceptance Corp.,708 F.2d 143 (C.A. La. 1983) (even where no pecuniary or out-of-pocket loss has been shown from creditor's failure to comply with disclosure requirements of FCRA, Act permits recovery for humiliation and mental distress as well as for injury to one's reputation and creditworthiness) and Jones v. Credit Bureau of Huntington, Inc., 399 S.E.2d 694 (W.Va. 112 (1990) (humiliation and mental distress constitute recoverable elements of damage).

C. Criminal penalties for obtaining information under false pretenses (15 U.S.C. § 1681q) - fine of not more than $5,000 or imprisonment for not more than 1 year, or both.

[Note: CRRA gives FTC civil money penalty enforcement authority; it also provides the chief law enforcement officer of any state may enforce the FCRA].

IX. CONCLUSION.

A. Ted Weiss Child Support Enforcement Act of 1992, Pub. L. No. 102-537, §1, Oct. 1992, 102 Stat. 3531 (amending 15 U.S.C. § 1681a, et.seq.) effective January 1, 1993.

CRAs will include in consumer reports furnished by the agency any information on the failure of consumer to pay overdue support which:

1. Is provided

   a. To the CRA by a state or local child support enforcement agency, or

   b. To the CRA and verified by any local, state, or federal government agency, and

2. Antedates the report by 7 years or less.

3. See also, S. 1668, Social Security Act Amendments of 1993 [left Senate Committee on Finance Nov. 17, 1993 (139 Cong. Rec. S15900-02, Nov. 17, 1993)].

Committee amendment proposes to require state child support enforcement agencies to report periodically the names of obligors who are a least 2 months delinquent in paying child support and the amount to consumer reporting agencies. Present law requirement that delinquent amount must exceed $1,000 and requirement for notice and due process would be retained. Payment of fee by credit reporting agency would be repealed. Effective date would be: Oct. 1, 1995.

B. Pending legislation:

1. H.R. 2790, section 466 - would amend 15 U.S.C. § 1681(b) to allow release of credit reports to a state agency administering a state plan under section 454 of the Social Security Act, for use to establish or modify a child support award.

2. S. 1301, § 601 (introduced 7/28/93 - would amend FCRA - 15 U.S.C. § 1681F § 608) - would require CRAs to furnish consumer reports to the FBI upon their written request ("National Security Letter" used to obtain information without a court order) when such records are necessary to conduct certain foreign counterintelligence investigations and the consumer whose report is sought is believed to be a foreign power or an agent of a foreign power; other identifying information on consumers will be given when the consumer has been or is about to be in contact with a foreign power or an agent thereof. Also, the CRA would not disclose that the FBI asked for the report.

   H.R. 2330 (conference report) does not include provision granting FBI access. See 139 Cong. Rec. H10370-03 (Nov. 20, 1993) and 139 Cong. Rec. H10150-01 (Nov. 18, 1993).

X. CRA ADDRESSES AND PHONE NUMBERS.

A. Equifax.

P.O. Box 740241
Dept. P
Atlanta, Ga. 30375-0241
(404) 885-8000
1-800-685-1111

B. Trans Union.

1. National Consumer Disclosure Center.

25249 Country Club Blvd.
P.O. Box 7000
North Olmstead, Ohio 44070

2. East.

P.O. Box 360
Philadelphia, Pa. 19105
(215) 569-4852

3. Midwest.

Consumer Relations
P.O. Box 2926
Wichita, Ks. 67201
(316) 263-9161

4. South.

Consumer Relations
222 S. First Street, Suite 201
Louisville, Ky. 40202
(502) 584-0121

5. West.

P.O. Box 3110
Fullerton, Calif. 92634
(714) 738-3800

C. TRW Credit Data.

TRW Consumer Assistance and/or
TRW Complimentary Credit Report
P.O. Box 2350
Chatsworth, California 91313-2350
(214) 235-1200

D. Credco. (combines files from Equifax, Trans Union,and TRW) $24 fee (but errors in report must be corrected through other bureaus) 1-800-443-9342.

ORDER FORM FOR CREDIT REPORT

DEAR TRW: PLEASE SEND ME A FREE COPY OF MY CREDIT REPORT. THE FOLLOWING INFORMATION ABOUT ME IS PROVIDED:

FULL NAME: _____ **SSN:** _____

CURRENT ADDRESS: _____ **DOB:** _____

_____ **SPOUSE'S NAME:** _____

_____

PREVIOUS ADDRESSES IN THE LAST FIVE YEARS:

NO.	STREET	CITY	STATE	ZIP	YEARS
NO.	STREET	CITY	STATE	ZIP	YEARS
NO.	STREET	CITY	STATE	ZIP	YEARS

I submit proof of my current address by enclosing a copy of my recent (circle one): INSURANCE BILL/MAJOR CREDIT CARD BILL/OTHER: _____ **(YOU MUST DO THIS TO PREVENT FRAUD)**

I certify that I am the person named above and that I am submitting this request for my own credit report.

SIGNED: _____ **DATE:** _____

MAIL TO: TRW COMPLIMENTARY CREDIT REPORT, P.O. BOX 2350, Chatsworth, CA 91313-2350

CHAPTER 6

FAIR DEBT COLLECTION PRACTICES ACT
15 U.S.C. § 1692

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FAIR DEBT COLLECTION PRACTICES ACT
15 U.S.C. § 1692

I. REFERENCES.

A. Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

B. State Debt Collection Statutes.

C. Federal Trade Commission Staff Commentary to FDCPA (non-binding).

D. National Consumer Law Center, Fair Debt Collection, (2d ed. 1991) and Cumulative Supplement.

E. NCLC Reports, "Debt Collection & Repossession Edition," National Consumer Law Center, 11 Beacon Street, Boston, Massachusetts, 02108 (617) 523-8010.

F. Consumer Credit Guide, Commerce Clearing House, Inc. (1991) and Supplements.

G. Lucas and Harrell, "1992 Update on the Federal Fair Debt Collection Practices Act," 47 Bus. Law 1309 (May 1992).

H. Arnold, "Mortgages: Mortgage Service Not Subject to Fair Debt Collection Practices Act," 22 Real Est. L. Rep. 3 (July 1992).

I. Yen, "Application of the Fair Debt Collection Practices Act to Lawyers Representing Creditors in Collection Actions," 110 Bank. Law 160 (March-April 1993).

II. INTRODUCTION.

III. OVERVIEW OF THE DEBT COLLECTION PROCESS.

A. Creditors (those to whom the debt is owed) start collection efforts with series of form letters, graduate to phone calls or personal visits, then to repossession or referral to collection agency or lawyer for suit.

1. Initial contacts usually friendly "reminder" letters.

2. Followed by letters requesting consumer phone to discuss problem and suggesting nonpayment is serious.

   a. Phone calls may serve legitimate purpose of determining why payment are late and resolving misunderstandings and disputes.

   b. Calls may be used illegally to harass consumer in attempts to collect debt from distressed consumer.

3. When payments 30 to 60 days late, creditor generally threatens to repossess collateral or foreclose on a mortgage.

B. At any stage of process, creditor may write off debt, either because debt obviously not collectible or because creditor has internal rule that obligations unpaid for certain period of time will be charged off for tax purposes.

C. Creditor may turn account over to lawyer or debt collector (one in the business of collecting debts for others).

1. Lawyer may simply send or furnish creditor with dunning letter or series of letters for flat fee or pursuant to retainer. Lawyer may also be retained to initiate legal action, usually contingency fee, retaining portion of amount collected (i.e., 30-50%).

2. Collection Agency may be retained for flat fee or retainer.

   a. Many times, 50% contingency.

   b. Seldom do collection agencies bother to get all documents related to debt from creditor - rather, they get name, address of consumer, and amount of debt.

   c. Must comply with federal Fair Debt Collection Practices Act.

   d. Six largest collection agencies, by placement value of debt, are GC Services, Payco American Corps., American Creditors bureau, Credit Claims and Collections, Financial Collection Agencies, and Allied Bond Collection respectively. [These handle 32% of all post charge-off debt - The Nilson Report, No. 508, p. 4 (Sep. 1991)].

IV. FAIR DEBT COLLECTION PRACTICES ACT (FDCPA), 15 U.S.C. § 1692 (1982).

A. Purpose - Passed by Congress in 1982 in response to the abusive practices of debt collectors. The purposes of the statute are:

   1. To eliminate abusive debt collection practices.

   2. To ensure that those collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.

   3. To promote consistent state action to protect consumers against debt collection abuses.

B. FDCPA is found in Title VIII of the Consumer Credit Protection Act and FTC interprets via non-binding interpretive commentaries.

C. Definitions.

1. A "debt collector" is a person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects debts owed to others.

   a. Includes a party based in U.S. who collects debts owed by consumers residing outside U.S. Residence of consumer is irrelevant.

      Query: What about creditors who use collectors located outside the U.S. to contact consumers located outside U.S.?

   b. Attorneys may meet the definition of "debt collector." 15 U.S.C. § 1692(a)(6)(F) (Supp. V 1987).

      (1) See Crossley v. Lieberman, 868 F.2d 566 (3rd Cir. 1989) (attorney who wrote demand letters to debtor on behalf of a lending bank and engaged in debt collection activities for other banks was a debt collector for purposes of the Fair Debt Collection Practices Act).

      (2) But see Porter v. Hill, 838 P.2d 45 (Or. 1992) (attorney who brought action against former client to collect fees for legal services rendered was acting as a "debt collector" under state Unlawful Debt Collection Practices Act as a person who was attempting to enforce obligation that was alleged owed to him as commercial creditor by consumer as result of consumer transaction).

   c. Not included in the definition are, among others (there are 6 categories of excepted persons):

      (1) Officers or employees of a creditor collecting debts for that creditor.

      (2) Any officer or employee of the U.S. or any state to the extent that collecting or attempting to collect is in performance of his/her duty.

Question: Would a LAA be considered a debt collector when contacting others re: bad debts owed a client? NO What about the PX system (AAFES) trying to collect from soldiers? NO

(3) Any person collecting any debt owed another to the extent such activity...

(a) concerns a debt which was originated by such person, or

FTC Commentary: This exemption does not apply to a party that takes assignment of retail installment contracts from the original creditor and then reassigns them to another creditor but continues to collect the debt arising from the contracts, because the debt was not "originated by" the collector/first assignee.

Commercial Service of Perry, Inc. v Fitzgerald, No. 92CA1080 (Colo. Ct. App. 1993) - Company (principal business was purchasing loans and collecting on them) that purchased borrower's loan note already in default from FDIC and then filed suit to collect amount due on note was a collection agency under Colorado FDCPA. (Colorado Act patterned after federal FDCPA). Court rejected company's assertion that it was not seeking to collect for a creditor but, instead, was purchasing obligations to collect them on its own account. Court cites Kimber (see below)

(b) concerns a debt which is not yet in default at the time it was obtained by such person. (See, Barber v. National Bank, 815 P.2d 857 (Alaska 1991) - mortgage service company that obtained debt before default exempted from FDCPA coverage (not a debt collector).

See also, Kimber v Federal Financial Corp., 668 F. Supp. 1480 (M.D. Ala. 1987) - The excluding factors in the exception are that the debts are the

result of an assignment or transfer and that the debts were already in default at the time of assignment or transfer.

In other words, if the debt is already in default, then the purchaser of the debt may indeed be a debt collector.

2. A "creditor" is a person or organization to whom or to which a debt is owed. Generally, creditors are not included within the definition of "debt collector" when collecting its own debts using its own name.

(States may have statutes which limit conduct of creditors as well as debt collectors, See Appendix)

3. A "debt" is any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily used for personal, family, or household purposes, whether or not the obligation has been reduced to judgment (i.e., overdue obligations on bills, dishonored checks used to pay for goods or services intended for personal, family, or household purposes, student loans).

D. Requirements imposed by the FDCPA:

1. Requires validation of debts (a debt collector must notify the debtor of the nature of the debt, the identity of the creditor, and must cease collection efforts until verification of the debt is completed if the consumer chooses to verify the debt).

2. Requires that a debt collector's letter disclose that any information provided by recipient will be used to collect debts. See Emanuel v. American Credit Exchange, 870 F.2d 805 (2nd Cir. 1989) (disclosure required even when letter did not request information from debtor).

3. Provides a means by which a consumer can stop the attempts of a debt collector to communicate with the consumer.

E. Protections under the Fair Debt Collection Practices Act. 15 U.S.C. § 1692 (1982).

1. Restricts contacts by debt collectors with third parties.

a. Debt collectors may contact third parties seeking debt collection assistance only if:

(1) The debtor has given prior consent directly to the debt collector, or

(2) The debt collector has obtained a court order permitting such contact, or

(3) Contact is reasonably necessary to effectuate a postjudgment judicial remedy.

b. Debt collectors may contact third parties to acquire information about consumer's location, but must

(1) Identify self, state he/she is trying to confirm or correct location information about consumer, and only if expressly asked, identify his/her employer,

(2) Refrain from referring to the debt,

(3) Usually make only a single contact with each third party,

(4) Not communicate by postcard,

(5) Not indicate the collection nature of his/her business purpose in any written communication, and

(6) Limit communications to the consumer's attorney, where collector knows of the attorney, unless the attorney fails to respond.

c. They may contact a consumer reporting agency if otherwise permitted by law.

2. Without prior consent of the consumer given directly to the debt collector or a court order, a debt collector may not communicate with a consumer (this includes consumer's spouse, parent if consumer is a minor, guardian, executor, or administrator) (15 U.S.C. § 1692c):

   a. At unusual or inconvenient times or places (8:00 A.M. - 9:00 P.M. at consumer's location is presumed convenient).

   b. If the debt collector knows the consumer is represented by an attorney and knows or can readily ascertain the attorney's name and address.

      Graziano v. Harrison, 763 F.Supp. 1269 (D.N.J. 1991). Collector did not violate Act by failing to cease communication with debtor once notified debtor represented by counsel where subsequent notices pertained to different debts and collector not informed attorney represented debtor on all subsequent debts.

   c. At the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

   d. After the consumer notifies the debt collector in writing that the consumer refuses to pay the debt or that the consumer wishes the debt collector to cease further communication with the consumer, except that the debt collector may notify the consumer that the debt collector intends to invoke a specific remedy.

3. A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with a debt. 15 U.S.C. § 1692d.

4. **A debt collector may not use any false, deceptive, or misleading representations in connection with the collection of any debt.** 15 U.S.C. § 1692e. See Crossley v. Lieberman, 868 F.2d 566 (3rd Cir. 1989) (debt collector who falsely implied that a mortgage foreclosure case against debtor was in litigation violated the Fair Debt Collection Practices Act).

5. **A debt collector may not use unfair or unconscionable means to collect any debt. 15 U.S.C. § 1692f.**

F. Legal Actions by Debt Collectors.

1. Debt collector must sue consumer only in the judicial district where the consumer resides or signed the contract sued upon,

   a. See, Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992) (Attorney collector who brought foreclosure action in county other than that where real estate was situated, violated FDCPA, even though state statute allowed such venue).

   b. See also, Action Professional Service v Kiggins, No. 16680 (S.D. 1990) (interprets "judicial district" as meaning in the appropriate state (vice federal) court "judicial district."

2. Except that an action to enforce a security interest in real property which secures the obligation must be brought where property is located.

V. REMEDIES.

A. Violation of FDCPA is deemed an unfair and deceptive act or practice in violation of the Federal Trade Commission Act. Consequently, the FTC could pursue action.

B. The Act also allows private cause of action for the consumer.

C. Standing to sue.

1. "Any debt collector who fails to comply with any provision ... with respect to any person is liable to such person..." Act does not define terms "with respect to any person."

2. Wright v. Finance Service of Norwalk, Inc., 1993 WL 208765 (6th Cir. June 17, 1993) - terms involve more than just addressee of letters... includes persons who "stand in the shoes" of the debtor or have the same authority as the debtor to open and read the letters of the debtor." (i.e. executrix of debtor).

D. Civil liability for failure to comply with FDCPA includes (15 U.S.C. § 1692k):

1. Actual damages (FTC Commentary: includes damages for personal humiliation, embarrassment, mental anguish, or emotional distress).

2. Additional statutory damages allowed by the court up to $1,000 (no actual damages required)

   Divided 6th Circuit holds $1,000 for each violation of statute vice maximum recovery of $1,000 per suit. (Wright v. Finance Service of Norwalk, Inc. - executrix sued for FDCPA violations in collection notices sent to her deceased mother].

3. Attorney's fees and court costs if the consumer prevails.

E. In determining the amount of damages, the court shall consider, among other factors:

1. The frequency and persistence of noncompliance by the debt collector.

2. The nature of the noncompliance.

3. The extent to which the noncompliance was intentional.

F. Generally, this is a strict liability statute; however, a debt collector may not be held liable if the debt collector can show by a preponderance of evidence that the violation was unintentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

G. Action to enforce FDCPA may be brought in any appropriate U.S. District Court without regard to amount in controversy, or in any other court of competent jurisdiction, within one year from date on which violation occurs. (FTC Commentary: 1 year limitations period applies only to private lawsuits, not those initiated by government).

VI. PROCESSING REQUESTS FOR DEBT COLLECTION ASSISTANCE BY THE MILITARY.

A. References.

1. Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

2. 32 C.F.R. § 43a, Indebtedness of Military Personnel (1990).

3. DOD Directive 1344.9 (7 May 1979).

* 4. AR 600-15, Indebtedness of Military Personnel (14 March 1986). Soon to be amended to include regulations implementing Garnishment of military wages [see Pub. L. 103-94, 107 Stat. 1001 (Oct. 6, 1993].

5. MCO P5800.8, Marine Corps Manual for Legal Administration, Ch. 7, Indebtedness (24 December 1984).

6. Bureau of Naval Personnel Manual, 6210140, Indebtedness and Financial Responsibility of Members (January 1979).

7. United State Coast Guard Personnel Manual, COMDTINST M1000.6A, Ch. 8, Sect. F (8 January 1988).

8. AFR 35-18 (17 April 1989).

B. Determine whether the requestor can contact third parties directly. Query: Is this person a "debt collector" subject to the FDCPA or a "creditor" who may be limited by state law?

1. Requests from Debt Collectors.

Debt collectors may contact third parties seeking debt collection assistance only if:

a. The debtor has consented to such contact,

b. The debt collector has obtained a court order permitting such contact, or

c. Communication necessary to effectuate postjudgment judicial remedy.

2. **Requests from Creditors.**

a. A "creditor" is a person or organization to whom or to which a debt is owed.

b. **Creditors <u>are</u> entitled to contact third parties for assistance <u>unless</u> state law precludes such contact.**

DOD installations in those states will follow state law because it does not infringe upon significant military interests.

Credit Unions and Banks:

(1) **Marine Corps:** Commanders will provide debt processing assistance to credit unions serving DOD personnel even if the host state prohibits third party contact by creditors. Credit unions may bring delinquent loans or dishonored checks to the attention of the commander.

(2) **Army:** Those serving DOD must conform to Standards of Fairness. Commanders will answer all check complaints. No mention that they are exempt from state law prohibiting third party contact.

(3) **Navy:** Those serving DOD must conform to Standards of Fairness. No mention they are exempt from state law regarding third party contact.

(4) **Air Force:** Comply with state law prohibiting creditor third party contact.

C. **Review Service Regulations.**

1. Department of Defense Directive 1344.9.

a. DOD Definitions.

(1) **Just Financial Obligations.** A legal debt acknowledged by the military member in which there is no reasonable dispute as to the facts or the law; or one reduced to judgment which conforms to 50 U.S.C.

App. § 501 (SSCRA), if applicable. (32 C.F.R. § 43a.3).

(2) **A Proper and Timely Manner.** A manner which under the circumstances does not reflect discredit on the military service. (32 C.F.R. § 43a.3).

(3) **Debt Collector.** An agency or agent regularly engaged in the collection of debts described under Pub. L. 95-109 (FDCPA). (32 C.F.R. § 43a.3).

b. General Policies.

(1) **Members are expected to pay just financial obligations in proper and timely manner.**

(2) **Services have no legal authority, except in the case of court ordered alimony or child support, to require members to pay a private debt or to divert any part of their pay for its satisfaction.**

(3) **Enforcement of private obligations of a military member is a matter for civil authorities.**

c. Processing debt complaints will not be extended to those:

(1) Who have not made a bona fide effort to collect the debt directly from the military member;

(2) Whose claims are patently false and misleading;

(3) Whose claims are obviously exorbitant.

2. Service regulations implement DOD Directive.

D. **Debt Processing Procedures.**

1. Requirements for Creditors.

a. Creditors subject to Regulation Z (12 C.F.R. 226; Truth in Lending Act) must submit with their requests for assistance:

(1) Certificate of Compliance, and

(2) Copy of disclosures provided the military member as required by Truth in Lending Act 15 U.S.C. § 1601.

b. Creditors not subject to Regulation Z, such as public utility companies, must submit with their requests for assistance:

Certification that no interest, finance charge, or other fee is in excess of that permitted by law of state where obligation was incurred.

c. Foreign owned companies must submit with their requests for assistance:

(1) Copy of terms of the debt (English translation), and

(2) Certification it has subscribed to DOD Standards of Fairness.

2. Indebtedness Complaints Meeting DOD Requirements will be Processed.

a. Commanders shall:

(1) Review facts surrounding transaction forming basis of complaint, to include:

(a) Member's legal rights and obligations,

(b) Member's defenses or counterclaims.

(2) Advise member that:

(a) Just financial obligations are expected to be paid in proper and timely manner, and

(b) Financial and legal counseling services are available.

(3) **Notify claimant that soldier told of complaint, summarizing soldier's intentions if soldier gave permission to release that information.**

(4) **Consider administrative or punitive action, if proper.**

b. **Commanders will not:**

(1) **arbitrate** disputed debts, or

(2) **admit or deny the validity of the claim.**

All services: Do not try to judge or settle disputed claims or admit or deny validity. If soldier denies debt, notify creditor that disputed debts must be handled by civil authorities.

c. Commanders' responses will not indicate whether any action has been taken against a member as a result of the complaint.

3. **Indebtedness Complaints Not Meeting Service Requirements.**

All services: Return complaint, explaining no action until comply with regulation.

4. **Services May Deny Assistance to Creditors.**

a. When the claimant, having been notified of the DOD requirements, refuses or repeatedly fails to comply;

b. When the claimant, regardless of the merits of the claim, clearly shows an attempt to unreasonably use the processing privilege.

E. **Discipline.**

All services: Commanders may take administrative or disciplinary action against members who fail to meet their just financial obligations in a proper and timely manner.

1. **Army:**

   a. Put in permanent record,
   b. Deny reenlistment,
   c. Administrative separation,
   d. Punitive action under UCMJ, articles 92,123,133, or 134.

2. **Marine Corps:**

   a. Put in fitness reports and pro/cons,
   b. Take appropriate administrative, nonpunitive, or punitive action.

3. **Navy:**

   a. Action should be governed by article concerning officer performance,
   b. Counseling,
   c. Administrative discharge for misconduct,
   d. Report all bankruptcies to Chief of Naval Personnel.

4. **Coast Guard:**

   a. Put in officer fitness reports and take other corrective action,
   b. Submit adverse special fitness report,
   c. Counseling,
   d. Put in enlisted records
   e. Administrative separation,
   f. Recommend against reenlistment,
   g. Adverse security clearance,
   h. Punitive action.

F. Bankruptcy.

1. **Army:** Care must be taken not to infringe on the rights of soldiers under bankruptcy law.

2. **Navy:**

   a. A discharge in bankruptcy does not give a member immunity from prosecution for offenses of dishonorable failure to pay just debts committed prior to a petition of bankruptcy.

   b. Commanding officers must submit to Chief of Naval Personnel a full report of circumstances of any petitions and discharges in bankruptcy, and any wage earner plans.

3. **Coast Guard:** If dishonorable failure to pay just debts has occurred prior to discharge of the indebtedness through bankruptcy, the subsequent discharge will not preclude action under the UCMJ.

VII. GARNISHMENT OF FEDERAL WAGES: Involuntary Allotments for Military

Hatch Act Reform Amendments, Pub. L. 103-94, 107 Stat. 1001 (Oct. 6, 1993).(Section 9: provisions to treat federal pay the same as non-federal pay for garnishment purposes).

A. As originally proposed and passed by the Senate, the garnishment bill (S. 253) was intended to apply the remedy of garnishment equally to all debtors, including military personnel.

[This concerned DoD, as military members are subject to default judgments in the event they cannot appear for court proceedings and are not successful in getting stays pursuant to the SSCRA. This would open a heretofore unavailable avenue of collection for creditors, because historically there has been no waiver of sovereign immunity for garnishment of military wages except for child support and alimony].

B. Subsequently, the garnishment proposal was incorporated into S. 185, The Hatch Act Reform Amendments, section 9.

C. The Senate, on 14 July 1993, approved an amendment (No. 568) which would remove the military from the formal garnishment procedures and, instead, allow the Secretary

of Defense to issue regulations authorizing involuntary allotments to satisfy commercial debt. [139 Congr. Rec. S8692-01 (daily ed. July 14, 1993) statements of Sen. Pryor and Sen. Craig].

D. The regulations "shall" include:

1. Provisions for the involuntary allotment of pay of members of the uniformed services for indebtedness owed a third party as determined by the final judgement of a court of competent jurisdiction, and as further determined by competent military or executive authority to be in compliance with the procedural requirements of the Soldiers' and Sailor's Civil Relief Act; and

2. Consideration for the absence of a member of the uniformed service from an appearance in a judicial proceeding resulting from the exigencies of military duty. [139 Congr. Rec. S8692-01 (daily ed. July 14, 1993)]

E. The Hatch Act Reform Amendments passed the Senate on 20 July 1993. [139 Congr. Rec. S8950-04 (daily ed. July 20, 1993); 139 Congr. Rec. D803-02 (daily ed. July 20, 1993)].

For text of the Senate version, see 139 Congr. Rec. S9169-03 (daily ed. July 21, 1993).

F. On 21 September 1993, the House passed the Senate version of the bill (H.R. 20 - formerly the Federal Employees Political Activities Act of 1993).

G. The bill was signed on 6 October 1993 and was to become effective 120 days after that date (with limited exceptions). (Pub. L. 103-94, 107 Stat. 1001) DoD is now working on the implementing regulation for involuntary allotments. [See Indebtedness of Military Personnel, 59 Fed. Reg. 21713 (April 26, 1994) (to be codified at 32 C.F.R. § 50)].

VIII. CONCLUSION.

APPENDIX
STATE DEBT COLLECTION STATUTES

(excerpt from NCLC, *The Consumer Credit and Sales Legal Practice Series*, Fair Debt Collection, updated 1992)

STATE STATUTES	COVERAGE	
	COLLECTION AGENCIES	CREDITORS
Ala. Code § 40-12-80	yes	no
Alaska Stat. §§ 8.24.041 to 24.380 (Collection Agencies)	yes	
Ariz. Rev. Stat. Ann. §§ 32-1001 to 1057 (Collection Agencies)	yes	
Ark. Stat. Ann. §§ 17-21-101 to 404 (Collection Agencies)	yes	
Cal. Bus. & Prof. Code §§ 6850-6956 (West) (Collection Agencies)	yes	
Cal. Civ. Code §§ 1788-1788.32 (Fair Debt Collection Practices)	yes	yes
Colo. Rev. Stat. §§ 12-14-101 to 137 (Collection Agencies)	yes	
Colo. Rev. Stat. §§ 5-1-101 to -12-105 (Consumer Credit Code)	yes	yes
Conn. Gen. Stat. §§ 36-243a to -243c (Creditors' Collection Practices)		yes
Conn. Gen. Stat. §§ 42-127 to -133a (Collection Agencies)	yes	
Del. Code Ann. tit. 30, § 2301(40) (revenue raising measure only)	yes	
D.C. Code Ann. §§ 28-3814 to -3816 (Debt Collection)	yes	yes
Consumer Protection Procedures Act (July 22, 1976, D.C. Law 1-76,§ 1,23 D.C. Reg. 1185)	yes	yes

STATE STATUTES	COVERAGE	
	COLLECTION AGENCIES	CREDITORS
D.C. Code Ann. §§ 22-3423 to -3425 (criminal statute banning use of "D.C." etc. to create false impression)	yes	
Fla. Stat. §§ 559.55-.78 (Consumer Collection Practices)	yes	yes
Ga. Code Ann. §§ 25-301 to 9903 (Industrial Loan Act)		small loan companies
Ga. Code Ann. § 9-405 (collection agencies and practice of law)		
Hawaii Rev. Stat. §§ 443B-1 to -20 (Collection Agencies)	yes	
Hawaii Rev. Stat. § 443A-17 (UDAP violations)		
Idaho Code §§ 26-2222 to -2252 (Collection Agencies)	yes	
Ill. Rev. Stat. ch. 111, §§ 2001-2040 (Collection Agencies)	yes	
Ill. Rev. Stat. ch. 38, § 17-5 (penalties)		
Ind. Code Ann. §§ 25-11-1-1 to 12 (Burns) (Collection Agencies)	yes	
Iowa Code Ann. §§ 537.1101-.7103 (West) (Consumer Credit Code)	yes	yes
Kan. Code § 16a-6-201	yes	no
Kentucky (none)		
But see Ky. Rev. Stat. § 367.110 (UDAP)		
La. Rev. Stat. Ann. §§ 9:3510-:3571 (West) (Consumer Credit Code)	yes	yes

STATE STATUTES	COVERAGE	
	COLLECTION AGENCIES	CREDITORS
La. Rev. Stat. Ann. § 14:353 (West) (prohibits simulated documents)		
Me. Rev. Stat. Ann. tit. 32, §§ 11,001 to 11,054 (Debt Collection)	yes	
Me. Rev. Stat. Ann. tit. 9-A, §§ 1.101-6.301 (Consumer Credit Code)	yes	yes
Md. Ann. Code art. 56, §§ 323-329C (Collection Agencies)	yes	
Md. Comm. Law Code Ann. §§ 14-201 to -204 (Debt Collection)	yes	yes
Mass. Gen. Laws Ann. ch. 93, §§ 24-26 (West) (Collection Agencies)	yes	
Mass. Gen. Law Ann. ch. 93, § 49 (UDAP)	yes	yes
Mass. Gen. Laws Ann. ch. 272, § 97A (simulated court documents prohibited)		
Mich. Comp. Laws Ann. §§ 339.901 -.920 (Mich. Stat. Ann. §§ 18.425(901)-(920) (Collection Agencies)	yes	yes
Mich. Comp. Laws Ann. § 445.251- .258 (Debt Collections by Regulated Persons)	no	yes
Minn. Stat. Ann. §§ 332.31-.45 (West) (Collection Agencies)	yes	
Mississippi (none)		
Missouri (none)		
Montana (none)		

STATE STATUTES	COVERAGE	
	COLLECTION AGENCIES	CREDITORS
Neb. Rev. Stat. § 45-601 (Collection Agencies)	yes	
Neb. Rev. Stat. §§ 45-173 to 188 (Installment Loans)		yes (licensees)
Nev. Rev. Stat. §§ 649.005-.435 (Collection Agencies)	yes	
N.H. Rev. Stat. Ann. §§ 358-C:1 to C:4 (Unfair Debt Collection)	yes	yes
N.J. Stat. Ann. §§ 45:18-1 to -6.1 (West) (Collection Agencies)	yes	
N.J. Stat. Ann. § 2C:21-19(d) (simulated legal documents)		
N. Mex. Stat. Ann. §§ 61-18A-1 to -33 (Collection Agencies)	yes	no
N.Y. Gen. Bus. Law §§ 600-603 (McKinney) (Debt Collection Procedures)	yes	yes
N.Y. Penal § 190.50 (McKinney) (simulated legal process)		
N.C. Gen. Stat. §§ 66-49.24 to .50 (Collection Agencies)	yes	
N.C. Gen. Stat. §§ 75-50 to -56 (Prohibited Acts by Debt Collectors)		yes
N.D. Cent. Code §§ 13-05-01 to -10 (Collection Agencies)	yes	
Ohio (none)		
But see Ohio Rev. Code Ann. § 1345.01 (Baldwin) (UDAP)		

STATE STATUTES	COVERAGE	
	COLLECTION AGENCIES	CREDITORS
Oklahoma (none)		
But see Okla. Stat. Ann. tit. 12 § 1751 (prohibits collection agent/agency from bringing action in small claims court)		
Or. Rev. Stat. §§ 646.639-.656 (Unlawful Debt Collection Practices)	yes	yes
Or. Rev. Stat. §§ 697.005-.095 (Collection Agency Businesses)	yes	
18 Pa. Cons. Stat. Ann. § 7311 (Purdon) (Unlawful Collection Practices) (criminal statute)	yes	
73 Pa. Cons. Stat. Ann. §§ 201-1 to -8 (Purdon) (Unfair Trade Practices)	yes	yes
Rhode Island (none)		
S.C. Code § 37-6-111 (Consumer Credit Code)	yes	yes
S.C. Code § 37-5-108 Consumer Credit Code)	yes	yes
South Dakota (none)		
Tenn. Code Ann. §§ 62-20-101 to 126 (Collection Agencies)	yes	
Tenn. code Ann. § 62-20-123 (penal statute)		
Tex. Rev. Civ. Stat. Ann. arts. 5069-1101 to .11 (Vernon) (Debt Collection)	yes	yes
Utah Code Ann. §§ 12-1-1 to -8 (Collection Agencies)	yes	
Vt. Stat. Ann. tit. 9, §§ 2451a-2462 (Consumer Fraud)	yes	yes

STATE STATUTES	COVERAGE	
	COLLECTION AGENCIES	CREDITORS
Virginia (none)		
But see Va. Code § 18.2-213 (penal statute re: simulating legal process to collect money)		
Wash. Rev. Code Ann. §§ 19.16.100-.950 (Collection Agencies)	yes	
W. Va. Code §§ 47-16-1 to -5 (Collection Agencies)	yes	
W. Va. Code §§ 46A-2-101 to -138 (Consumer Credit Protection)	yes	yes
Wis. Stat. Ann. § 218.04 (West) (Collection Agencies)	yes	
Wis. Stat. Ann. §§ 427.101-.105 (West0 (Debt Collection)	yes	yes
Wyo. Stat. §§ 33-11-101 to -116 (Collection Agencies)	yes	

CHAPTER 7

COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES

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COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES
16 C.F.R. Part 429 (1993)

I. REFERENCES.

A. 16 C.F.R. Part 429 (1993).

B. 37 Fed. Reg. 22933 Oct. 26, 1972) - promulgation of Rule.

C. 53 Fed. Reg. 45455-01 (Nov. 10, 1988) - Auto auctions/craft fairs.

D. National Consumer Law Center, Unfair and Deceptive Acts and Practices, (3d ed. 1991 w/ 1993 Supplement).

II. INTRODUCTION.

III. PROTECTION UNDER THE FTC RULE.

A. Purpose - the FTC promulgated the home solicitations trade practices rule (16 C.F.R. Part 429) because it believed that door-to-door sales were especially prone to fraud and predatory practices.

B. Protection.

1. The rule permits a consumer to withdraw unilaterally from contracts resulting from door-to-door solicitations.

   a. **Rescission (for any reason or no reason) during the 3-day cooling-off period.** The consumer has an automatic right to rescind such contracts by midnight of the third business day after the date of the transaction to cancel. Sundays and federal holidays are not included within the 3-day cancellation period.

   b. No explicit extended right to rescind under Rule, but state statutes often provide continuing period when seller violates statute.

2. The Rule also requires certain information and forms be given to consumer at time of transaction, and provides rights, duties, and responsibilities of merchants, consumers, and other involved parties.

IV. DEFINITIONS.

A. A "door-to-door sale" is:

1. **a "sale, lease, or rental of consumer goods or services**

Definition of "consumer goods or services:"

a. Goods or services used primarily for personal, family, or household purposes.

b. Includes courses of instruction or training regardless of purpose for which taken.

2. **with a purchase price of $25 or more . . .**

Questions: Does this exempt from coverage "rent to own" terminable leases where initial deposit and monthly payments do not exceed $25?

Does the $25 minimum apply to each month's or weekly lease payments or to the total of payments?

a. Purpose of Rule was to exclude sales by milkmen, laundrymen, land other route salespersons who customarily make sales which otherwise would fall within definition.

b. "Purchase price" means total price paid or to be paid for consumer goods, including all interest and service charges.

c. **Practice Tip:** "Rent To Own" companies routinely do not supply the cancellation notice required under the Rule. See if transaction fits definition of "door-to-door sale."

3. **in which the seller or his (her) representative personally solicits the sale, including those in response to or following an invitation by the buyer, and**

[State Home Solicitation Sales Act applied in Brown v. Jacob, 454 N.W. 2d 226 (Ct. App. Mich. 1990) (contract for non-emergency repairs resulted from "home solicitation" although homeowner invited estimate by calling contractor) See also Bauer v. Kinderman, 1992 WL 348173 (Ct. App. Ohio 1992) (Ohio Home Solicitation Sales Act applied where buyer called seller by phone requesting in-home estimate for new roof and replacement windows)].

4. **the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller."** 16 C.F.R. § 429.1, Note 1(a).

B. Examples of door-to-door sales.

1. A salesperson comes to buyer's place of business or another seller's store,

2. Sales presentations in rented hotel rooms or public halls.

3. Salesperson approaches potential buyer at a restaurant (i.e., discount photographic sales scams).

4. Door-to-Door home improvement sales. (State law also governs transaction); i.e.:

> A law requiring transient door-to-door sellers of home repair services to register with Dept. of Professional and Financial Regulation, Div. of Licensing and Enforcement makes it a violation of law for home repair services contract to fail to meet the written contract requirements of, among others, the laws governing consumer solicitations and home solicitations sales. (Me. Rev. Stat. Ann. tit. 32, § 14503 (West 1993).

C. Door-to-door sales under 16 C.F.R. Part 429 do not include:

1. Transactions made pursuant to prior negotiations in course of visit by buyer to retail establishment with fixed permanent location where goods are exhibited or services offered for sale on a continuing basis.

2. Transactions in which consumer is accorded right of rescission by provisions of the Consumer Credit Protection Act (15 U.S.C. § 1635) or regulations issued pursuant thereto (i.e., Truth in Lending Act rescission rights).

3. Transactions in which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer and the buyer furnishes the seller with a signed statement so stating the emergency and waiving the 3-day right to cancel.

4. Transactions conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and seller or its representative prior to delivery of the goods or performance of the service.

Some state home solicitation statutes apply to seller-initiated telephone sales, either by:

a. Explicit statutory definition [Alaska, Arkansas, Florida, Louisiana, Maine, Michigan, Oregon (limited), Virginia, Wisconsin, and Wyoming], or by

b. Judicial interpretation [People v. Toomey, 71 Cal. 3d 245 (1984) (telephone solicitations initiated from seller's offices are included within scope of statute where contract was made at buyer's home); Hollywood Decorators Inc. v. Lancet, 118 Misc. 2d 1096 (N.Y. Sup. Ct. 1983) (statute applied where seller advertised by radio, buyer telephoned seller, and seller met with buyer at his home and executed contract); Brown v. Martinelli, 419 N.E. 2d 1081 (Ohio 1981) (Ohio's home solicitation sales act includes telephone contacts initiated by seller)].

5. Transactions in which the buyer has contacted the seller and specifically requested that the seller visit the buyer's home to perform repair or maintenance work on the buyer's personal property.

   a. However, if in course of visit, seller sells buyer right to get additional services or goods other than replacement parts needed in performing the maintenance or in making the repairs, sale of the additional goods or services may be a "door-to-door" sale.

   b. **Practice Tip:** Some state statutes do not contain this exemption (Brown v. Jacob, 454 N.W. 2d 226 (Mich. App. 1990).

6. Transactions pertaining to the sale or rental or real property....

   FTC has explicitly stated (see 37 Fed. Reg. 22936 at 22947) that transactions such as sale of driveway resurfacing, aluminum siding, roofing material or treatment, landscaping, or repairs to the home or to other real property are not exempt from Rule.

Bauer v. Kinderman, 613 N.E.2d 1083 (Ct. App. Ohio 1992) (Ohio Home Solicitation Act, which was patterned after FTC rule, includes home improvement products and services (in this case, windows, roofing, siding) as consumer goods subject to the cooling off period. However, the transaction in the case fell within an exception to the state Act: when the buyer initiates contact with the seller who has a fixed business location.

7. Sales of automobiles at public auctions and tent sales if the seller has at least one permanent place of business. 53 Fed. Reg. 45455 (Nov. 10, 1988); or

8. Sales of arts and crafts at fairs, shopping malls, civic centers, community centers, and schools. 53 Fed. Reg. 45455 (Nov. 10, 1988).

V. RESPONSIBILITIES UNDER THE RULE.

A. Seller must:

1. Provide consumer with fully completed copy of sales contract,

2. Attach to that contract an easily detachable written notice of cancellation for buyer's use, and

3. Orally inform the consumer of his or her rights at the time the contract is signed.

4. Honor a valid notice of cancellation, cancel indebtedness, and to refund any payments made within 10 business days of receipt of buyer's cancellation notice.

B. Contract must have, in immediate proximity to space reserved for buyer's signature, a statement of buyer's right to cancel within 3 business days of the transaction.

1. Rule provides cancellation notice language, but allows sellers to shorten mandated notice language by omitting certain language not applicable to the particular transaction.

2. **Practice Tip:** Some sellers simply copy other seller's notices, not realizing they have omitted necessary language for their particular transaction.

3. **Practice Tip:** Sellers often fail to orally explain cancellation rights. Must give 2 explanations (1 in contract; 1 oral).

C. Seller may not:

1. Misrepresent buyer's right to cancel, nor include in contract any waiver or rights created by the Rule.

2. Sell or assign consumer's note for 5 business days.

VI. CANCELLATION.

A. Buyer's responsibilities to effect cancellation:

1. Mail or deliver to the seller a signed and dated copy of the notice of cancellation provided by the seller or any other written notice of cancellation within 3 business days of the transaction.

2. Make any goods delivered by the seller available to the seller at the buyer's residence in substantially as good condition as when received, or comply with the seller's instructions regarding the return of the goods at the seller's risk and expense.

3. If the buyer fails to make the goods available to the seller, the buyer remains liable for performance of all obligations under the contract.

B. Seller's Responsibilities Upon Receipt of Cancellation Notice.

1. Seller must notify buyer within 10 business days of receipt of notice of cancellation, of his/her intent to either repossess or abandon any shipped or delivered goods.

2. Seller must collect any goods delivered to the buyer within 20 days of the date the notice of cancellation.

3. If seller fails to do this, the buyer may retain or dispose of the goods without any further obligation.

VII. INTERRELATION WITH STATE HOME SOLICITATION LAWS.

A. Every state has enacted a 3-day cooling off period law analogous to FTC rule.

1. Laws may reiterate FTC rule exactly, state that compliance with FTC Rule automatically satisfies state law, or set out requirements different from those in FTC Rule.

2. Some state laws cover sales under $25.00, apply to seller-initiated telephone sales, and cover sales of realty except when purchaser is represented by attorney or negotiated by broker.

B. Compliance with FTC Rule does not exempt seller from complying with state law, except if state law directly in conflict with Rule and is weaker than the federal Rule, or imposes a penalty on the buyer for cancellation.

C. If consumer has Truth in Lending Act (TILA) 3-day rescission rights (transaction involves non-purchase money security interest in principal dwelling), then FTC Rule does not apply.

[If TILA rescission rights apply, may use state door-to-door solicitation statute. (See TILA outline)].

VIII. REMEDIES.

A. Under FTC Rule: Rescission only. No right to bring private damage action for Rule violation.

B. Otherwise, for failure to comply with disclosure requirements:

1. Violation of FTC Rule may be per se UDAP violation.

2. Violations of door-to-door sales laws are not necessarily per se violations of a state's consumer protection statute. [Laymance v. Vaughn, 1992 WL 328706 (Ct. App. Tenn. 1992) (Recovery pursuant to Tennessee Home Solicitation Sales Act does not bar recovery under the state Consumer Protection Act provided plaintiff is able to present evidence sufficient to establish violation of the latter)]. But see Bart v. Forte, 1992 WL 48707 (Super. Ct. Conn. 1992) - Both the Connecticut Home Improvement Act and the Connecticut Home Solicitation Sales Act provide that violations of each are per se violations of the state Unfair and Deceptive Trade Practices Act.

3. May be state UDAP violation for seller to systematically perform services during 3-day cooling off period if used as method to frustrate consumer's cancellation rights. (i.e., Home improvement contractor who performs work on home during cancellation period).

C. Buyer's liability to return goods or pay reasonable value upon rescission.

1. FTC interprets cancellation rights strictly against seller, even when seller has already performed before cancellation period expired -- no recovery for seller.

2. States differ in buyer's liability.

a. Seller bears risk. [Cole v. Levett, 672 F. Supp. 947 (S.D. Miss. 1987); Brown v. Jacob, 454 N.W. 2d 226 (Mich. App. 1990) (Michigan statute explicitly states seller not entitled to compensation for work before cancellation); American Quality Roofing, Inc. v. Ipock, 730 S.W. 2d 470 (Tex. At. App. 1987) (failure to offer cancellation right apparently complete defense to action to collect on services rendered)].

b. Seller entitled to recover "quantum meruit" for reasonable value of services/goods.

(1) Beley v. Ventura County Municipal Court, 160 Cal. Rptr. 508 (1979); Hurlbert v. Cottier, 372 N.E. 2d 734 (1978) (Consumer could rescind contract for siding already installed, but had to tender the siding's reasonable value if it could not be returned "in its original condition)."

(2) See also See Reynolds v. Bank, 792 F. Supp. 1035 (E.D. Mich. 1992). 14 months after contract, buyer could rescind, cancel home mortgage, keep windows installed, get return of payments made, statutory damages, and attorneys fees. However, buyer must pay to seller reasonable value of goods. To require otherwise, would result in windfall to buyer. Seller violated disclosure requirements under TILA and Michigan Home Solicitation Sales Act. Court cited rescission procedure under TILA.

(3) Buyer who exercises "bad faith" in repudiating contract based on seller's disclosure violations not entitled to keep property without paying reasonable value to seller. Habetz v. Condon, 618 A. 2d 501 (Conn. 1992). There is a "bad faith"

exception to general rule that seller's violations preclude recovery from buyer. But See, Wadia v. Hirschfeld, 618 A. 2d 506 (Conn. 1992) (Where there was no evidence of bad faith by consumer).

IX. CONCLUSION.

CHAPTER 8

TRUTH IN LENDING ACT

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TRUTH IN LENDING ACT
15 U.S.C. §1601-1667

I. REFERENCES.

A. 15 U.S.C. §1601-1667 (1982 with cumulative Supplement 1993).

B. Regulation Z (12 C.F.R. Part 226 (1981 as amended to 1993)).

C. National Consumer Law Center, The Consumer Credit and Sales Practice Series, "Truth in Lending," (2d. ed. 1989 w/ 1993 Supplement).

D. NCLC Reports, "Consumer Credit and Usury Edition," National Consumer Law Center, Inc., 11 Beacon Street, Boston, MA 02108.

E. Installment Credit Guide - published by Commerce Clearing House, 4025 West Peterson Ave., Chicago, IL 60646-6085.

F. Alperin and Chase, Consumer Law: Sales Practices Credit Regulation, Vol. I & II, (West Publ. Co. 1986) with Supplements.

G. Feldman, The Specious Open-End Credit Plan--A Discussion of the Law Leading up to FTC v. Traditional Industries, 45 Bus. Law. 1989 (June 1990).

H. Higgs and Warrington, Open-End Credit (Excluding Home Equity Plans): An Overview, 663 Prac. Law Inst. 35 (Commercial Law and Practice Course Handbook Series Consumer Credit 1993) (PLI Order No. A4-4432).

II. INTRODUCTION.

III. PURPOSE.

A. Economic stabilization and competition is strengthened by informed use of credit by consumers.

1. **TILA requires "meaningful disclosure of credit terms" and reflects a shift in emphasis from "let the buyer beware" to "let the seller disclose."**

Allen v. Beneficial Finance Co., 393 F. Supp. 1382 (N.D. Ind. 1975), aff'd, 531 F.2d 797 (7th Cir.), cert. denied, 429 U.S. 885 (1976) (noting that TILA reflects a transition in congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose).

2. TILA also designed to protect consumer against inaccurate and unfair credit billing and credit card practices (see associated outlines).

B. The Act is in Title I of the Consumer Credit Protection Act and is **implemented by the Federal Reserve Board via Regulation Z (12 C.F.R. Part 226).**

1. The Regulation has effect and force of federal law (Gray-Taylor, Inc. v. Tennessee, 587 S.W.2d 668 (Tex. 1979).

2. But see, Porter v. Hill, 838 P.2d 45 (Or. 1992) (While regulations promulgated by the FRB pursuant to its authority to construe provisions of TILA are not binding on courts, they are entitled to substantial deference, since agency has interpretive powers).

C. **TILA is to be liberally construed in favor of consumers, with creditors who fail to comply with TILA in any respect becoming liable to consumer regardless of nature of violation or creditors' intent.** In re Wright, 133 B.R. 704 (E.D. Pa. 1991). See also, American Exp. Travel Related Services Co. v. Web, 405 S.E.2d 652 (Ga. 1991) (Being remedial in nature, requirements of TILA's credit card provisions must be liberally construed to protect consumers, while at the same time strictly enforced to achieve legislative goal of national standardization).

IV. SCOPE.

A. **TILA applies to** [15 U.S.C. § 1602; 12 C.F.R. § 226.1 (1993)]:

1. Each individual or business that offers or extends credit when 4 conditions are met:

   a. The credit is offered or extended to consumers,

   b. The offering or extension of credit is done "regularly" [extends credit more than 25 times (or more than 5 times for transactions secured by dwelling) per year],

   c. The credit is subject to a finance charge or is payable by written agreement in more than 4 installments, and

   d. The credit is primarily for personal, family, or household purposes.

2. If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge or is not payable by agreement in more than 4 installments, or if the credit card is used for business purposes.

   [Credit card holders are liable for unauthorized use of the card only up to $50. 15 U.S.C. § 1643. (See Fair Credit Billing Outline)].

3. Also, certain requirements apply to persons who are not creditors but who provide applications for home equity plans to consumers.

B. **TILA is inapplicable to** [15 U.S.C. § 1603; 12 C.F.R. § 226.3 (1993)]:

1. Creditors who extend credit primarily for business, commercial, agricultural, or organizational purposes or other purposes which are otherwise regulated, such as securities brokers.

   [But rules governing issuing credit cards and liability for unauthorized use apply to all credit cards].

2. Student Loan Programs. Loans made, insured, or guaranteed pursuant to program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. § 1070 et. seq.).

3. "Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds $25,000." 15 U.S.C. § 1603(3).

V. MATERIAL DISCLOSURES REQUIRED.

A. Required disclosures must be made (15 U.S.C. § 1632; 12 C.F.R. §§ 226.5 et seq. and 226.17 et seq.):

1. **"Clearly and conspicuously"**
2. **In meaningful sequence,**
3. **In writing, and**
4. **In a form the consumer may keep.**

B. FRB promulgates model disclosure forms, but where they would be misleading, lenders should provide tailored notice consistent with TILA.

NOTE: Many states also have laws which govern credit disclosures; i.e.

CHECK CASHING COMPANIES Virginia v Allstate Express Check Cashing, Inc., No. HC-44-1; Virginia v Foremost Group, Inc.,No. HC-1234-1; Virginia v Ameracheck Corp., No. HC-1232-1 (Cir. Ct., Richmond Sep. 1993) - Check-cashing companies violated Virginia Consumer Finance Act by making short-term advances to customers who write personal checks in return for substantially smaller amounts of on-the-spot case in transactions amounting to short term loans with annual percentage rates sometimes higher than 2,000%. (Cases cited in BNA Antitrust & Trade Reg. Daily (Oct. 7, 1993). Still pending are cases against Payday in Norfolk, VA, Cash Now Three, Inc. in Alexandria, VA.

TAX REFUND ANTICIPATION LOANS North Carolina Ass'n of Electronic Tax Filers v Graham, 429 S.E.2d 544 (N.C. 1993) (North Carolina's Refund Anticipation Loan Act (N.C. Gen. Stat. §§ 53-245-254) which imposes registration and disclosure requirements on and otherwise regulates tax refund anticipation loans does not violate U.S. Constitution and was not preempted by federal tax and banking laws. State law ensured residents were fully informed as to difference between refund anticipation loan and simple electronic filing of returns and as to potentially high cost of refund loan.

Texas Attorney General settled deceptive trade practices lawsuit with H&R Block, Inc. forcing tax return company to advertise its "Rapid Refund" program is actually a loan program charging customers up to 150% in annual interest. Filed as UDAP suit. [Case reported in National Association of Attorneys General Consumer Protection Report (Sep. 1993)].

C. **Closed-end Credit Transactions** (includes both sales credit and loans) (12 C.F.R. § 226.17 et. seq.):

1. Typical features:

   a. Credit is advanced for a specific time period.

   b. The amount financed, the finance charge, and the schedule of payments are agreed upon by the creditor and the consumer.

2. Disclosures:

   a. Identity of the creditor.
   b. Amount financed,
   c. Itemization of amount financed
   d. Annual percentage rate, including applicable variable-rate disclosures,
   e. Finance charge,
   f. Total of payments,
   g. Payment schedule,
   h. Prepayment/late payment penalties,
   i. If applicable to the transaction:

      (1) Total sales cost,
      (2) Demand feature,
      (3) Security interest,
      (4) Insurance,

(5) Required deposit, and
(6) Reference to contract.

D. **Open-end Credit Transactions** (15 U.S.C. § 1637; 12 C.F.R. § 226.5 et.seq.).

Open-end credit includes bank and gas company credit cards, stores' revolving charge accounts, and cash-advance checking accounts.

1. Typical features:

a. Creditors reasonably expect the consumer to make repeated transactions.

b. Creditors may impose finance charges on the unpaid balance.

c. As the consumer pays the outstanding balance, the amount of credit is once again available to the consumer.

2. Disclosures:

a. Annual percentage rate including applicable variable-rate disclosures,

b. Method of determining finance charge and balance upon which finance charge imposed, as explained in 12 C.F.R. § 226.6,

c. Amount or method of determining any membership or participation fees,

d. Security interests if applicable to transaction, and

e. Statement of billing rights.

3. Other requirements include furnishing consumer with a periodic statement of the account.

a. 12 C.F.R. § 226.12 details special credit card provisions, including liability of cardholder and assertion of claims and defenses against card issuer (see Fair Credit Billing Act outline).

b. 12 C.F.R. § 226.13 details billing error resolution (see Fair Credit Billing Act outline).

VI. VIOLATIONS OF TILA.

A. Creditors are liable for violation of the disclosure requirements, **regardless of whether the consumer was harmed by the nondisclosure, UNLESS:**

1. The creditor corrects the error within 60 days of discovery and prior to written suit or written notice from the consumer [15 U.S.C. § 1640(b)], or

2. The error is the result of bona fide error [15 U.S.C. § 1640(c)]. The creditor bears the burden of proving by a preponderance of the evidence that:

   a. The violation was unintentional.

   b. The error occurred notwithstanding compliance with procedures reasonably adapted to avoid such error (error of legal judgement with respect to creditor's TILA obligations not a bona fide error).

B. Civil remedies for failure to comply with TILA requirements (15 U.S.C. § 1640):

1. Action may be brought in any U.S. district court or in any other competent court within one year from the date on which the violation occurred (15 U.S.C. § 1640(e)). This limitation does not apply when TILA violations are asserted as a defense, set-off, or counterclaim, except as otherwise provided by state law.

   But see Jones v. Transohio Sav. Ass'n, 747 F.2d 1037 (6th Cir. 1984) (holding that the creditor's active concealment of information tolls the running of the statute of limitations).

2. **Private remedies - applicable to violations of provisions regarding credit transactions, credit billing, and consumer leases.** 15 U.S.C. § 1640.

   a. Actual damages in all cases.

   b. Attorneys' fees and court costs for successful enforcement and rescissi actions.

   c. Statutory damages.

      (1) For individual actions, double the correctly calculated finance charge but not less than $100 or more than $1,000 for individual actions.

      (2) For class actions, an amount allowed by the court with no required minimum recovery per class member to a maximum of $500,000 or 1% of the creditor's net worth, whichever is less.

      (3) Can be imposed on creditors who fail to comply with specified TILA disclosure requirements, with the right of rescission, with the provisions concerning credit cards, or with the fair credit billing requirements. 15 U.S.C. § 1640(a).

3. Enforcement by administrative agencies. 15 U.S.C. § 1607.

   a. The enforcement scheme for banks includes the Federal Reserve System, the Federal Deposit Insurance Corporation, and other agencies.

   b. The enforcement agency responsible for creditors not subject to the authority of any specific enforcement agency is the Federal Trade Commission.

   c. 9 separate agencies currently have enforcement responsibilities.

   d. Enforcement agencies can:

(1) Issue cease and desist orders or hold hearings pursuant to which creditors are required to adjust debtors' accounts (15 U.S.C. § 1607(e)(4)(A), (B)) to ensure that the debtor is not required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(2) If the FTC determines in a cease and desist proceeding against a particular individual or firm that a given practice is "unfair or deceptive," it may proceed against any other individual or firm for knowingly engaging in the forbidden practice, even if that entity was not involved in the previous proceeding. 15 U.S.C. § 45(m)(1)(B).

C. Criminal penalties - Willful and knowing violations of TILA permit imposition of a fine of $5,000, imprisonment for up to 1 year, or both. 15 U.S.C. § 1611.

VII. TRUTH IN LENDING ACT RESCISSION RIGHTS: 3-DAY COOLING OFF PERIOD (15 U.S.C. § 1635; 12 C.f.R. § 226.15).

A. In addition to remedies described above, consumers who enter home equity loans may also have rescission rights as described below.

B. Under TILA, a consumer may rescind a consumer credit transaction involving a non-purchase-money security interest in the consumer's principal dwelling

1. Within 3 business days if all TILA disclosure requirements met, or

2. During an extended statutory period for TILA disclosure violations:

a. Failure to give adequate notice of right to rescind,

b. Failure to give adequate TILA credit term disclosures.

C. Rescission voids the security interest in the principal dwelling.

D. Consumer must have ownership interest in dwelling that is encumbered by creditor's security interest. Consumer need not be a signatory to the credit agreement.

E. TILA rescission rights do not apply to business credit transactions, even if secured by consumer's principal dwelling.

F. Scope of Rescission Rights.

1. Right to rescind applies whenever there is <u>non-purchase money security interest</u> in consumer's principal residence (i.e., home equity loans/lines of credit/home improvement loans, etc.)

2. A consumer can have only <u>one</u> principal dwelling at a time (includes mobile homes, trailers, houseboats, if used as principal dwelling).

a. A vacation or other second home is not a principal dwelling.

b. A transaction secured by a second home cannot be rescinded,

c. Even if the consumer plans to reside there in the future.

G. Time to Exercise Right to Rescind.

1. Right to rescind until midnight of third business day following the later of:

a. Consummation of transaction,

(1) In the case of closed-end credit, when the credit agreement is signed.

(2) In the case of open-end credit, the occurrence giving rise to the right to rescind:

(a) Opening the plan,

(b) Each credit extension above previously established credit limit,

(c) Increasing the credit limit,

(d) Adding to an existing account a security interest in the consumer's principal dwelling, and

(e) Increasing the dollar amount of the security interest taken in the dwelling to secure the plan.

b. Delivery of the required rescission right notice, or

c. Delivery of all material disclosures.

H. Extended right to rescind.

1. Continuing right to rescind if required disclosures not made or made incorrectly, but

a. There is statutory cut-off of extended right to rescind at 3 years after consummation.

b. Will be cut off earlier by transfer of all consumer's interest in the property (including involuntary transfer such as foreclosure), or sale of the property.

2. **Violations Giving Rise to An Extended 3-Year Right to Rescind.**

a. **Failure to give proper rescission notice.**

(1) Creditors are required to deliver two copies of the right to rescind to each consumer entitled to rescind.

(2) Notice must disclose the following:

(a) The retention or acquisition of a security interest in the consumer's principal dwelling,

(b) The consumer's right to rescind,

(c) How to exercise the right to rescind, with a form for that purpose, setting forth the creditor's business address,

(d) The effects of rescission, and

(e) The date the rescission period expires.

See, Rowland v. Magna Millikin Bank of Decatur, 812 F. Supp. 875 (D. Ill. 1992) - Consumer entitled to extended period of recision because copy of contract illegible, not dated or signed by anyone other than consumer. Second copy given 44 days later was filled-in and legible.

b. **Failure to disclose credit terms of the transaction in accordance with TILA (i.e, interest, payment terms, etc.).**

I. **Waiver of the Right to Rescind.**

1. Consumers may modify or waive right to rescind credit transaction if extension of credit is needed to meet bona fide personal financial emergency before end of rescission period.

2. Consumer must provide creditor with dated written statement describing emergency,

   a. Specifically modifying or waiving right, and

   b. Signed by all consumers entitled to rescind.

3. Borrower's waiver because foreclosure imminent ineffective because under terms of mortgage, foreclosure could not occur before two months at time of waiver and thus, there was no bona fide emergency. Liepava v. M.L.S.C. Properties, Inc., 511 F.2d 935 (9th Cir. 1975). Borrower's may not falsely claim an emergency. Mortgage Mint Corp. v. Morgan (Or. Ct. App. 1985).

J. **Delay of Performance.**

1. Unless the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party,

   a. Disburse advances to the consumer,

   b. Begin performing services for the consumer, or

   c. Deliver materials to the consumer.

2. During the delay period, a creditor may

   a. Prepare cash advance check (or loan check in the case of open-end credit),

   b. Perfect the security interest and/or

   c. Accrue finance charges,

d. In the case of open-end credit, prepare to discount or assign the contract to a third party.

3. Delay beyond rescission period.

a. Creditor must wait until he/she is reasonably satisfied consumer has not rescinded.

b. May do this by

(1) Waiting reasonable time after expiration of period to allow for mail delivery, or

(2) Obtaining written statement from all eligible consumers that right not exercised.

K. Rescission Process.

1. When consumer rescinds, the security interest becomes void and consumer is not liable for any amount, including finance charges.

a. Within 20 calendar days after receiving notice of rescission, creditor must

(1) Return any property or money given to anyone in connection with the transaction,

(2) Take whatever steps necessary to reflect termination for the security interest.

b. When creditor meets its obligations, consumer must tender the money or property to creditor, or if tender not practicable, its reasonable value.

c. If creditor fails to take possession of tendered money or property within 20 days, consumer may keep it without further obligation.

2. Court may modify procedures.

a. Court has power to exercise equitable discretion and condition rescission of a loan upon the return of the loan proceeds. New Maine National Bank v. Gendron (Me. 1992). See also New Maine National Bank v. Gendron (Me. 1991). Even though bankrupt debtor could not return loan proceeds, debtor could still rescind. In re Chancy 33 BR 355 (Bankr. Okla. 1983).

b. See also: Reynolds v. D & N Bank, 792 F. Supp. 1035 (E.D. Mich. 1992). Consumer cancelled home improvement contract 14 months after signed; 4 TILA violations; creditor failed to respond (did not return money or cancel security interest); consumer sued to enforce recision, obtain damages, and keep value of property purchased rather than tender it to creditor. Court gave creditor 20 days to comply with its obligations, which creditor then failed to do. Court, in unreported opinion, then granted consumer's request. Creditor blew second chance! (See NCLC Reports, Vol 11, March/April 1993).

L. Particular Types of Transactions.

1. Refinancing and Consolidation.

a. Rescission rights do not apply to refinancing or consolidation by same creditor of an extension of credit already secured by consumer's principal dwelling.

b. Rescission rights do apply to extent new amount exceeds unpaid balance, any earned unpaid finance charges on existing debt, and amounts attributed solely to costs of refinancing or consolidation.

Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066 (3rd Cir. 1992). Sequential loans with same creditor to pay off old loans secured by home, extend more money, and which were secured by the same home. Lender violated TILA by giving complete rather than limited rescission rights to borrower,

thereby entitling borrower to extended right to rescind.

(1) Porter (borrower plaintiff) claimed lender erred in giving notice of the right to completely rescind the loans, when all she had the right to do was rescind the "new money" portion of the transaction. During subsequent bankruptcy proceedings, she sought to rescind loans after the 3 day period, claiming extended right to do so.

(2) Lender argued that, because they gave her greater rights than she was entitled to by telling her she could rescind the entire amount, not just the "new" money, she should not be entitled to relief.

(3) Court:

(a) If the whole loan may be rescinded, the borrower must return all the money (old and new) and the old and new security interests would be satisfied. A borrower might not be able to tender back all of the money and may, therefore, not exercise rescission rights.

(b) On the other hand, if the borrower may rescind only the new money portion, then he/she returns the new money and the old security interest remains.

(c) Therefore, the correct rights notice provided by the lender is important in advising the borrower what his/her options are. Held for Porter. She had extended right to rescind. (Court: If standard forms do not adequately provide correct rescission rights notice, then lender should draft adequate notice).

2. Open-end line of credit secured by home used to pay off loan not originally secured by home requires complete rescission rights.

In re Michel; Michel v. Beneficial Consumer Discount Co. (Bankr. Pa. 1992). Lender extending open-end line of credit secured by home which paid off a prior similar transaction not secured by the home, improperly gave limited rescission notice to consumer. The lender gave too few rights to the borrower. Unlike Porter, supra, this transaction was subject to complete rescission. The changes in credit terms were substantial, with the debtor giving a security interest in the home for the first time. Therefore, the borrower had an extended right to rescind.

3. Door-to-door sales.

a. When home solicitation sale is financed with second mortgage loan, consumer may be entitled to two separate rights to cancel when the transactions are independent.

(1) When consumer offers to obtain his/her own financing independent of assistance or referral from seller, sale and financing are separate transactions.

(2) When there are separate transactions,

(a) FTC Rule (Cooling Off Period for Door-to-Door Sales) - Requires sellers to give buyers 3 days in which to cancel a home solicitation sale, and notice of this cancellation right.

(b) TILA requires 3 day rescission period (unless extended for TILA violation).

(3) Seller bound by consumer's timely cancellation regardless of which party receives notice of cancellation.

b. For single transactions (seller arranged financing), look to state home solicitation law to determine whether transaction still covered by state's home solicitations statute 3-day cooling off period.

(1) When seller finances or arranges financing with second mortgage, this is considered a single transaction.

(2) When there is a single transaction, TILA rescission rights apply, but not FTC Rule 3-day cooling off period.

(a) FTC Rule does not apply to transactions in which there is a TILA right to rescind (i.e, second home mortgage transactions).

(b) Therefore, consumer has only TILA right to rescind and not the additional 3 day cooling off period rights under FTC Rule.

(3) <u>But</u>, state cooling off periods may apply even when TILA rescission rights are available.

(a) State home solicitation law may not have exemption like FTC Rule does.

Example: Kentucky statute does not have exemption. Thus, a combined sales/credit transaction involving a second mortgage is not exempt from the state home solicitations statute just because it has complied with the federal TILA.

(b) 3 day right to cancel begins on date credit contract is signed (when validity of contract is dependent of obtaining independent, acceptable financing) and consumer is given TILA disclosures (to include rescission rights notice).

[See Kentucky Attorney General's Opinion 92-41 (Mar. 17, 1992)- Pursuant to Kentucky home solicitation sales statue (Ky. Rev.

Stat. Ann. § 367.410-450), date of transaction occurs when credit contract completed and signed and buyer provided with TILA disclosures. Therefore, 3 day right to rescind begins then and not before].

(c) Seller must give notice

i) Of the transaction date,

In combined credit/sales transactions like this, the final transaction occurs when the credit contract is signed, not when the sales agreement is signed.

ii) And, of the deadline for exercising right to cancel.

VIII. CONCLUSION.

Pending Legislation

H.R. 2904 ("Home Ownership and Equity Protection Act of 1993" introduced 8/5/93) - proposes to amend the TILA (15 U.S.C. § 1602) to protect home ownership and equity through enhanced disclosure of the risks associated with certain mortgages (high cost mortgages).

CHAPTER 9

WARRANTIES

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WARRANTIES

Outline of Instruction

I. REFERENCES.

A. U.C.C. §§ 2-312 through 2-318.

B. Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1982).

C. 16 C.F.R. Subchapter G - Rules, Regulations, Statements, and Interpretations Under the Magnuson-Moss Warranty Act (Parts 700-03).

D. 16 C.F.R. Part 455 (Trade Regulation Rule Concerning Sale of Used Motor Vehicles).

E. State "Lemon" Laws.

F. National Consumer Law Center, "Sales of Goods and Services," (2d ed. 1989 w/ 1993 cummulative supplement).

G. Magnuson-Moss Litigation Manual: Auto Warranty Cases (2d ed. 1986), published by the Center for Auto Safety.

H. "Little FTC Acts" permit treble damages in many states for unfair or unconscionable acts.

I. Brockmeyer, Piper, and Marbury, "Federal and State Warranty Laws," C801 ALI-ABA 337 (Mar. 1993).

II. INTRODUCTION.

III. SOURCES OF WARRANTY PROTECTION.

A. The Uniform Commercial Code, Title 2 (Sales), §§ 2-312 through 2-318.

B. Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312.

C. State Lemon Laws.

D. 16 C.F.R. Part 455 (FTC trade regulation rule regarding warranty protection for used cars).

IV. UNIFORM COMMERCIAL CODE WARRANTIES.

A. The Uniform Commercial Code, Title 2 (Sales), §§ 2-312 through 2-318.

B. Warranty of title.

C. Warranties of quality.

1. Express warranties.

2. Implied warranties.

a. Warranty of merchantability.

(1) The seller is one who ordinarily sells such goods.

(2) The warranty has not been validly excluded or modified.

b. Warranty of fitness for a particular purpose. Imposed by law whenever the seller at the time of contracting has reason to know:

(1) Any <u>particular purpose</u> for which the goods are being purchased, and

(2) That the buyer is relying on the seller's skill or judgment to provide goods suitable for that purpose.

3. Modifying warranties of quality.

a. Modifying express warranties. Attempts to negate or limit the warranty are construed wherever reasonable as staking out the boundaries of the warranty.

b. Modifying implied warranties.

(1) Exclusion or modification is generally permitted by the use of appropriate language.

(2) In addition, implied warranties may be excluded or modified by course of dealing or trade usage, or may be precluded by the buyer's prior inspection of the goods.

4. Warranties under the U.C.C., whether express or implied, should be construed as consistent with each other and as cumulative.

5. Procedural requirements for enforcing rights under warranty.

a. Consumers seeking to enforce warranty rights normally must notify the seller that the warranty has been breached within a reasonable time after the breach is or should have been discovered. U.C.C. § 2-607(3)(a).

b. Actions must also be brought within the statute of limitations. U.C.C. § 7-725.

(1) The U.C.C. defines a statute of limitations of 4 years.

(2) The U.C.C. statute of limitations begins to run at the time of delivery of the goods, not from the time the defect is discovered or the time of injury.

D. Remedies for breach of U.C.C. warranties.

1. Buyer's remedies for breach of warranty.

a. The primary U.C.C. remedy for defective goods is revocation of acceptance, which permits the buyer to recover any money paid to the seller.

b. Obtain a judicial declaration that a warranty "fails of its essential purpose." U.C.C. § 2-719(2).

c. Sell the goods and obtain the difference in value from the original seller.

d. "Cover" - go into the market place to buy other goods to replace the defective goods received from the seller, then recover the excess price paid for the substitute goods.

e. Keep the goods and either deduct the amount of damages from the unpaid purchase price or, if the buyer has already paid for the goods, sue for damages. U.C.C. §§ 2-714, 2-717.

2. Possible recovery for breach of warranty.

a. General damages.
b. Incidental damages. U.C.C. § 2-715(1).
c. Consequential damages. U.C.C. § 2-715(2).
d. Punitive damages.
e. Liquidated damages.
f. Other remedies agreed to by the contracting parties.

3. Conditions for invoking remedies.

a. The defect in the goods must be serious enough to "substantially impair" their value to the buyer. U.C.C. § 2-608(1).

b. The seller must first be given an opportunity to "cure" the defect before the buyer is allowed to revoke acceptance of the goods. U.C.C. § 2-508.

V. WARRANTIES UNDER THE MAGNUSON-MOSS WARRANTY ACT (15 U.S.C. §§ 2301-2312).

A. Protections afforded by the Magnuson-Moss Warranty Act.

1. The substantive rights provided by law are specified, including:

a. If there is a <u>written</u> warranty, implied warranties cannot be disclaimed.

b. If there is a full warranty, consumer must receive refund of the purchase price or replacement of defective goods.

c. The Act prohibits tie-ins.

(1) A warrantor cannot attempt to condition its written or implied warranty on the consumer's using a product or a service.

(2) The only exception is if the FTC approves a tie-in that provides a product or service that is free of charge and is identified by brand name.

2. The Act requires greater disclosure with respect to the warranty coverage provided on consumer products.

3. The Act declares a public policy in favor of "informal dispute settlement procedures".

a. The Act authorizes the Federal Trade Commission to prescribe rules setting forth minimum requirements for such procedures. 16 C.F.R. § 703.

b. The FTC rules provide incentives to encourage manufacturers to set up consumer arbitration programs. Manufacturers and dealers can require consumers to use arbitration before resorting to legal remedies, provided:

(1) The arbitration process is at no cost to the consumer.

(2) The arbitration result is nonbinding.

(3) The arbitration program is independent from company control.

(4) An annual audit which reveals how many awards favor consumers is published annually.

4. The Act (federal law) authorizes state courts to award attorneys' fees and court costs to consumers who win their revocation of acceptance cases.

B. Applicability of the Magnuson-Moss Warranty Act.

1. Consumer products manufactured after 4 July 1975.

2. On which there is a written warranty.

3. A written warranty is:

a. A written affirmation that the product is defect free or will meet a specified level of performance for a specified period,

or

b. A written undertaking to refund, repair, replace or remedy a product <u>IF</u> it fails to meet specifications.

c. Which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

C. Substantive provisions of the Magnuson-Moss Warranty Act.

1. Although the Magnuson-Moss Warranty Act does not require that any consumer product be warranted, it does provide that if the manufacturer of such a product chooses to give a written warranty:

a. It must be made available to the consumer before the decision to buy is made. The seller must comply by:

(1) Clearly and conspicuously displaying the text of the warranty "in close conjunction to" the warranted product, and/or

(2) Maintaining readily available binders containing copies of the warranties for the products sold in each department of the seller's store, and/or

(3) Displaying the package of a warranted consumer product in such a way that the printed text of the warranty on the package is clearly visible to prospective buyers at the point of sale, and/or

(4) Placing a notice containing the text of the warranty in close proximity to the warranted consumer product, in a manner which clearly indicates to prospective buyers the product to which it applies.

b. If the product costs more than $10, the warrantor must disclose (by means of its caption as a "full" or "limited" warranty) whether the warranty meets federal minimum warranty standards.

c. The terms and conditions of the warranty (including those required by the Act) must be expressed in "simple and readily understood" language.

d. All written warranties, full or limited, on consumer products costing more than $15 are required to disclose the terms and conditions of the warranty.

(1) The identity of the parties to whom the warranty is extended, including any limitations (such as to the original purchaser of the product).

(2) A clear description and identification of products, parts, characteristics, components, or properties covered by the warranty.

(3) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with the written warranty.

(4) The point at which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration.

(5) A step-by-step explanation of the procedure which the consumer should follow to obtain performance of any warranty obligation.

(6) Information about the availability of any "informal dispute settlement mechanism" elected by the warrantor.

(7) Any limitations on the duration of implied warranties.

(8) Any exclusions of or limitations on relief available to the consumer, such as incidental or consequential damages.

(9) The following statement: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state."

e. Certain Magnuson-Moss Warranty Act provisions, including the provision requiring designation of written warranties as "full" or "limited," apply only to products actually costing the consumer more than $10 excluding tax.

f. A warrantor who requires the consumer to return a "warranty registration card" or similar document as a condition precedent to warranty coverage must disclose this fact in the warranty.

2. Service contracts.

a. Defined by the Magnuson-Moss Warranty Act as a "contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product." 15 U.S.C. § 2301(8).

b. The Magnuson-Moss Warranty Act specifically recognizes the right of a supplier or warrantor to enter into a service contract with the consumer in addition to or in lieu of a written warranty, as long as the service contract "fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language." 15 U.S.C. § 2306(b).

3. Provisions affecting implied warranties.

a. The Magnuson-Moss Warranty Act limits disclaimer or modification of implied warranties when the product is covered by a written warranty or by a service contract entered into within 90 days of the sale.

b. A disclaimer, modification, or limitation made in violation of the Magnuson-Moss Warranty Act is ineffective.

D. Who can sue under the Magnuson-Moss Warranty Act.

1. Anyone who buys a consumer product for purposes other than resale.

2. Anyone to whom the product is transferred during the life of a written or implied warranty.

E. Who can be sued under the Magnuson-Moss Warranty Act.

1. Any warrantor.

2. Any supplier.

F. Remedies available for breach of Magnuson-Moss Warranty Act provisions.

1. Cease and desist orders issued by the FTC under its administrative enforcement authority.

2. Civil penalties for unfair or deceptive acts or practices.

3. Injunctive relief.

4. Private civil relief under the Magnuson-Moss Warranty Act.

a. Negotiation and/or mediation through an informal dispute settlement mechanism. Although a warrantor need not provide this nonjudicial alternative for the resolution of warranty disputes, if such a mechanism is available a consumer can be required to use the mechanism before beginning civil action provided:

(1) The mechanism and its implementation meet the requirements established by the FTC and

(2) The warrantor incorporates into the written warranty the requirement that the consumer resort to the mechanism

before pursuing any legal remedy under the Magnuson-Moss Warranty Act.

b. Industry complaint bureaus.

c. Consumers can sue for damages and other legal and equitable relief in either state or federal court.

d. The amount in controversy for suit in federal court must exceed $50,000 for both individual and class actions.

e. Personal injury damages.

(1) Typically, private actions for breach of warranty may be brought under the Magnuson-Moss Warranty Act only for direct economic damage.

(2) Consequential damages, such as personal injuries, cannot be recovered unless there has been a violation of the Act's substantive provisions.

f. Punitive damages may be recovered in suits brought under the Magnuson-Moss Warranty Act if available under state law.

g. Damages for emotional distress can be recovered under the Magnuson-Moss Warranty Act if they are available in breach of warranty actions under state law.

h. Attorneys' fees and courts costs are allowable if the consumer prevails in the action.

VI. CHALLENGING SECRET AUTO WARRANTIES.

A. After car's written warranty expires, manufacturers often establish policy to pay for repairs for certain widespread defects rather than deal with case-by-case complaints.

1. These policies are communicated only to company's regional offices and sometimes to dealers, never to consumers.

2. Generally, manufacturer issues bulletin to regional offices stating it will pay to fix particular problem for limited time period and/or milage on the car.

3. These "secret" warranties only benefit consumers who complain the most, and to the right party.

4. Less aggressive consumers never learn of the "secret warranties" and pay for repairs.

B. Currently no explicit requirement for manufacturers to publicize these policies or communicate them directly to consumers.

1. Might argue it is state UDAP violation.

a. Manufacturer has, by its policy, admitted that a defect exists for which it is responsible, but has not disclosed the defect or that it will repair it.

b. Discount manufacturer's claim that it is merely extending "goodwill" in making repairs by arguing the difference between goodwill and widespread repair reimbursement authorized in advance of anticipated failures.

c. Also, argue that the secrecy involved, its availability only to persistent complainers who reach those informed of the policy and the denial of compensation after the cutoff date when timely complaints were made.

d. UDAP damages should include cost of actual repairs and consequential damages.

2. Might also argue violation of state fraud statute based on manufacturer's knowing concealment of defect and its repair policy.

3. May have claim for breach of implied warranty of merchantability.

a. Secret warranty is admission of existence of defect.

b. Though manufacturer's express warranty may have expired, implied warranty of merchantability continues if defect existed

at time car left manufacturer and defect makes car unfit for ordinary purposes.

C. Consumers encountering defects after expiration of written warranty should:

1. Contact regional sales office of the manufacturer,

2. Aggressively pursue warranty coverage or reimbursement for repairs, and

3. Contact Center for Auto Safety, 2001 S Street, N.W., Suite 410, Washington, D.C. 20009, (202) 328-7700, which has specific information on the secret warranties of various auto manufacturers, as does the FTC.

VII. STATUTORY WARRANTIES IN NEW AUTO SALES: "LEMON LAWS".

A. Introduction.

B. Impact of typical state "lemon" law.

1. Creates a new statutory warranty that modifies every manufacturer's warranty.

2. Sets standards for consumers and manufacturers in determining when a buy-back must be awarded.

C. State lemon laws may be applied to automobiles purchased before the law went into effect if the warranty period has not expired at the time relief is sought under the law's provisions.

D. Common provisions. Although there is a great deal of variety among the various "lemon" laws, the lemon laws include many common provisions.

1. Most lemon laws apply only to new cars, although some also apply to used cars, motorcycles, off road vehicles, and mobile homes.

See, e.g., N.Y. Gen. Bus. Law § 198-b (1990) (used cars with less than 36,000 miles are covered if they are sold by persons selling three or more used cars per year and they develop serious problems in the first 60 days or 3,000 miles, which ever comes first; cars with more than 36,000 are covered for 30 days or 1,000 miles).

2. Many statutes provide that the manufacturer must allow the consumer to return the car for a full refund or a replacement vehicle if:

   a. The consumer reports the defect within the warranty period or within one year of the date of actual delivery of the vehicle, whichever is earlier.

   b. A substantial defect in a new automobile cannot be repaired in a reasonable number of attempts.

3. All state lemon laws contain an explicit "savings clause" that preserves consumers' rights under all other laws.

4. The good faith of the dealer in attempting to repair the vehicle does not defeat the consumer's right to relief under a lemon law if the malfunction goes uncorrected.

   See, e.g., Muzzy v. Chevrolet Div., General Motors Corp., No. 87-272 (Vt. Dec 1, 1989) (in five separate attempts, dealer was unable to correct stalling problem and rough running engine; dealer then installed valve that it said corrected problem--court affirmed refund of portion of purchase price and other expenses: statutory criteria was three repair attempts and satisfaction (subjective) of customer).

5. Under most lemon laws, the repair attempts must be made even after the manufacturer's warranty expires, as long as the defect was first reported within the warranty period.

6. Lemon laws generally are limited to defects covered by the manufacturer's written warranty, so the malfunction must be shown to have resulted from a defect in material or workmanship.

7. Manufacturers are seldom held liable for defects caused by the owner's negligence, improper repair attempts, or unauthorized modifications.

8. Under all lemon laws, the consumer must give notice of the defect, but the notice provisions vary greatly.

9. No lemon law requires that after the consumer notifies the dealer or manufacturer of the substantial defect the consumer discontinue use of the vehicle while awaiting the dealer's repair attempts.

10. Most lemon laws permit the dealer an affirmative defense if:

    a. The defect or nonconformity does not substantially impair the value or use of the vehicle.

    b. The defect is caused by the consumer's abuse, neglect, or unauthorized modifications or alterations.

11. Offsets. Some state laws provide that the consumer will pay the dealer an offset.

E. Remedies available under lemon laws.

1. Most lemon laws require consumers first to resort to an informal dispute settlement mechanism (IDSM) designated by the manufacturer, if the IDSM complies with FTC guidelines contained in 16 C.F.R. § 703, before being eligible to receive a full refund or a replacement vehicle.

    a. The lemon laws of some states require that the consumer use the manufacturer's IDSM only if the IDSM complies with the FTC guidelines "completely," while others require that the consumer comply with the IDSM if it complies with the FTC guidelines "substantially."

    b. States vary as to which programs they find consistent with FTC guidelines, and this determination may ultimately be made by the court.

2. Some states provide state-organized and funded IDSM mechanisms. See e.g., Hawaii Rev. Stat. § 490:2-313.2; N.Y. Gen. Bus. Law § 198-a(g).

3. The basic remedy of refund of the purchase price includes, in most states, all taxes, preparation fees, and other charges or fees paid by the consumer.

4. Most states also require deduction of the reasonable value of the consumer's use of the automobile up to the first time the car was submitted for correction of the defect.

5. Attorneys' fees and court costs may be made available for consumers who successfully sue to obtain lemon law remedies.

6. Some lemon laws include prohibitions against waiver of lemon law protection and resale of a returned lemon unless full disclosure of the car's history is made to the buyer.

7. Some lemon laws permit consequential and incidental damages.

8. Under a few statutes, manufacturers who are sued in bad faith or without substantial justification are entitled to recover legal expenses from the consumer.

F. Ford Motor Co. v. Barrett, 800 P.2d 367 (Wa. 1990). Court upheld constitutionality of pro-consumer provision in Washington's new car lemon law.

1. Consumer won decision from a lemon law arbitration panel requiring Ford to repurchase car, with statutory offset for use. Ford appealed.

2. Statute provides that, if consumer prevails on such an appeal by manufacturer, recovery shall include attorney's fees and costs. (No attorney's fees if manufacturer prevails). Also, if arbitration board ordered replacement or repurchase by manufacturer, and manufacturer does not comply or provide consumer with free loaner car during appeal, a successful consumer gets continuing damages of $25.00 per day.

3. Court: Upheld monetary provisions of statute and said $25.00/day was liquidated damages not a penalty.

VIII. WARRANTY PROTECTION OF USED CARS.

A. The FTC has issued a trade practices rule, effective 9 May 1985, in an attempt to reduce oral misrepresentations, particularly with respect to warranty coverage. 16 C.F.R. Part 455.

1. While the rule does not require that used cars be sold with a warranty, it does require disclosure, through the use of a mandatory "Buyers Guide" window sticker, of the existence of any warranty coverage which does exist.

2. The rule also requires disclosure of certain other information deemed helpful to consumers, such as an explanation of the term "as is", and a warning against spoken promises that are not confirmed in writing.

3. Pursuant to the rule, it is a deceptive act or practice for a used car dealer to:

   a. Misrepresent the mechanical condition of a used vehicle.

   b. Misrepresent the terms of any warranty offered in connection with the sale of a used vehicle.

   c. Represent that a used vehicle is sold with a warranty when the vehicle is sold without any warranty.

4. Pursuant to the rule, it is an unfair practice for a used car dealer to:

   a. Fail to disclose, prior to sale, that a used vehicle is sold without any warranty.

   b. Fail to make available, prior to sale, the terms of any written warranty offered in connection with the sale of a used vehicle.

5. No private right of action for FTC Rule violation, but:

   a. Rule violations may be remedied using state UDAP statutes,

   b. Might argue violation of Rule is automatic violation of Magnuson-Moss Act, which authorizes private action for damages and

attorney fees. See Currier v. Spencer, 299 Ark. 182, 772 S.W.2d 309 (1989). Trial court apparently awarded Magnuson-Moss attorney's fees for violation of FTC Used Car Rule. Arkansas Supreme Court, without discussing whether Magnuson-Moss Act can be used to challenge FTC Used Car Rule violations, affirmed trial court award.

B. Some states have passed used car lemon laws.

C. Most state lemon laws, although designed primarily to protect new car owners, also cover subsequent purchasers of warranted vehicles during the warranty period.

IX. RELATIONSHIP BETWEEN VARIOUS WARRANTY PROTECTIONS.

A. The Magnuson-Moss Warranty Act is designed to complement rather than supersede state warranty law.

1. The Magnuson-Moss Warranty Act expressly preserves "any right or remedy of any consumer" under state or other federal law. 15 U.S.C. § 2311(b)(1).

2. Because some states have special consumer warranty statutes which may give the consumer greater protection than the Magnuson-Moss Warranty Act, and thus take precedence over that Act, the FTC has required that all written warranties covered by the MMWA must clearly and conspicuously disclose from one to three additional provisions.

a. All such warranties must say: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state." 16 C.F.R. § 701.3(a)(9).

b. In addition, if the written warranty contains any limitations on the duration of implied warranties, such limitations must be disclosed on the face of the warranty accompanied by the following statement: "Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you." 16 C.F.R. § 701.3(a)(7).

c. Any limitations on remedies for breach of warranty, such as exclusion of incidental or consequential damages, must be accompanied by the following statement: "Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."

B. If there is a conflict between a state's lemon law and a manufacturer's new car warranty, the warranty is superseded by the statute.

X. CONCLUSION.

APPENDIX A

"LEMON" LAW LEGISLATION

Alabama - Ala. Stat. § 8-20A-1.

Alaska - Alaska Stat. § 45.45.300.

Arizona - Ariz. Rev. Stat. § 44-1261.

California - Cal. Civ. Code § 1793.22.

Colorado - Colo. Rev. Stat. § 42-12-101.

Connecticut - Conn. Gen. Stat. § 42-179.

Delaware - Del. Code Ann., tit. 6 § 5001.

District of Columbia - D.C. Code, § 40-1301.

Florida - Fla. Stat. Ann. § 681.102 (West).

Georgia - Ga. Code Ann. § 10-1-780.

Hawaii - Haw. Rev. Stat. § 481I-2.

Idaho - Idaho Code § 48-901.

Illinois - Ill. Rev. Stat. ch. 121-1/2, § 1201.

Indiana - Ind. Code § 24-5-13.

Iowa - Iowa Code Ann. § 322 G.1 (West).

Kansas - Kan. Stat. Ann. § 50-645.

Kentucky - Ky. Rev. Stat. Ann. § 367.840.

Louisiana - La. Rev. Stat. § 51:1941 (West).

Maine - Me. Rev. Stat. Ann. tit. 10 § 1161.

Maryland - Md. Code Ann. Com. Law § 14-1501.

Massachusetts - Mass. Gen. Laws Ann. ch. 90 § 7N 1/2.

Michigan - Mich. Stat. Ann. § 9.2705(1).

Minnesota - Minn. Stat. Ann. § 325F.665.

Mississippi - Miss. Code Ann. § 63-17-151.

Missouri - Mo. Stat. Ann. § 407.560 (Vernon).

Montana - Mont. Code Ann. § 61-4-501.

Nebraska - Neb. Rev. Stat. § 60-2701.

Nevada - Nev. Rev. Stat. § 598.751.

New Hampshire - N.H. Rev. Stat. Ann. § 357-D.

New Jersey - N.J. Stat. Ann. § 56:12-30.

New Mexico - N.M. Stat. Ann. § 57-16A-1.

New York - N.Y. Gen. Bus. Law § 198-a; N.Y. Veh. & Traf. Law §417-a.

North Carolina - N.C. Gen. Stat. § 20-351.

North Dakota - N.D. Cent. Code § 51-07-16.

Ohio - Ohio Rev. Code Ann. § 1345.71.

Oklahoma - Okla. Stat. Ann. tit. 15, § 901.

Oregon - Or. Rev. Stat. § 646.315.

Pennsylvania - Pa. Stat. Ann. tit. 73, § 1951 (Purdon).

Rhode Island - R.I. Gen. Laws § 31-5.2-1.

South Carolina - S.C. Code Ann. § 56-28-10 (Law Co-op).

Tennessee - Tenn. Code Ann. §§ 55-24-201.

Texas - Tex. Rev. Civ. Stat. Ann. art. 4413(36) (Vernon).

Utah - Utah Code Ann. § 13-20-1, 41-3-406.

Vermont - Vt. Stat. Ann. tit. 9 § 4170.

Virginia - Va. Code § 59.1-207.7.

Washington - Wash. Rev. Code § 19.118.

West Virginia - W. Va. Code § 46A-6A-1.

Wisconsin - Wis. Stat. § 218.015.

Wyoming - Wyo. Stat. Ann. § 40-17-101.

APPENDIX B

FEDERAL TRADE COMMISSION ACTION

In the Matter of Nobody Beats the Wiz, Inc., Docket No. C-3329, May 7, 1991, Complaint, Decision and Order. (See File No. 902-3147, November 8, 1990 for agreement containing consent order to cease and desist). Violation of Magnuson Moss Warranty Act and Federal Trade Commission Act. Company selling electronic appliances, including T.V.'s, VCR's, stereos, video cameras, and microwave ovens failed to make texts of warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 C.F.R. 792.3(a):

1. Displaying text of warranty in close proximity to warranted product;
2. Furnishing text of warranty upon request prior to sale and placing signs in required locations advising prospective buyers of availability of warranties upon request.

FTC issued cease and desist order to refrain from failing to take the above measures and ordered company to train employees of responsibilities under Magnuson-Moss.

In the Matter of Jeep Eagle Corporation, File No. 8423103, February 9, 1989, Consent Order for Public Comment. American Motors, later succeeded by Jeep Eagle, violated Federal Trade Commission Rule against unfair and deceptive trade practices by breaching contracts of warranty to repair or replace defective parts of 1983-85 Alliances and 1984-85 Encores. AMC's authorized Renault dealers often failed to repair successfully automatic transmission fluid and engine oil leaks and associated problems on these cars, as required by written warranties issued by AMC. This constituted unfair and deceptive trade practices under FTC Act and breach of contract. AMC must implement redress program:

1. Cash redress of $40.00 per documented repair visit beginning with the fourth visit, to each purchaser of the cars who experienced four or more dealer repair visits for certain specified automatic transmission fluid leaks and related problems during their full and limited warranties (24 Months/24,000 miles).

2. Notice of redress program mailed to approximately 2,000 purchasers and checks mailed to them no later than 10 months of finality of order.

In the Matter of Craftmatic/Contour Org., Inc., Docket No.1 C-3156, June 13, 1985, Consent Order. Violations of Federal Trade Commission Act and Magnuson-Moss Warranty Act. Within the warranty offered to consumers was a provision that the defective product must be returned to the selling dealer with all costs born by the consumer of dismantling, shipping to and from the consumer, packaging and reassembly. The company then advertised their warranty without telling consumers of their obligation to pay all costs associated with the return and repair. Ordered to honor warranties and bear cost and distribute warranty information in accordance with Magnuson-Moss.

CHAPTER 10

ARMED FORCES DISCIPLINARY CONTROL BOARDS

I. GENERAL

Armed Forces Disciplinary Control Boards are established by joint service agreement and Army Regulation 190-24 to assist commanders in eliminating conditions inimical to the health, welfare, morale, and discipline of military personnel[1]. These Boards ensure the establishment and maintenance of liaison between military and civil law enforcement authorities, reporting on undesirable conditions affecting military personnel to commanders and recommending action. Recommended action may include designation of a given establishment as "off limits" to military personnel or removal of such a designation. "Undesirable conditions" include conditions relating to drug abuse and drug paraphernalia,[2] venereal disease, racial and other discriminatory practices, liquor violations, lack of discipline, illicit gambling, and unfair commercial practices. Among the establishments most often targeted are merchants, landlords, real estate brokers, and public accommodation or consumer managers and owners.

Armed Forces Disciplinary Control Boards are better able to deal with unscrupulous proprietors than individual service members or family members. Most members of the business community realize that having their establishments declared "off-limits" will result in adverse publicity and financial loss. Thus, the referral of such cases to these boards may contribute greatly to protecting service members and their family members from unscrupulous merchants.

"Off-limits" designation is considered only when other alternatives have not been successful. Commanders first attempt to correct adverse conditions through informal communications with the proprietors involved. If this is unsuccessful, the commander may submit a report to the local board. Individual service members

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[1]AR 190-24; MCO 1620.2B; AFR 125-11; COMDIRST 1620-1C.

[2]See AR 190-24, para. 2-2a(7), which directs that commanders assess the availability of drug abuse paraphernalia in the vicinity of DOD installations. See also DOD Directive 1010.4, 25 Aug. 1980, Alcohol and Drug Abuse by DOD Personnel.

and their family members can submit sworn complaints to their local commanders.

The local board may appoint an investigator to verify the information reported. If adverse conditions appear to exist, the board will send the proprietor a letter of notification identifying the complaint, offering a reasonable time to correct the alleged conditions, and explaining the right to present information to the board.[3] If the adverse conditions persist, the board should recommend the imposition of the "off-limits" sanction. The recommendation of the local board is forwarded to the sponsoring commander. If the sponsoring commander approves the recommendation, the board president will notify the proprietor concerned of the action taken. No definite time limit is set when an "off-limits" sanction is imposed. The adequacy of the corrective action taken by the proprietor is the determining factor.

In an emergency situation, the commander may temporarily declare an establishment or area "off-limits." This action must be reported immediately to both the next major commander and the local board. The local board will process this report in the same manner as normal requests for "off-limits" action.

In overseas areas, "off-limits" procedures may be established. Insofar as AR 190-24 is compatible with the local situation, it should be used as guidance in the formulation of such procedures.

II. LEGAL AUTHORITY FOR "OFF-LIMITS" DESIGNATION

Legal authority to govern the conduct of service personnel, and thus the right to prescribe that certain areas or establishments are "off-limits" to them, may be traced to Article I of the Constitution, which states that "[t]he Congress shall have power . . . to make Rules for the Government and Regulation of the land and naval Forces," and Article II, which states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States. . . ."

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[3]For a detailed discussion of "off-limits" procedures see Appendix B of AR 190-24. A revision of the applicable service regulation may be found in 32 Code of Federal Regulations 631 (1991).

Congress has specifically granted authority to the Executive to prescribe regulations for the government of the Armed Forces, and thus to prescribe rules for the conduct of service personnel.[4] Where a commander acts within legal limits in placing an establishment "off-limits," an action to challenge this decision cannot be maintained without impleading the sovereign, even if abuse of discretion is alleged. Thus, if the United States does not consent to be sued, courts lack the jurisdiction to inquire into the action taken.[5] In the most recent reported case involving action by an AFDCB, the court suggested that there is no property interest with which the military interferes when soldiers are ordered not to do business with a particular establishment.[6] The due process provisions of AR 190-24, if closely followed, should meet judicial muster, even if a property interest is identified. For additional discussion of a commander's off-post authority, see Dep't of Army Pamphlet 27-21, Administrative and Civil Law Handbook, para. 2-17d.

III. ORGANIZATION AND FUNCTIONS

An Armed Forces Disciplinary Control Board (AFDCB) may be established by an installation, base, or station commander. If a complaint involves two or more installations or services, there will be joint participation in the AFDCB by those affected. In such cases, the commander of the service or installation with the greatest number of troops shall serve as the "sponsoring commander" of the board. Designated sponsoring commanders are responsible for providing administrative support to their respective boards, including recorders for the boards, implementing directives, and current "off-limits" rosters.

Major Army, Navy, Marine Corps, Air Force, and Coast Guard commanders monitor the establishment of and participation in AFDCBs by subordinate commands and resolve differences among subordinate commanders with regard to matters affecting board responsibilities.

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[4]10 U.S.C §§ 121, 3061, 6011, 8012 (1988); 5 U.S.C. § 301 (1988). See also 10 U.S.C. § 3012(b)(1)(g) (1988).

[5]Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946); Harper v. Jones, 195 F.2d 705 (10th Cir. 1952).

[6]Metlin v. Palastra, 729 F.2d 353 (5th Cir. 1984).

The membership of the board shall include, at a minimum, representatives in the following areas: law enforcement, legal, health and environment, public affairs, equal opportunity, safety, chaplains, alcohol and drug abuse, and personnel and community activities. Voting members and the President of the Board will be designated by the sponsoring commander. The boards will meet at least quarterly to receive reports and take appropriate action on conditions within their jurisdictional areas relating to matters affecting the health, safety, welfare, morale, and discipline of military members or their families.

IV. "OFF-LIMITS" DESIGNATION

Service personnel are prohibited from entering areas that have been designated "off limits." Sponsoring commanders publish approved lists of off limits areas. Generally, off-limits establishments are not visited by military law enforcement personnel unless circumstances warrant. In the United States "off-limits" signs are not posted, but signs may be posted overseas if the host country does not object.

V. ROLE OF THE LEGAL ASSISTANCE ATTORNEY

Legal assistance attorneys (LAA) often detect patterns of unfair or unethical practices by particular businesses or firms through their contact with clients. When this occurs, the LAA may have the client present the complaint to the Board or may proceed to the Board under the SJA's guidance if the clients involved agree to disclosure of privileged information. LAAs typically explain the functions and procedures of the Board to their clients and, when appropriate, help the client prepare the complaint. Complaints should be sworn and documented as fully as possible.

SUMMARY OF
ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB)
ARMY

A. General.

1. AFDCBs may be established by installation, base, or station commanders.

2. The mission of AFDCBs is as follows:

   a. Advise and make recommendations to commanders on matters concerning the elimination of crime or other conditions which may negatively affect the health, safety, morals, welfare, morale, or discipline of Armed Forces personnel.

   b. Ensure the establishment and maintenance of the highest degree of liaison and coordination between military commands and appropriate civil authorities.

3. In each AFDCB area, the commander of the installation with the largest base population will be the AFDCB sponsoring commander. Sponsoring commanders will provide administrative support for the AFDCB program.

4. An "off-limits" area is defined as any vehicle, conveyance, place, structure, building, or area prohibited to military personnel to use, ride, visit, or enter during the period for which it may be declared off-limits.

5. Violations of an off-limits sanction may subject the soldier to disciplinary action under the Uniform Code of Military Justice.

B. Composition and Duties of AFDCBs.

1. Each board, as a minimum, will consist of representatives from the following nine functional areas:

   a. Law enforcement.
   b. Legal.
   c. Health and environment.
   d. Public affairs.
   e. Equal opportunity.
   f. Safety.
   g. Chaplains.
   h. Alcohol and drug abuse.
   i. Personnel and community activities.

2. Duties and functions of AFDCBs.

   a. Meet in session.

   b. Receive and take appropriate action on reports of conditions that may negatively affect the health, safety, morals, welfare, morale, or discipline of Armed Forces personnel.

   c. Conduct liaison with civil authorities on problem areas.

   d. Make recommendations to commanders in the board's area of jurisdiction concerning off-installation procedures to prevent or control undesirable conditions.

C. AFDCB Procedures.

1. Prior to initiating routine off-limits actions, installation commanders will attempt to correct, through contact with local civilian leaders, any adverse condition or situation.

2. If these actions are unsuccessful, commanders will submit requests for off-limits action to the AFDCB serving their area.

3. The AFDCB, prior to recommending off-limits restriction, will send written notice of the condition or situation to the person or firm responsible.

   a. The AFDCB will offer a reasonable time to correct the condition or situation.

   b. The AFDCB will provide the individual or firm with the opportunity to present any relevant information to the board.

   c. Even if a person's establishment or area has been declared off-limits, he may at any time petition the president of the board for removal of the off-limits restriction.

      (1) The petition will be in writing.

      (2) The petition will state, in detail, the action taken to eliminate the adverse condition or situation that caused the imposition of the restraint.

   d. In response to the petition, the Board will either recommend removal or continuation of the off-limits restriction to the local sponsoring commander.

4. Challenges to the off-limits restrictions.

   a. Adequacy of due process. Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946).

   b. Free exercise of religion. Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985).

   c. Freedom of association. Doe v. Fulham, No. 83-137-CIV-4 (E.D.N.C. 1983).

CHAPTER 11

REAL ESTATE FINANCING
(VA LOANS/FORECLOSURES)

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MAJ Gsteiger, IMA
January 1993

REAL ESTATE FINANCING
(VA LOANS/FORECLOSURES)

Outline of Instruction

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I. Real Estate Settlement Procedures Act, 12 U.S.C.A. § 2601, et seq.

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M. Department of Veterans Affairs Pams. 26-4, VA-Guaranteed Home Loans for Veterans (Aug. 1989); 26-5, Pointers for the Veteran Homeowner (Mar. 1992); 26-6, To the Home-Buying Veteran (Oct. 1989); 26-68-1, Selling Your GI Home? (Apr. 1989); and 26-91-1, A Quick Guide for Homebuyers & Real Estate Professionals (Aug. 1991).

II. INTRODUCTION.

III. APPLYING AND QUALIFYING FOR FINANCING.

A. A loan application and supporting documentation must be submitted to the lender.

B. Applicant must qualify for the amount of the loan.

1. Generally, monthly mortgage payment of principal and interest should not be more than 26% of gross monthly income.

2. Long-term debts should not exceed 36% of gross monthly income.

C. House must appraise for more than the loan amount. Most lenders will require recent appraisal and finance up to a specified percentage of appraised value or actual cost, whichever is less.

D. Buyers should shop around to find best financing available.

1. Compare types of financing available and terms.

2. Consider a 15-year note instead of a 30-year note.

3. Consider amount of down payment.

4. Shop for best annual percentage rate.

E. If application is accepted, lender issues a commitment letter.

1. The letter constitutes an offer which the prospective purchaser may accept by countersigning.

2. If signed, the letter becomes a contract (could expire if closing not completed before a certain date).

3. Real Estate Settlement Procedures Act, 12 U.S.C.A. § 2601, et seq. requires lenders to give applicant a good faith estimate of all settlement charges.

IV. SOURCES AND TYPES OF LOANS AND FINANCING.

A. Conventional Loans (loans made without federal government assistance).

1. Standard fixed-rate mortgages.

a. Characterized by fixed term, fixed interest rates, and fixed monthly payments.

b. Buyers considering conventional mortgages should inquire into the following:

(1) minimum and maximum loan amount,

(2) maximum loan to value ratio, (usually 80%)

(3) interest rates,

(4) maximum or minimum term of loan,

(5) loan origination fees,

(6) Private Mortgage Insurance requirements,

(7) escrow account requirements,

(8) time for commitments and closing, and

(9) assumability of loan.

c. Advantage: no surprises during life of loan.

d. Disadvantages: usually means higher rates, not assumable, and a 20% down payment is usually required.

2. Flexible Loan Insurance (FLIP mortgage) [also referred to as Pledge Account Mortgages].

a. This type of mortgage lowers the buyer's monthly payments during the early years of mortgage by supplementing payment with funds from a pledged-interest bearing account established by the borrower.

b. The supplemental payment continues until the account is depleted.

c. Allows buyer to qualify for larger loan.

3. Renegotiable Rate Mortgage (RRM).

a. This type of mortgage features fixed interest rate and payments during periods of 3, 4, or 5 years with provision for adjustments at end of each period.

(1) Upward adjustments are at the option of lender.

(2) Downward adjustments are mandatory.

(3) Adjustments are usually based on an index published by Federal Home Loan Bank.

(4) Total adjustments can not exceed 5%.

b. Advantage: lower interest rate in first few years.

c. A variation of the RRM is the Rollover Mortgage (ROM).

4. Adjustable Rate Mortgage (ARM) [also referred to as Variable Rate Mortgages].

a. ARMs feature fixed monthly payments over a one to five year period with an interest rate adjusted to an index of each period.

b. Typical indexes used:

(1) National Mortgage Contract Rate,

(2) One-year Treasury constant maturity,

(3) 11th District cost of funds, or

(4) Federal Home Loan Bank Board series for closed loans on existing homes.

c. Most adjustable rate mortgages include caps and floors:

(1) Cap on the annual and lifetime increases in the interest rate (typically 2% on annual and 6% on total).

(2) Cap on the amount of payment.

(3) Floor on minimum interest rate.

d. To evaluate ARMs, consider:

(1) initial interest rate,

(2) frequency of rate adjustments,

(3) index used,

(4) margin over index,

(5) limits on adjustments,

(6) assumability,

(7) convertability,

(8) prepayment penalties, and

(9) points charged.

e. Advantage: ARMs can be substantially cheaper than fixed rate mortgages.

f. Disadvantage: Buyer does not know with certainty what payments will be over the life of the loan and negative amortization is possible.

g. Disclosure requirements. 12 C.F.R. Part 453; 12 C.F.R. Part 29; 12 C.F.R. Part 226.

5. Graduated Payment Mortgages (GPM).

a. GPM's are characterized by low monthly payments that rise gradually for a set number of years, then level off and remain steady for the balance of the mortgage term.

b. Buyer borrows additional money during early years which is added to the outstanding principal balance (negative amortization).

c. Interest rate is usually constant.

d. Most appropriate for young, upwardly mobile first time homeowners. Problems occur if income does not rise as expected.

6. Other types of conventional financing.

a. Graduated Payment Variable Rate Mortgage.

b. Deferred Interest Mortgage instrument defers payment of a portion of accruing interest for specified period.

c. Shared Appreciation Mortgage (SAM).

(1) Long-term loan furnished at a lower interest rate in return for a percentage share of future appreciation.

(2) It is difficult to assess the actual cost of SAM financing.

d. Reverse Annuity Mortgage (RAM).

(1) Not used to purchase a home, but used by older Americans to convert equity into monthly income supplement.

(2) Indebtedness is payable upon the death of the borrower, sale of the home, or a specified date.

(3) Variations include Rising Debt RAM and Fixed Debt RAM.

e. Balloon Payment Financing.

f. Growing Equity Mortgage (GEM). Monthly payments increase each year with the increase being applied to principal. A variation is the bi-weekly mortgage.

g. Shared Equity Mortgage (SEM). Two parties purchase property, but only one occupies it. Generally the other has invested and receives a monthly return and a percentage of the sale proceeds.

(1) Advantages for the investor:

(a) Shared appreciation (with high rate of return).

(b) Tax deductions. I.R.C. $280(A)(d)(3)

(c) Few management concerns.

(2) Advantages for the homeowner.

(a) Purchase and live in expensive home.

(b) Builds up equity.

(c) Partial tax deductions.

h. Buy-Down Mortgage. Often used by builders, who in essence prepay a portion of the interest on the mortgage for a period of years.

B. Federally Backed Mortgages.

1. Federal Housing Administration (12 U.S.C.A. § 1701 et seq.)

a. Nor loan (12 U.S.C.A. § 1709)

(1) FHA will insure 97% of first $25,000 plus 95% of balance of purchase price on the appraised value or the purchase price up to specified limits which vary by geographic area.

(2) Applies to owner-occupied dwelling (1 to 4 families).

(3) Borrower's down payment must be paid in cash. Secondary financing of down payments, closing costs, and prepaid items is not permitted.

(4) Loan terms.

(a) Lender cannot charge discount points to borrower.

(b) Seller may pay discount points (no limit).

(c) Borrower may be charged a one point service charge.

(d) Maximum maturity is 35 years.

(e) Lender sets interest rate.

(f) Generally assumable.

(5) FHA charges a mortgage insurance premium on the outstanding balance of the loan at closing.

b. FHA Mortgage Insurance for Veterans ("In-service" loans). (12 U.S.C.A. § 1715m and AR 608-8).

(1) Active duty members will have FHA mortgage insurance premiums waived while on active duty.

(2) Prepayment penalty also waived.

(3) Must be on active duty and have served for two or more years.

(4) Subject to the same rules as the regular FHA loan, but the mortgage insurance premium is waived.

c. FHA also provides for Adjustable Rate Mortgages (12 U.S.C. A. § 1715z-16) and Shared Appreciation Mortgages (12. U.S.C.A. § 1715z-17).

2. Veterans Administration Home Loan Program (38 U.S.C.A. § 3701 et seq.).

a. VA guarantees loan up to 60% of the loan or a maximum of $46,000 (whichever is less) for purchase of residential property (1 to 4 family units), improvement of existing home, purchase of mobile home, or refinancing existing home (38 U.S.C. § 3703).

(1) Lenders are generally willing to make loans up to 4 times the amount of the guarantee or $184,000 without a down-payment.

(2) The VA guaranty provides the same security to the lender as would a large down payment by the borrower.

b. Eligibility: serve on active duty for at least 181 days (90 during war), be released under conditions other than dishonorable, and obtain a Certificate of Eligibility from VA.

c. Advantages:

(1) Veterans not required to pay any portion of closing costs (all can be financed) and may not pay any discount points. Prohibition does not prevent seller from making an agreement with the purchaser that the purchaser will pay any points charged to the seller to make the loan (38 C.F.R. § 36.4312). Ganey v. Doran, 236 Cal. Rptr. 787 (Cal. App. 1987).

(2) No down payment required (but lenders can and will require if loan exceeds 4 times amount of loan guarantee).

(3) Assumability of VA loans.

(a) Pre 1 MAR 1988 loans fully assumable (38 C.F.R. § 36.4275, 36.4310).

(i) Buyer does not have to be a veteran.

(ii) Buyer must, however, be found creditworthy for VA to issues a release of liability to the veteran.

(b). Post 1 MAR 1988 loans only assumable with VA and lender approval (38 C.F.R. § 37.4508).

(4) Fixed interest rates.

(a) Typically, lender promises to issue the loan at the VA rate at closing.

(b) It is possible to obtain an unconditional commitment on a VA loan. Procedure is contained in VA Circular 26-84-16.

(5) New homes must carry a one-year builder warranty of compliance with VA specifications.

d. Disadvantage: The veteran will be charged a 1 percent fee for obtaining a VA loan. The veteran has the option of paying the fee in cash or financing it as part of the initial principal amount of the loan. For low down payment loans VA charges a sliding funding fee similar to mortgage insurance.

e. A veteran is entitled to only one VA guaranty entitlement. This entitlement can be restored by:

(1) Selling to another eligible veteran who assumes loan with his entitlement.

(2) Completely paying off loan.

(3) Partial entitlement also possible. (e.g., when entitlement is raised or full entitlement not initially used).

3. Refinancing VA loans (38 C.F.R. § 36.4223).

(a) Refinancing of loans not currently VA guaranteed - Up to 90% of value (38 C.F.R. §.36.4306).

(b) Refinancing of loan currently guaranteed by VA - Up to value of realty or existing loan and closing costs. New loan term cannot exceed original term plus 10 years (38 C.F.R. § 36.4306(a)(4)).

C. Existing Financing.

1. Assumptions.

a. Most conventional loans do not allow assumptions.

b. "Due on sale" clauses operate to accelerate maturity of loan to make outstanding balance due.

c. Under assumptions, the seller continues to be primarily liable.

2. Purchase Money Mortgage.

a. Seller agrees to finance part of the purchase price for the buyer by taking a second mortgage.

b. These mortgages are typically for short-term periods ending with a balloon payment.

c. Risks include problems with obtaining deficiency judgments and defaults on underlying mortgage.

3. Secondary Financing.

a. A second mortgage is a lien on property that is subordinate to an existing mortgage.

b. Typically, borrower, assumes an existing mortgage that does not cover selling price and takes out another loan to cover difference.

c. Lenders usually charge higher rate for second mortgages.

4. Wrap-around mortgage.

a. A form of second mortgage, but second loan instrument includes amount of first loan plus second.

b. Wrap-arounds are complex.

(1) May violate due on sale clause in first mortgage.

(2) Implementing legal documents must include additional safeguards.

5. Seller financing.

D. Home Equity Line of Credit.

1. Used by homeowners with over 20% equity in their primary residence.

2. Essentially a second mortgage which is preapproved but not paid to the homeowner until he or she requests it.

3. Closing costs are charged when the line of credit is established. The interest rate may vary.

4. Payments are fully tax deductible up to certain limits.

5. Disadvantages include using the funds for short-term purposes and fluctuating interest rates.

V. COSTS OF OBTAINING FINANCING.

A. Points.

1. Loan origination fees.

2. Points as prepaid interest.

3. Buy-Downs.

B. Credit and Appraisal Reports.

C. Private Mortgage Insurance (PMI).

1. Safeguards lender in case of default.

2. Typically required if loan is more than 80% of purchase price and not federally insured (insures lack of equity).

3. The initial premium is paid at closing and subsequent premiums added to monthly payments.

4. New VA Funding Fee operates in a similar manner, but is a one time payment.

D. Credit Life Insurance.

1. Usually decreasing term life insurance.

2. Premium payments added to monthly principal and interest payments.

3. May be better to purchase a straight life or a term life insurance policy.

E. Title Insurance.

1. Title insurance insures owner against claims on the property.

2. Survey of property not more than 6 months old is usually required.

3. Title insurance premium is paid once and coverage lasts as long as owner and heirs retain interest in the land.

4. Insure purchaser gets owner's title insurance to protect his equity.

VI. MORTGAGE CLAUSES.

A. Prepayment Privilege.

1. Allows borrower to refinance if interest rates go down.

2. Some mortgages contain a prepayment penalty if the borrower prepays with money borrowed from another lender.

B. Acceleration Clause.

1. Permits acceleration for breach of any mortgage covenants.

2. A mortgage may give the mortgagee the right to accelerate if the mortgagor sells or conveys the land without consent.

   a. "Due on sale" clauses are legal. 12 U.S.C. § 1701j-3.

   b. Failure to investigate and discover a "due on sale" clause may be legal malpractice.

   c. For VA and FHA guaranteed or insured loan, there are limitations on the events which can justify acceleration.

3. The acceleration clause in the note should not conflict with the acceleration clause in the mortgage.

4. A consumer-oriented mortgage should provide that mortgagor has right to receive notice of intent to accelerate and a grace period to cure defaults.

C. Home Owners Insurance.

1. Most mortgages give lender right to select insurer and types and amounts of coverage.

2. Pro-consumer clause gives borrower right to select carrier subject to approval, requires amounts not to exceed amount due, and provides that insurance proceeds will be applied to restoration if economically feasible.

D. Other Clauses.

1. Eminent domain (clause typically gives lender right to receive condemnation award).

2. Warranties of title.

3. Escrow of Taxes and insurance (typically requires borrower to pay 1/12 of taxes and insurance every month).

4. Mortgage debt (should be described accurately).

5. Description of mortgaged property (accurate legal description is important).

VII. RIGHTS UPON DEFAULT.

A. Common Types of Default.

1. Failure to pay principal and interest.

2. Failure to pay taxes or insurance. See Allen Sales & Servicecenter, Inc. v. Ryan, 525 S.W.2d 863 (Tex. 1975).

3. Waste or construction difficulties.

B. Waiver of Default.

1. Mortgagee may waive default by accepting late payment.

2. Waiver of one late performance does not constitute waiver of all late performances.

C. Acceleration.

1. Most mortgages give mortgagee authority to accelerate the entire debt when mortgagor defaults.

2. Without an acceleration clause, mortgagee has right to recover only amount of default.

3. Acceleration clauses are usually triggered at the option of the mortgagee by filing foreclosure complaint.

4. Mortgagor may reinstate mortgage loan by curing the default before election is made (and, in some states, following the election).

5. After election, in many states the mortgagor cannot reinstate the loan by paying amount in default.

   a. Must pay entire debt.

   b. Growing number of courts will refuse to recognize an acceleration that would produce an unjust result.

D. Right to Possession and Rents.

1. Most mortgage contracts give mortgagee the right to immediate possession.

2. Mortgagee may control the property and collect all rents.

3. Mortgagee must exercise duties in prudent manner (trustee for mortgagor).

E. Equity of Redemption.

1. Some individuals may prevent foreclosure by paying off the mortgage debt before foreclosure proceedings are completed.

2. Can be accomplished only by paying of the entire mortgage debt.

3. Courts generally will not recognize contract provision waiving the right of equitable redemption.

4. Completion of foreclosure terminates right of redemption.

F. Alternatives to Foreclosure.

1. Workout arrangement with mortgagee.

a. Many lenders will consider renegotiating the loan terms if there is a plausible plan regarding how the payments will be made.

b. Evidence of an uncooperative lender may be helpful in later defending against collection by VA of the loss under the VA guaranty.

2. Deed in lieu-of foreclosure.

3. Recovery on the note alone.

VIII. FORECLOSURE.

A. Foreclosure process may be commenced by mortgagee anytime after default.

1. Cuts off mortgagor's equity of redemption.

2. Person who purchases property receives title free and clear of rights of mortgagor.

B. Statute of Limitations.

C. Foreclosure by Judicial Sales.

1. Available in all states although procedures vary from state to state.

2. Complex, lengthy, and expensive procedure.

3. All affected parties must be named as defendants.

a. If mortgagor has a bankruptcy petition pending, bankruptcy court must consent.

b. Soldiers' and Sailors' Civil Relief Act grants special protection to military mortgagors.

(1) Foreclosure cannot proceed unless soldier appears or is represented.

(2) Soldier may qualify for a stay if service obligations interfere. 50 U.S.C.App. § 532(2)(a).

4. Affected parties must be given notice of foreclosure proceedings.

a. Failure of trustee to exercise "due diligence" in locating mortgagor makes sale voidable. Rosenberg v. Smith, 727 P.2d 718. (Alaska. 1986).

b. Notice to mortgagee must satisfy minimal standards, of due process. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

5. Sale advertisement requirements.

6. Court must approve foreclosure sale.

a. Inadequacy of price is insufficient to set aside.

b. Must show fraud or "chilled bidding" or failure to comply with advertising requirements.

c. Mortgagee may buy property.

7. Disbursement of sales proceeds.

a. Expenses of foreclosure sale.

b. Satisfaction of mortgage debt.

c. Satisfaction of junior liens.

d. Excess to mortgagor.

8. If sales proceeds are insufficient, the mortgagee may obtain a deficiency judgment.

D. Foreclosure by Power of Sale.

1. Mortgage provision may authorize sale of property without court supervision.

2. Many jurisdictions prohibit nonjudicial foreclosures.

3. Effect of sale is similar to judicial foreclosure.

4. Soldiers and Sailors Civil Relief Act protections.

a. Interest rate limited to six percent during activation, if loan entered into prior to active duty, 50 U.S.C.App. § 526.

b. Sales are barred if mortgagor is in military service unless agreement waiving exists. 50 U.S.C.App. § 532(3). Godwin v. Gerlin, 239 S.W. 2d 352 (1951).

c. Foreclosures will not be invalid if active duty status does not materially affect ability to comply. Keller v. Rodie, 61 N.E. 2d 387 (1945).

d. All statutes of limitations tolled while on active duty. 50 U.S.C. App. § 525.

5. Under some states, mortgagees who elect nonjudicial procedures are limited to foreclosure alone.

a. Mortgagee may not thereafter obtain deficiency judgment.

b. Veterans Administration is bound by its election to proceed nonjudicially. United States v. Vallejo, 660 F. Supp. 535 (W.D. Wash. 1987).

E. Statutory Redemption.

1. One-half of the states establish a right to redeem mortgaged property after foreclosure.

2. Protects mortgagor and junior lien holders from sale of property below its value.

3. Usually allow right of redemption for one year after sale.

a. Must pay sales price to redeem.

b. Right may be waived.

IX. REPRESENTING A VETERAN WITH A VA LOAN IN DEFAULT.

A. Introduction.

1. Current VA policy regarding defaults.

a. Almost $670 million in losses in 1988.

b. VA increasingly likely to pay guaranty and sue to collect deficiency.

c. Notice requirement.

2. Problems frequently arise because the veteran has sold the home and allowed another to assume the VA loan without obtaining:

a. A substitution of another's VA entitlement (discussed next); or

b. Release from liability from VA (discussed later).

(1) VA's consent to the transfer must be requested and obtained before.

(2) The assuming party must be credit worthy.

(3) The assuming party must contractually agree to assume and pay the promissory note and any obligation to VA under the VA guaranty.

(4) The lender's consent must also be obtained in most instances.

B. Pre-Foreclosure Options.

1. Substitution of Eligibility (38 C.F.R. § 36.4303(i)(3)).

a. At any time.

b. Requires purchaser to have VA entitlement.

c. Requires VA and lender approval.

2. Compromise (38 C.F.R. § 36.4323(e)(2)).

a. Negotiated agreement between VA and veteran.

b. Promissory note with up to 5 year repayment.

c. Default must be outside veteran's control and debt can be realistically paid within 6 years.

3. Deed in Lieu of Foreclosure.

a. Requires significant equity in home.

b. VA normally can get only 70% of fair market value of home.

c. Rarely used.

4. Pre-Foreclosure Release of Liability (38 U.S.C. § 3717, 3714 and 38 C.F.R. § 36.4509(b)).

a. Mandatory by statute if eligible.

b. Release must be issued if:

(1) A transferee is liable to VA for debt

(2) Loan was current at time transferee acquired property

(3) Transferee was credit worthy at time of transfer.

c. Burden of proof is on veteran to establish all three factors.

d. Does not reinstate eligibility.

C. Post-Foreclosure Options.

1. Release of Liability (38 U.S.C. § 3713(b) and 38 C.F.R. § 36.4509(c)).

a. Discretionary.

b. Agency may issue release if:

(1) A transferee is liable to VA for debt.

(2) Loan was current at time the transferee acquired the property.

(3) Transferee was credit worthy at time of transfer.

c. VA test for credit worthiness rejected by courts (Elkins v. Derwinski, 2 Vet. App. 422 (C.V.A. 1992)("The law requires the VA to look at the facts as they existed at the time of transfer, not after transfer..." Id. at 427).

d. Burden of proof is on veteran.

e. Release does not reinstate eligibility.

f. Denial does not foreclose waiver request.

2. Waiver of Indebtedness (38 U.S.C. § 5302(b)).

a. Congressional intent is for VA to waive debt as long as collection against "equity and good conscience".

b. "Equity and good conscience" is defined in 38 C.F.R. § 1.965, and is to be determined by looking at:

(1) Fault of veteran.

(2) Balancing of faults.

(3) Undue hardship on veteran and his family.

(4) Whether waiver will nullify objectives of benefits.

(5) Unjust enrichment.

(6) Change in position to veteran's detriment.

c. No waiver if material fault exists.

d. Veteran can request reconsideration of final waiver decisions before 18 DEC 1989 if debt still outstanding (VA Cir. 20-90-34).

e. If debt is post 18 DEC 1989, waiver request must be made within one year of notice.

D. Representation of Veterans With Indebtedness.

1. Initial request to VA Regional Office.

a. Request release of liability under 38 U.S.C. § 3713(b).

b. Request release of liability under 38 U.S.C. § 5302(b).

c. Assert other grounds for release, such as invalidity of the underlying debt based on state law (Schaper v. Derwinski, 1 Vet. App. 430 (C.V.A. 1990)(Veteran may dispute a debt under C.F.R. §§ 1.900-1.994).

2. One year statute of limitation.

3. Burden of proof on veteran.

4. Present evidence based on statutory and regulatory factors.

5. Decision by Committee on Waivers and Compromises.

6. Appeal to Board of Veterans Appeals (BVA).

7. Review by Court of Veterans Appeals (CVA).

a. CVA may review BVA's action to determine whether the statutory standard was applied in accordance with the regulatory guidance or whether the decision was made in an arbitrary or capricious manner (38 U.S.C. § 4061(a)(F3)(A)); Schaper v. derwinski, 1 Vet. App. 430 (C.V.A. 1990).

b. A decision committed to "absolute discretion" of an agency head is subject to judicial review when the agency has promulgated regulations governing the exercise of such discretion."(Schaper v. derwinski, 1 Vet. App. 430 (C.V.A. 1990)).

E. Practice before the CVA.

1. CVA created in 1988 - has exclusive jurisdiction (38 U.S.C. § 7251).

2. Appeals must be made to the CVA within 120 days of the date on which the notice of the Board's decision was mailed.

3. Scope of Review - 38 U.S.C. § 7261. Will set aside decisions of BVA if

   a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

   b. Contrary to constitutional right, power privilege, or immunity.

   c. In excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right.

   d. without observance of procedure required by law.

   e. Findings of fact will be set aside if clearly erroneous.

      (1) Interpreted as "a definite and firm conviction that a mistake has been made."

      (2) Similar to usual Art. III review standard.

4. Veteran is given "benefit of the doubt."

   a. Defined as "if there is an approximate balance of evidence on a material issue, it will be resolved in favor of the veteran."

   b. Standard does not apply during process of submitting evidence or showing that a claim is well grounded.

5. Agency must clearly identify crucial findings and account for unpersuasive evidence.

   Decisions require clear analysis and succinct explanations.

F. Other Court Challenges.

1. No private cause of action exists for a failure of the VA to follow its publications and regulations (Rank v. Nimmo, 677 F.2d 692 (9th Cir. 1980), Cert. Denied, 459 U.S. 907 (1980); Simpson v. Cleland, 640 F.2d 1354 (D.D.C. 1980).

2. The discretion committed by regulation is such that a challenge to the VA for failing to exercise its discretion under the Administrative Procedures Act will likely fail (Rank v. Nimmo, 677 F.2d 692 (9th Cir. 1980), Cert. Denied, 459 U.S. 907 (1980).

G. Reinstatement of Eligibility (38 C.F.R. § 36.4303(i)).

1. Loan guaranty must be paid in full.

2. Use VA Form 26-1880.

X. MAKING THE DECISION TO BUY OR RENT.

A. Consider Advantage of Buying.

1. Tax savings:

a. Itemized deductions available to homeowners save annual taxes.

b. Tax deferral or avoidance on capital gain. I.R.C. § 1034 and 121.

2. Generate savings through effects of inflation.

B. Methodology for comparing the alternatives.

XI. CONCLUSION.

CHAPTER 12

SUPPLEMENTARY RESOURCE MATERIAL

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BANKRUPTCY

Questions and Answers for Clients

Distributed by the Legal Assistance Division
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This information was adapted by the National Consumer Law Center (NCLC) from a pamphlet prepared by Legal Services, Inc., under a grant from the Pennsylvania Law Coordination Center, and from NCLC, *Surviving Debt* (1992). Those seeking more detailed information or technical assistance should consult NCLC, *Consumer Bankruptcy Law and Practice* (4th ed. 1992), or NCLC, *Surviving Debt*. NCLC's commitment to and support of consumers is appreciated.

A decision to file for bankruptcy should be made only after determining that bankruptcy is the best way to deal with your financial problems. This brochure cannot explain every aspect of the bankruptcy process. If you still have questions after reading it, you should speak with an attorney familiar with bankruptcy or a paralegal working for an attorney.

What is Bankruptcy?

Bankruptcy is a legal proceeding in which people who cannot pay their bills can get a fresh financial start. The right to file for bankruptcy is provided by federal law, and all bankruptcy cases are handled in federal court. Filing bankruptcy immediately stops all of your creditors from seeking to collect debts from you, at least until your debts are sorted out according to the law.

What Can Bankruptcy Do for Me?

Bankruptcy may make it possible for you to:

- Eliminate the legal obligation to pay most or all of your debts. This is called a "discharge" of debts. It is designed to give you a fresh financial start.
- Stop foreclosure on your house or mobile home and allow you an opportunity to catch up on missed payments. (Bankruptcy does not, however, automatically eliminate mortgages and other liens on your property without payment.)
- Prevent repossession of a car or other property, or force the creditor to return property even after it has been repossessed.
- Stop wage garnishment, debt collection harassment, and similar creditor actions to collect a debt.
- Restore or prevent termination of utility service.
- Allow you to challenge the claims of creditors who have

committed fraud or who are otherwise trying to collect more than you really owe.

What Bankruptcy Cannot Do

Bankruptcy, however, cannot cure every financial problem. Nor is it the right step for every individual. In bankruptcy, it is usually *not* possible to:

- Eliminate certain rights of "secured" creditors. A "secured" creditor has taken a mortgage or other lien on property as collateral for the loan. Common examples are car loans and home mortgages. You *can* force secured creditors to take payment over time in the bankruptcy process and bankruptcy *can* eliminate your obligation to pay any additional money if your property is taken. Nevertheless you generally cannot keep the collateral unless you continue to pay the debt.
- Discharge types of debts singled out by the bankruptcy law for special treatment such as child support, alimony, some student loans, court restitution orders, criminal fines, and some taxes.
- Protect cosigners on your debts. When a relative or friend has co-signed a loan, and the consumer discharges the loan in bankruptcy, the cosigner may still have to repay all or part of the loan.
- Discharge debts that arise after bankruptcy has been filed.

What Different Types of Bankruptcy Cases Should I Consider?

There are four types of bankruptcy cases provided under the law:

- *Chapter 7* is known as "straight" bankruptcy or "liquidations." It requires a debtor to give up property which exceeds certain limits called "exemptions", so the property can be sold to pay creditors.
- *Chapter 11*, known as "reorganization", is used by business and a few individual debtors whose debts are very large.
- *Chapter 12* is reserved for family farmers.
- *Chapter 13* is called "debt adjustment". It requires a debtor to file a plan to pay debts (or parts of debts) from current income.
- Most people filing bankruptcy will want to file under either chapter 7 or chapter 13. Either type of case may be filed individually or by a married couple filing jointly.

Chapter 7 (Straight Bankruptcy)

In a bankruptcy case under chapter 7, you file a petition asking the court to discharge your debts. The basic idea in a chapter 7 bankruptcy is to wipe out (discharge) your debts in exchange for your giving up property, except for "exempt" property which the law allows you to keep. In most cases, all of your property will be exempt. But property which is not exempt is sold, with the money distributed to creditors.

If you want to keep property like a home or a car and are behind on the payments on a mortgage or car loan, a chapter 7 case probably will not be the right choice for you. That is because chapter 7 bankruptcy does not eliminate the right of mortgage holders or car loan creditors to take your property to cover your debt.

Chapter 13 (Reorganization)

In a chapter 13 case you file a "plan" showing how you will pay off some of your past-due and current debts over three to five years. The most important thing about a chapter 13 case is that it will allow you to keep valuable property--especially your home and car--which might otherwise be lost, if you can make the payments which the bankruptcy law requires to be made to your creditors. In most cases, these payments will be at least as much as your regular monthly payments on your mortgage or car loan, with some extra payment to get caught up on the amount you have fallen behind.

You should consider filing a chapter 13 plan if you

(1) own your home and are in danger of losing it because of money problems;
(2) are behind on debt payments, but can catch up if given some time;
(3) have valuable property which is not exempt, but you can afford to pay creditors from your income over time.

You will need to have enough income in chapter 13 to pay for your necessities and to keep up with the required payments as they come due.

What Does It Cost to File for Bankruptcy?

It now costs $150 to file for bankruptcy, whether for one person or a married couple. The court may allow you to pay this filing fee in installments if you cannot pay all at once. If you hire an attorney you will also have to pay the attorney's fees you agree to.

What Property Can I Keep?

Note to the Attorney: *This answer is accurate for states that permit the federal exemptions. For states which have opted out of federal exemptions, the answer must be adapted to indicate that the debtor's exemptions are those specified by state law.*

In a chapter 7 case, you can keep all property which the law says is "exempt" from the claims of creditors. You ca choose between your exemptions under your state law or under fed law. In many cases, the federal exemptions are better.

Federal exemptions include:

- $7,500 in equity in your home;
- $1,200 in equity in your car;
- $200 per item in any household goods up to a total of $4,000;
- $750 in things you need for your job (tools, books, etc):
- $400 in any property, plus part of the unused exemption in your home;
- Your right to receive certain benefits such as social security, unemployment compensation, veteran's benefits, public assistance, and pensions--regardless of the amount.

The amounts of the exemptions are doubled when a married couple files together.

In determining whether property is exempt, you must keep a few things in mind. The value of property is not the amount you paid for it, but what it is worth new. Especially for furniture and cars, this may be a lot less than what you paid or what it would cost to buy a replacement.

You also only need to look at your equity in property. This means that you count your exemptions against the full value minus any money that you owe on mortgages or liens. For example, if you own a $50,000 house with a $40,000 mortgage, you count your exemptions against the $10,000 which is your equity if you sell it.

While your exemptions allow you to keep property even in a chapter 7 case, your exemptions do not make any difference to the right of a mortgage holder or car loan creditor to take the property to cover the debt if you are behind. In a chapter 13 case, you can keep all of your property if your plan meets the requirements of the bankruptcy law. In most cases you will have to pay the mortgages or liens as your would if you didn't file bankruptcy.

What Will Happen to My Home and Car If I File Bankruptcy?

In most cases you will not lose your home or car during your bankruptcy case as long as your equity in the property is fully exempt. Even if your property is not fully exempt, you will be able to keep it, if you pay its non-exempt value to creditors in chapter 13.

However, some of your creditors may have a "security interest" in your home, automobile or other personal property. This means that you gave that creditor a mortgage on the home or put your other property up as collateral for the debt. Bankruptcy does not make these security interests go away. If you don't make your payments on that debt, the creditor may be able to take and sell the home or the property, during or after the bankruptcy case.

There are several ways that you can keep collateral or mortgaged property after you file bankruptcy. You can agree to keep making your payments on the debt until it is paid in full. Or you can pay the creditor the amount that the property you want to keep is worth. In some cases involving fraud or other improper conduct by the creditor, you may be able to challenge the debt. If you put your household goods as collateral for a loan (other than a loan to buy them), you can usually keep your property without making any more payments on that debt.

Can I Own Anything After Bankruptcy?

Yes! Many people believe they cannot own anything for a period of time after filing for bankruptcy. This is not true. You can keep your exempt property and anything you obtain after the bankruptcy is filed. However, if you receive an inheritance, a property settlement, or life insurance benefits within 180 days after filing for bankruptcy, that money or property may have to be paid to your creditors if the property or money is not exempt.

Will Bankruptcy Wipe Our All My Debts?

Yes, with some exceptions. Bankruptcy will not normally wipe out:

(1) money owed for child support or alimony, fines, and some taxes;
(2) debts not listed on your bankruptcy petition;
(3) loans you got by knowingly giving false information to a creditor, who reasonable relied on it in making you the loan;
(4) debts resulting from "willful and malicious" harm;
(5) student loans owed to a school or government body, except if;

-- the loan first became due more than 7 years before the bankruptcy was filed *or*

-- the court decides that payment would be an undue hardship;

(6) mortgages and other liens which are not paid in the bankruptcy case (but bankruptcy will wipe out your obligation to pay any additional money if the property is sold by the creditor).

Will I Have to Go to Court?

In most bankruptcy cases, you only have to go to a proceeding called the "meeting of creditors" to meet with the bankruptcy trustee and any creditor who chooses to come. Most of the time, this meeting will be a short and simple procedure where you are asked a few questions abut your bankruptcy forms and your financial situation.

Occasionally, if complications arise, or if you choose to dispute a debt, you may have to appear before a judge at a hearing. If your need to go to court, you will received notice of the court date and time from the court and/or from your attorney.

Will Bankruptcy Affect My Credit?

There is no clear answer to this question. Unfortunately, if you are behind on your bills, your credit may already be bad. Bankruptcy will probably not make things any worse.

The fact that you've filed a bankruptcy can appear on your credit record for ten years. But since bankruptcy wipes out your old debts, you are likely to be in a better position to pay your current bills, and you may be able to get new credit.

What Else Should I Know?

Utility services--Public utilities, such as the electric company, cannot refuse or cut off service because you have filed for bankruptcy. However, the utility can require a deposit for future service and you do have to pay bills which arise after bankruptcy is filed.

Discrimination--An employer or government agency cannot discriminate against you because you have filed for bankruptcy.

Driver's license--If you lost your license solely because you couldn't pay court-ordered damages caused in an accident, bankruptcy will allow you to get your license back.

Co-signers--If someone has co-signed a loan with you and you file for bankruptcy, the co-signer may have to pay your debt.

How Do I Find a Bankruptcy Attorney?

As with any area of the law, it is important to carefully select an attorney who will respond to your personal situation. The attorney should not be too busy to meet you individually and to answer questions as necessary.

The best way to find a trustworthy bankruptcy attorney is to seek recommendations from family, friends or other members of the community, especially any attorney you know and respect. You should carefully read retainers and other documents the attorney asks you to sign. You should not hire an attorney unless he or she agrees to represent you throughout the case.

In bankruptcy, as in all areas of life, remember that the person advertising the cheapest rate is not necessarily the best.

Many of the best bankruptcy lawyers do not advertise at all.

Paying for debt counseling is almost never a good idea. There is almost nothing that a paid debt counselor can offer other than a recommendation about whether bankruptcy is appropriate and a list of highly priced debt consolidation lenders. There is no good reason to pay someone for this service. A reputable attorney will generally provide counseling on whether bankruptcy is the best option. This avoids the double charge of having to pay a counselor and then an attorney. If bankruptcy is not the right answer for you, a good attorney will offer a range of other suggestions.

Document preparation services also known as "typing services" or "paralegal services" involve non-lawyers who offer to prepare bankruptcy forms for a fee. Problems with these services often arise because non-lawyers cannot offer advice on difficult bankruptcy cases and they offer no services once a bankruptcy case has begun. There are also many shady operators in this field, who give bad advice and defraud consumers.

When first meeting a bankruptcy attorney, you should be prepared to answer the following questions:

- What types of debt are causing you the most trouble?
- What are your significant assets?
- How did your debts arise and are they secured?
- Is any action about to occur to foreclose or repossess property or to shut off utility service?
- What are your goals in filing the case?

Can I File Bankruptcy Without an Attorney?

Although it may be possible for some people to file a bankruptcy case without an attorney, it is not a step to be taken lightly. The process is difficult and you may lose property or other rights if you do not know the law. It takes patience and careful preparation. Chapter 7 (straight bankruptcy) cases are easier. Very few people have been able to successfully file chapter 13 (debt adjustment) cases on their own.

REMEMBER: THE LAW OFTEN CHANGES. EACH CASE IS DIFFERENT. THIS FLYER IS MEANT TO GIVE YOU *GENERAL INFORMATION*, AND NOT TO GIVE YOU SPECIFIC LEGAL ADVICE.

CHAPTER 13

COMPENDIUM OF STATE STATUTES

Each state's statutes are divided into 10 uniform categories. The first nine are arranged alphabetically and the tenth is a miscellaneous collection of state laws. The categories are:

Credit Reporting
Debt Collection
Home Solicitation Sale
Minors' Contracts
Repossession Requirements
Statutes of Limitations
Truth-In-Lending Requirements
Unfair and Deceptive Trade Practices
Warranties
Miscellaneous

Alabama

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory equivalent. Regarding creditors and debtors, see Alabama Consumer Credit Act of 1971. § 5-19-1 et seq.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. The sales agreement must contain a conspicuous notice of this cancellation right. § 5-19-12(a).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the merchandise if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. The seller must return any refunds received to the buyer within 10 days after cancellation of the sale. § 5-19-12(b).

A sale under pre-existing open-end credit plans, a previously negotiated sale, and an emergency sale with a non-pre-printed waiver signed by the buyer are not included in the protections provided by this statute. § 5-19-12(c).

MINOR'S CONTRACT

Age of majority to contract - 19. (§ 26-1-1); Disabilities of minority removed at 18 years for males/females who are married or widowed. (§ 30-4-15 and § 30-4-16); 17 for college education loans (§ 26-1-5) also, for person 15 and over, annuity on life, body, health, property, and other interests as liabilities are without recision rights. (§ 27-14-5).

Contractual Liability - Contract by minors are voidable at the option of the minor except as to certain limited classes of

contracts or transactions. A contract made during minority may be ratified after reaching majority. A minor is liable in quasi contract only for the reasonable value of necessaries furnished to him/her even if he/she has agreed to pay a greater amount. Necessaries are useful articles and may be included depending upon the minor's circumstances (social position and situation in life). Taxes assessed on a minor's property are necessaries and are considered contracts in fulfillment of a legal duty. 42 AMJUR 2d § 58 et seq. See also (§ 31-1-2).

REPOSSESSION REQUIREMENTS

The remedy of self-help is available in Alabama as long as possession is obtained "without a breach of the peace" and without use of trickery, fraud, artifice or stealth. § 7-9-503.

For judicial repossession (detinue), the creditor must make an affidavit that the property in question belongs to the creditor. The creditor also must execute a bond in such sum and with such surety as may be approved by the clerk. § 6-6-250(a). In the case of repossession of household furniture and equipment, service of process is sufficient (for the purpose of a judgment for the property but not for costs or personal judgment) if a copy of the summons and complaint is left at the place where the property was seized and removed. § 6-6-251.

If the creditor repossesses or voluntarily accepts surrender of the goods sold in which he has a security interest and the original cash price is $1,000 or less, the debtor is not personally liable to the creditor for the unpaid balance of the debt arising from this sale and the creditor is not required to sell the collateral. § 5-19-13. In all other cases where a creditor retains a security interest in goods, the debtor must be given written notice of the proposed disposition of the collateral, and a commercially reasonable disposition (e.g., sale or lease, not retention) must occur within 90 days of repossession where the debtor has paid 60% or more of the cash price (for purchase money security interest in consumer goods) or the loan amount (in all other cases).

STATUTE OF LIMITATIONS

Contract under seal - 10 years. § 6-2-33.

Simple written contract - 6 years. § 6-2-34.

Contract for sale of goods - 4 years (may be reduced to 1 year by original agreement but not extended) § 7-2-725 - does not apply to express warranties extending to future performance of the goods

and personal injury in the case of consumer goods. See Commercial Union Assurance Co. v. Zurich Am. Ins. Co., 471 F. Supp. 1011 (S.D. Ala. 1979). The cause of action accrues when the breach occurs, regardless of knowledge.

Oral contracts - 6 years. § 6-2-34.

Judgments - Courts of record - 20 years. § 6-2-32. But see rebuttable presumption of satisfaction after 10 years. § 6-9-191.

Action to recover money on open or unliquidated account - 3 years. § 6-2-37.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Statutory Equivalency Provisions. Any creditor, when extending credit with respect to a consumer credit sale, loan, or lease other than open-end credit, shall furnish the debtor duplicate copies of all instruments executed by the debtor in connection with the transaction. The contract shall contain the following statement printed in eight point type immediately above the space for the debtor's signature: "CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT." § 5-19-6.

UNFAIR AND DECEPTIVE TRADE PRACTICES

ALA. CODE "Deceptive Trade Practices Act" § 8-19-1.

Unlawful Trade Practices (§ 8-19-5): Twenty-one enumerated unfair practices or deceptive acts and a catch-all clause.

Special Requirements - Where knowledge is an element of the unlawful practice, know, knowing, knowingly, and knew means either actual awareness or such awareness as a reasonable person should have considering all the surrounding circumstances. § 8-19-3(4).

Definitions (§ 8-19-3): (1) Trade or Commerce includes advertising, buying, offering for sale, sale or distribution or performance of any service or goods wherever situated, and any trade or commerce affecting the people of Alabama. (2) Goods includes property, tangible or intangible real, personal, or mixed, and any franchise, license distributorship or similar right, privilege or interest. (3) Services includes work, labor including services in connection with repair of goods. Sale includes leasing, renting, or co-signing. (4) Consumer is any natural

person who buys goods or services for household, family, or personal use.

Exemptions ($ 8-19-7) - (1) Publication and dissemination of advertisement by the publisher, owner, agent, or employee of a newspaper, periodical, radio or television station or telephone company where there is no knowledge of the false, misleading, or deceptive nature of the advertisement. (2) Sellers of goods or services who disseminate advertisement or promotional material from a manufacturer, packer, distributor, being unaware the ads are false or misleading, and who provide the Attorney General or District Attorney with the pertinent names and addresses of the manufacturer, etc., and who agree in writing to discontinue the dissemination of the material. (3) Any persons or activities subject to the Alabama Insurance Code. (4) Any bank or affiliate regulated by the state banking department, the comptroller of the currency of the US, FDIC, or Board of Governors of the Federal Reserve System. (5) Any person subject to Title 10, Chapter 4, Article 6 (Health Care Service Plans). (6) Regulated activities of any utility, telephone company, or railroad subject to the Alabama Public Service Commission. (7) Any violation of the Federal Consumer Credit Protection Act. (8) Any activity subject to the Securities Act of Alabama, the Sale of Checks Acts, or to Pre-Issuance Procedure for Industrial Revenue Bonds.

The burden of proving the exemption is upon the person claiming it.

Private Remedies ($ 8-19-10) - A successful consumer can obtain actual damages sustained or $100 whichever is greater; up to treble damages at the discretion of the court considering, actual damages awarded, frequency of unlawful practices, number of persons adversely affected, and extent if intentional acts of unlawful practices; costs and reasonable attorney's fees. Defendant can obtain costs and attorney's fees for frivolous, bad faith, or harassing civil actions. The civil action can be brought in the Circuit Court of any county where defendant resides or has his/her principal place of business, is doing business, or committed the unlawful practice. Injunctive relief is available through the Attorney General's Office or District Attorney. Class actions are not available to private litigant but the Attorney General or District Attorney can bring an action in representative capacity for a named person or persons. These actions are limited to actual damages plus reasonable attorney's fees and costs.

Limitations ($ 8-19-5; $ 8-19-14) - Pecuniary injury required; civil remedies of the Act are mutually exclusive and consumer who files under the Act surrenders all rights and remedies available at common law, by statute or otherwise; 15 days prior to filing of

actions, a written demand for relief identifying the claimant and the deceptive practice is to be sent to the prospective respondent by US mail; 1 year statute of limitations for actions from date of discovery or reasonable discovery period of deceptive practice; 4 years statute of limitation from transactions unless contract or warranty for more than 3 years; if a long-term contract or warranty (over 3 years) 1 year statute of limitation after expiration or discovery whichever occurs first.

State Remedies (§ 8-19-4; § 8-19-8; § 8-19-11; § 8-19-12) - Attorney General or District Attorney can enforce; $2,000 per violation (penalties not applicable to those who have established reasonable procedures to comply with Act or injunction); injunctive relief by Attorney General or District Attorney; $25,000 per violation for contempt under injunction; Circuit Court can order dissolution, suspension of the franchise of a corporation, etc.; for a willful violation upon a second or continuing violation of an injunction, court may suspend or revoke any business license and enjoin from doing business for a continuous and willful violation; Attorney General or District Attorney can represent an individual or class of consumers; reasonable attorney's fees and costs are to be awarded; continuous and willful violation is a Class A misdemeanor.

Precedential Value of FTC Interpretations (§ 8-19-6) -Great weight to be given to interpretations by Federal Trade Commission and Federal Courts of Section 5(a)(1) of the Federal Trade Commission Act.

WARRANTIES

Sales-Express Warranty (§ 7-2-313) - Express warranties by the seller are created through affirmation of fact or promise relating to goods, description of the goods, and/or any sample or model which becomes part of or is made part of the basis of the bargain. Specific intent to make a warranty or formal words such as guarantee by the seller are not required. Seller's affirmation of value, opinion, or commendation of the goods does not create a warranty.

Sales - Implied Warranty (§ 7-2-314) - Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. To be merchantable, goods must at least be for the ordinary purposes for which used; conform to the promises or affirmation of fact on the container or label, etc.

Alabama

Sales - Implied Warranty: Fitness for Particular Purpose ($ 7-2-315) - Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose.

Sales - Exclusion of Warranty ($ 7-2-316) - Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited.

Warranty Obligations: Motor Vehicle Dealers ($ 8-20-8) - Manufacturers and new motor vehicle dealers are required to fulfill the terms of any express or implied warranty concerning the sale of a new motor vehicle to public which is the subject of a franchise agreement. Section authorizes courts to add reasonable attorney's fees to any award or relief granted.

Warranty: Sale of Gold, Silver, Watches, Jewelry, China, etc. ($ 8-14-23) - Persons, firms, or corporations selling, disposing, or offering for sale at public auction any gold, silver, plated ware, precious stones, watches, clocks, jewelry, bric-a-brac, china or glassware must be truthful in describing the character, quality, kind, and description of these goods. Such description is considered a warranty.

MISCELLANEOUS

Health Studio Services ($ 8-23-1 et seq) - Alabama regulates health studio services, personnel, and contracts. Every contract for health studio services must provide for the penalty-free cancellation of the contract within three days, exclusive of holidays and weekends, of its making, upon the mailing or delivery of written notice to the health studio. ($ 8-23-4). Such contracts must be in writing; sales persons must be registered; resident agent is required; and studios must obtain a $50,000 bond. Civil actions on the bond are authorized for consumers injured by breach of contract or bankruptcy with recovery against the surety. Violations of the chapter are Class C felonies and the Attorney General or District Attorneys are responsible for supervision and enforcement. Noncompliance is also an unfair or deceptive trade practice.

Rental Purchase Agreement ($ 8-25-1) - Alabama has statutory provision regulating rental purchase agreements for personal property. This 1986 statute requires disclosures by merchants to consumers; mandates disclosures on a separate form or as part of

the agreement; and prohibits certain provisions in the agreements such as confession of judgment, waiver of defense, counterclaim and mandatory purchase of insurance from the merchant. Consumers are allowed to reinstate agreements after failure to make timely payment if they take required action within 5 days for monthly payment plans and 2 days for shorter periods. Reinstatement period is extended 30 days by nonjudicial return. No more than 3 reinstatements are allowed. Disclosures include whether the merchandise is new or used; amount and timing of payments; total number and amount of payments; explanation of other charges; statement of who is liable for loss or damage; when ownership rights vest. Advertisements must identify transaction as a rental-purchase agreement and the total amount and number of payments. Consumers have a right to file a civil action and recover actual damages; 25% of an amount equal to the total amount of payments required for ownership but not less than $100 or more than $1000, and reasonable attorney's fees not to exceed 15% of the consumer's recovery and courts costs.

Alabama

Alaska

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision. But see collection Agency Regulation 08.24.041 - 08.24.380

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a door-to-door (home-solicitation) sale within five business days of entering into the contract if the purchase price is 10.00 or more. The seller must give the purchaser written notice of his right to revoke at the time of sale. Revocation of the contract is effective upon tender of rejected goods to the seller or agent, or upon the posting of a registered letter (marked Deliver to Addressee Only, Return Receipt) of rejection to the seller or his agent. $ 45.02.350(a). The seller must bear the cost of return of the rejected goods. $ 45.02.350(b).

A purchase made under prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location and the goods or services are offered for sale on a continuing basis, negotiated sale, a sale in which the buyer initiated the sale and the goods are needed for an emergency, a sale conducted entirely by mail, a sale in which the buyer requested the seller to visit his home for repair or maintenance, and a sale conducted at the purchaser's place of business are not included in the protections provided by this statute. $ 45.02.350(c).

MINOR'S CONTRACT

Age of majority to contract - 18 ($ 25.20.010; Disabilities of minority removed upon marriage if between the ages of 16-18 ($$ 25.20.20 and 25.05.171) or upon petition to the superior court if at least 16 years of age ($ 09.55.590) or for education loans if at least 16 years of age. ($ 14.43.140)

Alaska

REPOSSESSION REQUIREMENTS

At any time after an action is commenced for repossession of property, a creditor can claim immediate possession of the property by submitting an affidavit to the peace officer. § 09.40.260. The creditor also must submit an undertaking with the affidavit showing that sufficient sureties are bound in double the value of the property for prosecution of the action. § 09.40.270. Notice to the debtor is not required. The debtor can secure return of the property by submitting to the peace officer, a written undertaking approved by the clerk of court and executed by sufficient sureties bound in double the value of the property. § 09.40.280.

The foregoing statutory provisions are subject to Alaska Civil Rule 89 which recognizes constitutional requirements of due process previously established by the United States Supreme Court.

STATUTE OF LIMITATIONS

Contract under seal - 10 years. § 09.10.040.

Actions on promissory notes and simple written contract - 6 years. § 09.10.050.

Contract for sale of goods - 4 years. § 45.02.725.

Oral contracts - 6 years. § 09.10.050.

Judgments - Courts of record - 10 years. § 09.10.040.

Action on open or unliquidated account - 6 years § 09.10.050.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - A retail installment contract must be contained within a single document which is dated and signed by the buyer. § 45.10.010. The retail seller shall provide the buyer with a copy of the contract. Until the seller does so, the buyer is obligated to pay only the cash sale price. § 45.10.020.

An acknowledgement by the buyer of delivery of a copy of the contract must appear directly above the buyer's signature.

The retail installment contract must contain a number of items including any finance or service charges to the buyer. § 45.10.030. §45.10.120 governs the amount a seller may charge as

a "service charge", and details method of computing the service charge.

Enforcement may be by the Attorney General, § 45.10.170 or by barring recovery to the seller for any service charge under the contract. § 45.10.190.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices, including 32 enumerated practices. See Alaska Stat. § 45.50.471.

Special Requirements: None specified.

Scope: Trade or commerce.

Exclusions: Advertisement done by disinterested publisher, radio or television media without knowledge of falsity; acts regulated by state or federal law or agency, unless law does not prohibit the UDAP violation; act regulated by AS 21.36 governing trade practices in insurance or AS 06.05, Alaska Banking Code.

Private Remedies: Actual damages or $200, whichever is greater; treble damages discretionary for willful violations; necessary equitable relief; class actions for actual damages and equitable remedies subject to AG approval; "may" award attorney's fees to consumer; or to respondent if successful. See § 45.50.531.

Limitations: Loss of money or property required; statute of limitations is 2 years from date violation should have been discovered.

State Remedies: The Attorney General has rule-making powers; see 45.50.491 and enforces; injunction; restitution; civil penalty up to $5,000 on finding of deceptive trade practice. Civil penalty up to $25,000 on violation of injunction. See § 45.50.551.

Precedential Value of FTC Interpretations: Great weight.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 45.02.314.

Alaska

Where the seller at the time of contracting has reason to know a particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for that purpose. § 45.02.315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for the breach of warranty also can be limited. § 45.02.316.

Arizona

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - The purposes for which a consumer report can be issued by a consumer reporting agency are basically the same as those permissible under federal law with a few exceptions. Upon written request and a proper showing of identification, a consumer reporting agency must disclose to a consumer the contents of its file used for preparing a consumer report on the individual and all the facts and circumstances relative thereto. The agency also must disclose the names and addresses of all persons requesting reports within the previous 6 months. § 44-1693(a)(4). Neither consumer reporting agencies nor creditors, nor licensing agencies, nor employers shall request any waiver of rights by any consumer or charge any fee as a prerequisite to making information available to the consumer.

A creditor who denies credit, a licensing agency which denies a license, and an employer who denies a consumer employment, promotion or retention shall, upon written request, reveal the name and address of any consumer reporting agency whose report was used to make a final decision. § 44-1693(1)-(3). If a consumer disputes any item on his consumer report, he/she can give the agency written notice of the item, and then the agency has 30 days within which to admit the inaccuracy, deny the inaccuracy or state that it has had insufficient time to complete its investigation. § 44-1694. If there is an inaccuracy in the report, it must be immediately corrected and any person receiving a report of the inaccurate information must be informed of the correct information. § 44-1694(c).

No consumer reporting agency is liable to a consumer for any inaccurate information corrected in compliance with § 44-1694, § 44-1695(a). The agency is liable for damages, attorney's fees and court costs incurred from its refusal to correct a report. § 44-1695(b). An agency, user, or informer is liable for actual and punitive damages, attorney's fees, and court costs if it acts willfully and maliciously with intent to harm a consumer or its actions constitute gross negligence. § 44-1695(c).

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Statutory provisions regulating collection agencies. Collection agencies shall not attempt to collect any debt unless such debt is justly due from and legally chargeable against the debtor. Nor shall any agency engage in any unfair or misleading

practices or resort to any oppressive, vindictive, or illegal means or methods of collection. § 32-1051.

Enforcement may be by the State Banking Superintendent in a hearing for suspension or revocation of license or through criminal prosecution. §§ 32-1053, 32-1055, 32-1056.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement. § 44-5002(a). Cancellation occurs when the buyer gives written notice of cancellation in person or by telegram, or deposits notice in the U.S. Mail to the seller at the address specified for notice. § 44-5002(b). This notice of cancellation must indicate an intention of the buyer not to be bound by the home solicitation sale. § 44-5002(c).

The buyer must take reasonable care of the goods in his/her possession and upon demand tender to the seller any goods delivered by the seller pursuant to the sale at his/her residence within 20 days after cancellation of the home solicitation sale, but he/she is not obligated to tender these goods at any place other than his/her own address. If the seller fails to take possession of the goods within 20 days after cancellation, the goods become the property of the buyer without further obligations to pay for them. § 44-5007(a,b). The buyer may not cancel the home solicitation sale if he/she asked the seller to provide the goods or services due to an emergency and the seller makes a substantial beginning of performance before notice of cancellation and the goods cannot be returned to the seller in as good condition as received by the buyer. § 44-5007(d).

The seller must tender any payments or trade-ins to the buyer within 10 days after cancellation of the sale. § 44-5006. The seller is entitled to a cancellation fee if he/she has performed services pursuant to the sale before cancellation. This fee is the lesser of five percent (5%) of the cash price, $15, or the amount of the cash down payment. § 44-5007(c). The seller must also restore any altered property to its original condition.

A cash sale or a sale made pursuant to a pre-existing account with a seller, and a sale made pursuant to prior negotiations between the parties at a business establishment where goods are offered and exhibited for sale are not included in the protections provided by this statute. § 44-5001(1).

MINOR'S CONTRACT

Age of majority to contract - 18. Disabilities of minority are removed for contracts for insurance at age 15 (§ 20-1106); for educational loans if at least 16 years of age (§ 44-140.01); and for all contracts made by a veteran if a minor, (§ 44-131).

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit stating:

(1) That he/she is the owner of the property or is lawfully entitled to its possession;

(2) That the property is wrongfully detained by the debtor; and

(3) The actual value of the property and that it has not been seized under any process, execution, or attachment against the property of the creditor, or if so seized, that it is exempt. § 12-1301.

The creditor also must execute and deliver to the officer a bond made payable to the debtor in an amount not less than double the value of the property. § 12-1303.

Notice to the debtor is required upon the filing of an application for a provisional remedy. § 12-2405. The debtor can cause the property to be returned to him/her by executing a bond to the creditor in double the value of the property within 2 days after the property was taken. § 12-1304.

See also § 44-5501. Restrictions on Deficiency Judgments in Consumer Credit Sales: Buyer not personally liable for any deficiency if the sale price was $1,000 or less.

STATUTE OF LIMITATIONS

For debts evidenced by a contract written in the state - 6 years; 4 years for out-of-state contract. §§ 12-548, 12-550. Same rule for promissory notes.

Contract for sale of goods - 4 years. § 47-2725.

Action on open account or oral contracts - 3 years. § 12-543.

Judgments - 5 years for domestic judgments and 4 years for foreign judgments. §§ 12-544, 12-549.

Arizona

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Creditors, other than banks, savings and loan associations, credit unions, mortgage brokers, and licensed pawn brokers engaged in making consumer loans shall display or have available to the public in printed form a full and accurate schedule of charges. Printed forms shall disclose, in close proximity to the borrower's signature line, that the borrower may take copies of the documents away from the place of business for review prior to signing them. §§ 6-620.

Within 10 days after any consumer loan is made, the creditor shall deliver to the borrower a printed copy of § 6-652 and either exact copies of the instruments evidencing indebtedness or a clear statement of the amount and date of the loan, a schedule of payments, the type of any security, the creditor's name and address, each person primarily obligated and the agreed rates of charge. Charges which have been precomputed and subject to refund or recomputation shall also be disclosed. § 6-651A. § 6-651B requires disclosures be in both English and Spanish. Failure to provide bilingual disclosure may result in assessment of a fine against the creditor.

Consumer loan means the loan of money in an original principal amount of ten thousand dollars or less. § 6-601(1).

Maximum rates of charge on loans. See § 6-652.

UNFAIR AND DECEPTIVE TRADE PRACTICES

ARIZ. REV. STAT. ANN. § 44-1521 (1967 & Supp. 1983-1984).

Prohibited Practices: § 44-1522: The act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged is an unlawful practice. § 44-1528.

Special Requirements: None specified.

Scope: Sale, offer for sale, attempt to sell any merchandise for consideration including sales, leases, and rentals of real estate.

Arizona

Exclusions: Advertisements of publisher, radio or television media without knowledge; advertising complying with FTC regulations.

Private Remedies: None specified. (Courts imply private right of action.)

Limitations: None specified.

State Remedies: AG specifically and county attorney by inference given enforcement powers; procedural rulemaking in AG; injunction; receiver; $5,000 per initial violation; $10,000 for violation of injunction; court costs, with attorney's fees discretionary; misdemeanor penalties.

Precedential Value of FTC Interpretations: Used as a guide.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the service for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 47-2314(A).

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 47-2315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Implied warranties may also be limited or excluded by use of expressions such as "as is", "with all faults", etc., or by buyer examination of goods or buyer refusal to examine goods. § 47-2316C. The remedies for breach of warranty also can be limited. § 47-2316. Notwithstanding the provisions listed above, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

Arizona

The following summary was reviewed and updated by LTC David P. Saxon, 29th JAG Detachment, Tulsa, OKlahoma, Municipal Judge, Fort Smith, Arkansas 72901, Telephone Number: 501-784-2429, FAX: 501-783-2356.

Arkansas

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - The Credit Reporting Disclosure Act of 1989. (eff. July 3, 1989). ACA 4-93-101 - 104

If credit, a further extension of existing credit, or on increase in the limits of existing credit for personal, family or household purpose is devised either in whole or in part because of information contained in a consumer report from a consumer reporting agency, the user of the report must notify the consumer against whom the adverse action has been taken. The notice must be in writing and must contain a statement of the action taken, the name and address of the creditor, the name and address of the consumer reporting agency making the report, and the Social Security Number of the customer if the number has been given to the user of the report by the consumer or is contained in the report.

Any person who fails to provide the required notification is liable to the injured party for actual damages.

"Consumer," "Consumer Report," "Consumer Reporting Agency," and "person" are defined the same as in the Federal Law.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision. But see Collection Agency Regulation. §§ 17-21-101 through 17-21-404.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale any time prior to midnight of the third business day following execution of the agreement or offer to purchase. The time limitation on the buyer's right to cancel does not begin to run until notice of the right to cancel is given, if the seller fails to give both oral and written notice of the buyer's right to cancel. § 4-89-107-108.

Arkansas

The buyer must take reasonable care of the goods and tender the goods at his or her residence in substantially the same condition as delivered. If the seller fails to demand possession of the goods within 20 days after receipt of the notice of cancellation, then the buyer can keep the goods. The seller must return any payments, trade-ins, or evidences of indebtedness to the buyer. § 4-89-110.

The following sales are not included in the protections provided by this chapter:

(1) A sale for less than $25 other than insurance sales;

(2) A previously negotiated sale between parties at a business establishment at a fixed location;

(3) A sale in which the buyer initiated the contact and requested the seller to come to his/her home for the purpose of repairing or performing maintenance upon the buyers' personal property. (§ 4-89-102(1)(B)).

(4) A sale where the goods are to be delivered at one time if: (A) the order is evidenced only by a sales ticket or invoice upon which the buyer's signature is not required, (B) the buyer makes no payment prior to delivery, (C) the goods are not delivered within 3 business days of the order, (D) the buyer may refuse to accept the goods or return them for refund without any liability, and (E) the buyer's right to cancel or refuse delivery is conspicuously set forth on the sales receipt. § 4-89-102(1)(C).

MINOR'S CONTRACT

Age of majority to contract - 18. § 9-25-101.

Contractual liability - Whenever a minor borrows money from a bank to defray educational expenses and other necessaries, any contract entered into between the bank and the minor is binding upon such minor as if he/she were an adult. § 23-32-912. Also, a minor must make full restitution prior to recision (§ 9-20-101). See also § 4-1-103. Veterans are not under disability as to rights under laws of U.S. or any state.

REPOSSESSION REQUIREMENTS (Replevin Action)

The creditor must make an affidavit stating:

(1) A particular description of the property;

(2) The actual value of the property, and the damages which the creditor believes should be recovered;

(3) That the creditor is the owner of the property and is entitled to its immediate possession;

(4) That the property is wrongfully detained by the debtor, with the alleged cause of detention;

(5) That the property has not been taken for a tax or fine against the creditor or seized under an execution or attachment against his/her property; and

(6) That the creditor's cause of action has accrued within 3 years. See § 18-60-810.

The creditor also must have executed a bond in the presence of the sheriff with a surety, stating the sum adjudged against him/her not to exceed double the value of the property and the court costs. § 18-60-812. Notice to the debtor of the opportunity of a hearing before seizure of the property is required. § 18-60-805. Alternative method provides for notice of hearing to be served with complaint and summons. Defendant has five (5) days from service date to respond to request for order of delivery. 18-60-808. Within 2 days after the property is seized by the sheriff, the debtor can recover it by executing a bond to the creditor with sufficient sureties for double the value of the property. § 18-60-816.

STATUTE OF LIMITATIONS

Contract under seal - 5 years. § 16-56-111

Simple written contract - 5 years. Partial payment or written acknowledgement of default shall toll state of limitations. (1991 Amendment) § 16-56-111.

Contract for the sale of goods - 4 years. § 4-2-725.

Oral contracts - 3 years. § 16-56-105.

Action on a promissory note - 5 years. § 16-56-111.

Action on an open account - 3 years. § 16-56-105.

Medical service charges - 18 months. § 16-56-106.

Judgments - Courts of record - 10 years. § 16-56-114.

Arkansas

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - No state truth-in-lending statute.

UNFAIR AND DECEPTIVE TRADE PRACTICES

ARK. STAT. ANN. § 4-88-101.

Prohibited Practices: Deceptive practices, knowingly making false representation or omission of material fact with intent to cause reliance. In addition to the other practices falling under other state statutes or part of the common law are also actionable. 4-88-10-108.

Special Requirements: None specified.

Scope: Sale or advertisement of goods and services.

Exclusions: Advertising complying with FTC standards; acts permitted by laws administered by state departments of insurance, securities, highways, public service, and banking; broadcasters, printers, publishers and others who disseminate information without actual knowledge of deceptive nature of advertising or practice. See § 4-88-101.

Private Remedies: None specified.

Limitations: None specified.

State Remedies: AG through consumer counsel and Consumer Protection Division have rulemaking power; misdemeanor penalties; injunction; restitution; forfeiture of state licenses; costs for willful violation; $10,000 for initial violation or violation of injunction. See § 4-88-112.

Precedential Value of FTC Interpretations: Not mentioned.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 4-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that

the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 4-2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Remedies for breach of warranty also can be limited. Notwithstanding these provisions, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 1673. All implied warranties are excluded by expressions like "as is", "with all faults", or other language calling attention to the exclusion of warranties and making clear that there is no implemented warranty.

MISCELLANEOUS

1. Credit Services Organizations Act of 1987. § 4-91-101 -109. A credit service organization means any person or entity who, with respect to the extension of credit by others, sells, provides, performs, or represents he or she will do the same in return for payment, any of the following: (1) improve a buyers credit record, history, or rating; (2) obtain an extension of credit; or (3) provide advice or assistance to a buyer with regard to (1) and (2). The definition does not include banks, savings and loans, credit unions, etc.

A credit service organization may not charge or receive money prior to full and complete performance unless it has obtained a surety bond of $10,000. The service cannot charge a referral fee. It cannot make any statement about a person's credit rating, history, etc. that is untrue or misleading. See § 4-91-106.

Contracts between the buyer and credit service organization shall be in writing, dated and signed by the buyer. A buyer may cancel the contract within five days. The service must return all payments within 10 days. See § 4-91-109.

2. Rental Purchases Act. A rental purchase agreement is an agreement for the use of merchandise by a consumer for personal, family, household, or business purposes for an initial period of four months or less that is automatically renewable and permits the consumer to buy, but does not obligate the consumer to purchase, the merchandise. See § 4-92-105(7).

"Rental Purchase Agreement" means an agreement for use of merchandise by a consumer for personal, family, household, or business purposes for an initial period of four months or less that is automatically renewable and permits the consumer to buy, but

does not obligate the consumer to purchase, the merchandise. See § 4-92-102.

The agreement may not contain a provision requiring confession of judgment, authorizing merchant to commit a breach of peace upon repossessing, waiving defenses, counterclaims, or requiring buyer to purchase insurance from the leaser. See § 4-92-105(a).

The agreement must disclose whether merchandise is new or used, amount and timing of payments, total amount to be paid, amount and purpose of any other payment, and when consumer acquires ownership rights and consumer liability. See § 4-92-105(b).

The following summary was reviewed and updated by COL Stephen A. Lenske, Army SJA (IMA), National University of Health and Science, Bethesda, Maryland, Lenske, Lenske & Abramson, A Law Corporation, 6400 Canoga Avenue, Suite 315, Woodland Hills, California 91367, Telephone Number: (818) 716-1444, FAX: (818) 883-9260.

CALIFORNIA

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - The Consumer Credit Reporting Agencies Act requires that a reporting agency allow a consumer to see the files maintained about him/her by a consumer reporting agency, and to be told of the sources of the information in the files and of recent recipients of reports on the consumer (CAL. CIV. CODE § 1785.10.) The consumer reporting agency must inform any consumer requesting disclosure of the file information of his/her right to receive a decoded version of the file or a written explanation of any code used and, if applicable, of his/her right to receive disclosure without charge (CAL. CIV. CODE § 1785.17(1).)

Depending upon the manner selected by the consumer, disclosure can be by phone, mail or in person (CAL. CIV. CODE § 1785.15(b), and must provide trained personnel to explain the information furnished (CAL. CIV. CODE § 1785.15(d).) The report must disclose the recipients of any consumer reports on the consumer within the past two years if the report was for employment purposes and within the past six months for all other purposes (CAL. CIV. CODE § 1785.10(b).) Adjudicated bankruptcies which antedate the report by more than 14 years, unpaid judgments which antedate the report by more than 10 years, and other adverse information which antedates the report by more than 7 years are prohibited from being included in the report (CAL. CIV. CODE § 1785.13.)

The consumer credit report is free to the consumer if the request is made within 30 days of notification of adverse action taken pursuant to a credit application (CAL. CIV. CODE § 1785.17.) For negligent violations of this Act, the debtor can recover actual damages, including court costs, loss of wages, attorney's fees and damages for pain and suffering. For willful violations, actual damages plus punitive damages of not less than $100 nor more than $5,000 are recoverable (CAL. CIV. CODE § 1785.31(a).) In either case, injunctive relief may also be given (CAL. CIV. CODE § 1785.31(b).)

When the consumer requests disclosure of file information, the credit reporting agency must advise the consumer of his/her rights that in addition to any other remedy provided by law, a consumer may bring an action for a civil penalty, not to exceed $2,500.00,

(CAL. CIV. CODE § 1785.19), against a person who knowingly and willfully obtains access to a file in violation of any provision of the CAL. CIV. CODE.

The Consumer Contract Awareness Act of 1990 (CAL. CIV. CODE § 1799.200 et seq.), provides for delivery to a consumer of a copy of his/her consumer contract. A "consumer contract" is defined as "a writing prepared by a seller and signed, or to be signed, by a consumer which provides (1) for the sale or lease of goods or services that are purchased or leased primarily for personal, family, or household purposes, or (2) for extension of credit, the proceeds of which are used primarily for personal, family, or household purposes."

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - The California Fair Debt Collection Practices Act ("CAL. FDCPA" CAL. CIV. CODE § 1788-1788.32) is California's counterpart to the federal FDCPA. The two laws are similar, but not identical. A "consumer debt" is money, property or their equivalent owned by a natural person primarily for personal, family or household purposes (CAL. CIV. CODE § 1788.2(d),(e),(f).) CAL. FDCPA does not apply to debts incurred by business entities (partnerships, corporations, etc.); or to debts incurred by individuals primarily for business purposes (CAL. CIV. CODE § 1788.2(e),(f).)

CAL. FDCPA is applicable to anyone who in the ordinary course of business regularly engages in debt collection (CAL. CIV. CODE § 1788.2(c)), and requires that the agency and the caller be identified in any telephonic communication with the debtor (CAL. CIV. CODE § 1788.11(b).) Any attempt to collect a consumer debt by the use of threats, obscene or profane language, communications with third parties, misrepresentations in communications, or obtaining an affirmation from a bankrupt without proper disclosures is strictly prohibited by the Act (CAL. CIV. CODE §§ 1788.10 - 1788.14.)

A debt collector who violates the CAL. FDCPA is liable to the debtor for actual damages sustained by the debtor (CAL. CIV. CODE § 1788.30(a).) If the violation is willful, additional damages of not less than $100 nor more than $1,000 will be assessed (CAL. CIV. CODE § 1788.30(b).) The debt collector incurs no liability if he/she corrects the mistake or error within 15 days after its discovery or after receipt of written notice from the debtor (CAL. CIV. CODE § 1788.30(d).) Attorney's fees may be awarded to the prevailing party (CAL. CIV. CODE § 1788.30(c).) The remedies

provided in the CAL. FDCPA are in addition to any others provided by law (CAL. CIV. CODE § 1788.32.) 15 U.S.C. § 1673 places significant limitations on personalty subject to forfeiture.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale in the amount of $25 or more until midnight of the third business day following execution of an agreement or offer to purchase. Cancellation is effective when the buyer gives the seller written notice at the address specified in the agreement or when deposited in the mail properly addressed to the seller, postage prepaid. Additionally, a buyer has the right to cancel a home solicitation contract or offer for the purchase of a personal emergency response unit until midnight of the seventh business day after the day on which the buyer signs an agreement or offer to purchase (CAL. CIV. CODE § 1689.6(a-c).) The sales agreement must contain a conspicuous notice of this cancellation right (CAL. CIV. CODE § 1689.7(a).)

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. He/she is not obligated to tender anywhere other than his/her residence (CAL. CIV. CODE § 1689.11(b).) However, if the seller fails to demand possession within 20 days after cancellation of the contract, the buyer takes title to the goods without obligation to pay for them (CAL. CIV. CODE § 1689.11(a).) The seller must return to the buyer any payments previously made, and any evidences of indebtedness (CAL. CIV. CODE § 1689.10(a).) The seller must also restore any altered property to substantially as good condition as it was when the services were rendered (CAL. CIV. CODE § 1689.11(c).)

A sale involving a vehicle required to be registered, a sale involving rescission rights under the federal Truth-in-Lending Act, professional and financial services are not included in the protection provided by this statute (CAL. CIV. CODE § 1689.5.) Also not included in the protection of the statutes are sales where the goods are affixed to realty and they are subsequently sold or encumbranced to an independent third party and emergency services or repairs initiated by the buyer (CAL. CIV. CODE §§ 1689.9, 1689.13.)

Also excluded from the protection of the statute:

- Emergency sale of services or goods necessary to protect person or property;

- Sale by seller making 75 percent or more of sales at local trade premises;
- Sale under pre-existing credit arrangement;
- Sale previously negotiated at place of business.

See also Bus. & Prof. C. § 17500.3.

MINOR'S CONTRACT

A minor is anyone under the age of eighteen (18) ((CAL. CIV. CODE § 25.) A minor may not disaffirm an otherwise valid obligation entered into under the express authority or direction of a statute (CAL. CIV. CODE § 37.) In other cases, a minor may disaffirm a contract, before attaining the age of eighteen (18) or within a reasonable time afterwards, except in the following cases: 1) a contract to pay the reasonable value of necessaries provided they have actually been furnished to him/her; 2) court approved contracts for artistic or creative services; 3) court approved professional sport contracts; 4) contracts for pregnancy care (CAL. CIV. CODE §§ 34.5, 36.) Minors who are fifteen (15) years or older living separate from their parents may not disaffirm contracts for medical or dental care (CAL. CIV. CODE § 34.6.) Minors who are lawfully married may give consent to the furnishing of hospital, medical, and surgical care, which may not be disaffirmed. The statutory section has been repealed which changed minority status to adult upon marriage. Any veteran under 21 has majority for purchase (CAL. VET. CODE § 986.10.)

REPOSSESSION REQUIREMENTS

Personal Property sold on contract or installment account (other than motor vehicles) - Seller may retake goods without prior notice if retaking can be accomplished without breach of the peace (CAL. CIV. CODE § 1812.2; UCC § 9-503.) Within ten (10) days thereafter, seller must give buyer written notice of his/her intent to sell the goods or retain them in full satisfaction of the indebtedness. The notice must specify the date of any sale, the amount of overdue payments and that the buyer has a right to redeem within ten (10) days after the notice by making the overdue payments (CAL. CIV. CODE § 1812.2.) In the event a sale occurs, any surplus must be paid to the buyer (CAL. CIV. CODE § 1812.4.) Seller may not thereafter recover any deficiency (CAL. CIV. CODE § 1812.5.) If notice is not properly given, seller is liable to buyer for damages plus $10 (CAL. CIV. CODE § 1812.2.) Willful violation is a misdemeanor (CAL. CIV. CODE § 1812.6.)

Motor Vehicles sold on conditional sales contract - Seller may retake vehicle without prior notice if retaking can be accomplished without a breach of the peace (UCC § 9-503.) Within sixty (60)

days following repossession, seller must give buyer notice that buyer may redeem the vehicle by paying the full itemized indebtedness within fifteen (15) days and that buyer also has a right to reinstate, within the same period, by paying the itemized contract balance, collection charges and repossession costs (CAL. CIV. CODE § 2983.2.) In some cases involving buyer misconduct, buyer does not have a right to reinstatement. See CAL. CIV. CODE §§ 2983.2(a)(2), 2983.3(b).) The redemption and/or reinstatement period must be extended for ten (10) days upon buyer's timely written request. The notice must further advise buyer of seller's intent to dispose of the vehicle upon the expiration of fifteen (15) days of notice if it is mailed from and given to an address in California. Otherwise the period is twenty (20) days. Within forty-five (45) days after disposition, upon buyer's request, seller must account to buyer. Within said period, he/she must also pay over any surplus to buyer (CAL. CIV. CODE § 2983.2.)

Seller is entitled to any deficiency unless he/she had wrongfully and in bad faith denied buyer his/her right to reinstate the contract (CAL. CIV. CODE § 2983.3.) Violation of the foregoing requirements is a misdemeanor (CAL. CIV. CODE § 2983.6.)

Note: The foregoing requirements and procedures apply only to sellers who are engaged in the business of selling or leasing motor vehicles under conditional sales contracts (CAL. CIV. CODE § 2981(b).)

STATUTE OF LIMITATIONS

Written Obligations. An action upon any written contract, obligation or liability founded upon an instrument in writing; an action to recover (1) upon a book account, (2) upon an account stated, and (3) a balance due upon a mutual, open and current account; an action based upon the rescission of a contract in writing;

- 4 years. (CAL. CIV. PROC. CODE § 337)

Patent deficiency in real property improvement design, survey, construction, etc., and resulting injury to property or person;

- 4 years. (CAL. CIV. PROC. CODE § 337.1)

Action for latent deficiency in construction or survey of real property or injury arising out of such deficiency;

- 10 years. (CAL. CIV. PROC. CODE § 337.15)

Lessee's breach of written lease;

- 4 years. (CAL. CIV. PROC. CODE § 337.2)

Statutory liability; Injury to property; Fraud or mistake; Bonds of public officials and notaries; Slander of title; False advertising; Pollution violations;

- 3 years. (CAL. CIV. PROC. CODE § 338)

Action for civil penalties or punitive damages related to hazardous substances;

- 5 years. (CAL. CIV. PROC. CODE § 338.1)

Oral obligations; Title insurance; Rescission;

- 2 years. (CAL. CIV. PROC. CODE § 339)

Lessee's breach of unwritten lease;

- 4 years. (CAL. CIV. PROC. CODE § 339.5)

Personal injury; Wrongful death; Torts; Statutory penalties; Check payment by bank; Property seizure; Good faith improvements;

- 1 year. (CAL. CIV. PROC. CODE § 340)

Damages suffered as result of childhood sexual abuse; Certificates of merit:

- within 8 years of the date the plaintiff attains the age of majority; or,

- within 3 years of the date of discovery by the plaintiff after the age of majority, whichever occurs later;

(CAL. CIV. PROC. CODE § 340.1)

CoHP LaserJet+, 500+HPLAS500.PRSE § 337.5)

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - "Unruh Act" (CAL. CIV. CODE § 1801 et seq.) Any information required to be disclosed in a retail installment contract, conditional sale contract, or other document may be set forth in terminology required under Regulation Z. Nothing in the state laws prohibits the disclosure of additional information required or permitted under Regulation Z (CAL. CIV. CODE § 1801.5.)

California

"Regulation Z" means any rule, regulation, or interpretation promulgated by the Board of Governors of the Federal Reserve System under the federal Truth-in-Lending Act, as amended (15 U.S.C. § 1601 et seq.) (CAL. CIV. CODE § 1802.18.)

- Any application form or preapproved written solicitation for an open end credit card account to be used for personal, family, or household purposes which is mailed to a consumer residing in the state by a creditor whether or not the creditor is in California must include information explaining the annual percentage rate, membership or participation fees, transaction fees, and any "free ride" period. Creditor must also provide disclosure satisfying the requirements of Regulation Z. (CAL. CIV. CODE § 1801 et seq.)

UNFAIR AND DECEPTIVE TRADE PRACTICES

CAL. CIV. CODE § 1750 (West 1985 & Supp. 1988). Consumers Legal Remedies Act.

Prohibited Practices: 22 enumerated unfair methods of competition and unfair or deceptive practices (CAL. CIV. CODE § 1770.)

Special Requirements: Intentional violation and not result of bona fide error notwithstanding a reasonable error avoidance procedure needed to sustain action for damages; no damages awarded if correction or replacement given (CAL. CIV. CODE § 1770.)

Scope: Transactions that result in sale or lease of goods or services to any consumer (CAL. CIV. CODE § 1770.)

Exclusions: Construction and/or sale of entire residence, or all or part of commercial or industrial structure; sales of realty; advertisements done by publisher, radio and television media, with no knowledge of falsity; non-consumer transactions; non-intentional violations with correction or replacement made.

Private Remedies: Class actions with $300 minimum damages; actual damages, restitution of property, injunction; punitive damages; legal costs and attorney's fees to prevailing plaintiff, any other relief court deems proper (CAL. CIV. CODE § 1780.) Senior citizens and disabled persons may be awarded up to $5,000 additional damages if they suffer substantial physical, emotional, or economic damage as a result of defendant's conduct.

Limitations: Consumer must suffer damages; give 30 day notice letters if seeks damages; no damages if correction or replacement given; 3 year statute of limitation from commission of act.

California

State Remedies: None specified.

Prohibited Practices: Untrue or misleading statements and unfair methods of competition including unlawful, unfair, or fraudulent business practices and unfair, deceptive, untrue, or misleading advertising.

Special Requirements: None specified.

Scope: "Unfair competition" (unfair, unlawful, or fraudulent business practice) and untrue or misleading advertising the falsity of which the advertiser knew or reasonably should have known.

Private Remedies: Injunction; receiver; restitution or orders necessary to prevent unfair competition; restoration of any money or property lost; reasonable attorney's fees; costs.

Limitations: 4 year statute of limitations from time the cause accrues for unfair methods of competition.

State Remedies: Criminal penalties of 6 months' imprisonment and/or maximum $2500 fine for untrue or misleading statements; AG, DA, or city attorney enforces and state or local Department of Consumer Affairs may request action; injunction; maximum $2500 per violation; expenses of investigation and prosecution to state or local consumer agency; $6000 per intentional injunction violation; court considers extent of harm, persistent conduct, length of time of conduct, assets of plaintiff and corrective action by defendant.

WARRANTIES

The "Song-Beverly Consumer Warranty Act", is California's comprehensive consumer warranty law, the purpose of which is to accord the consumer a wide range of protection. See CAL. CIV. CODE §§ 1790-1797.6. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

1. Contracts for the Lease or Rental of Athletic Facilities (CAL. CIV. CODE § 1812.97.) Every contract for the lease or rental of athletic facilities must contain the following in bold type: Warning: California Law Provides that it is illegal to aid or abet in the unlawful sale, use, or exchange of anabolic Steroids, testosterone, and human growth hormone.

2. Contracts for Discount Buying Services (CAL. CIV. CODE § 1812.100 et seq.) Discount buying organization means any persons, corporation, etc., which, for consideration, provides its

clients with the ability to purchase goods or services at discount prices. This does not include organizations which charge a one-time fee of $50, or annual fee of $25.

Must be a written contract which discloses exact nature of services provided and a list, current within the previous 60 days, of at least 100 items sold through the organization.

California

The following summary was reviewed and updated June 1993 by LTC Dale R. Gardner, IRR, Office: 5433 Westheimer Road, Suite 410, Houston, TX 77056, (713) 626-8808, FAX: (713) 626-8807.

Colorado

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - See § 12-14-107.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - An injunction may be granted and the debtor may recover actual damages if the court finds as matter of law that a debt collector has engaged in or is likely to engage in unconscionable conduct in collecting a debt. § 5-5-108(2). Some acts which may be found unconscionable are (A) using or threatening violence or force against the debtor or a member of his family, (B) communicating with the debtorir a member of his family at frequent intervals or unusual hours, (C) using fraudulent, deceptive or misleading representations, and (D) causing or threatening to cause injury to the debtor's reputation or economic status. § 5-5-108(4).

See Colorado Fair Debt Collection Practices Act - § 12-14-101 et seq.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - If the Seller has obtained a written agreement or offer to purchase with the Buyer, the buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 5-2-502(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement or offer to purchase. § 5-2-502(2). Notice of cancellation is effective when deposited in the mailbox properly addressed to the seller, postage prepaid. § 5-2-502(3).

If the Seller has not obtained a written agreement or offer to purchase with the Buyer, the Buyer may cancel the home solicitation sale within three years of the date of the sale by notifying the seller in any manner and by any means of his/her intention to cancel. § 5-2-503(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand.HP LaserJet+, 500+HPLAS500.PRS The seller must tender any payments, notes of indebtedness, or goods received to the buyer within 10 days after notice of cancellation of the sale has been received by the Seller. § 5-2-504(1).

A sale made pursuant to a pre-existing revolving charge account, a previously negotiated sale at a business establishment, an emergency sale, a sale conducted entirely by mail or telephone, and a sale involving a rescission right under the federal Truth-in-Lending Act are not included in the protections provided by this statute. §§ 5-2-501, 5-2-502(5).

MINOR'S CONTRACT

Age of majority to contract - 18. § 13-22-101. However, parents have duty to support until age 21 or emancipation.

Contractual liability - Minor is liable only for medical, dental and related care received as a result of a contractual relationship. A minor veteran and/or his minor spouse are bound by loans obtained because of his veteran status. § 28-5-401.

REPOSSESSION REQUIREMENTS (Personal Property-Replevin)

The creditor must file a verified complaint or a complaint and an affidavit showing:

(1) That the creditor is the owner of the property or entitled to its possession and the source of the title or right;

(2) That the property is being detained by the debtor and how the debtor came into possession of the property;

(3) A description of the property, along with its location and a statement of its actual value; and

(4) That the property has not been taken for a tax assessment or fine or seized under an execution, or if seized, that it is exempt from seizure. Rule 104(b), C.R.C.P.

The creditor also must execute a bond with such surety as the court may require and in an amount set by the court but not exceeding double the value of the property. Rule 104(e), C.R.C.P. A show cause order will be issued to the debtor if the creditor has complied with the requirements of the affidavit. A hearing must be held within 10 days after issuance of the show cause order before a final determination as to the proper disposition of the

property can be made (at least five days notice is required). Rule 104(c), C.R.C.P. If the debtor gained possession of the property by theft, or the property is negotiable instruments or credit cards, or the property is perishable, or the debtor has waived his/her right to a hearing, an order of possession can be issued prior to a hearing. Rule 104(d), C.R.C.P.

The debtor can regain possession of the property by executing a bond with such surety as the court requires and in an amount not to exceed double the value of the property as set by the court. A notice of filing of the bond must be served on the creditor or his/her attorney, along with a copy of the bond. Rule 104(j), C.R.C.P.

See also Uniform Consumer Credit Code - Limitations on Creditors' Remedies - §§ 5-5-101 to 5-5-112.

STATUTE OF LIMITATIONS

Contracts founded on debt (liquidated debt or determinable unliquidataed amount), rent and "bad checks" - 6 years. § 13-80-103.5.

All contracts except under § 13.80-103.5 - 3 years. § 13-80-101. The excepted contracts, promissory notes and open accounts - 4 years.

Contract for sale of goods - 3 years. § 4-2-725 & §13-80-101.

Judgments - Courts of record - 20 years. § 13-52-102.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Colorado Consumer Credit Code requires the creditor to disclose to the buyer his/her credit charges as an annual percentage rate and any other charges, before credit is extended (EXCEPTION: telephone or mail sale, See §5-2-305). § 5-2-302, 304. These disclosures are required for sales, loans, and revolving credit transactions. §§ 5-2-306, 5-2-310, § 5-3-301. In cases of consumer credit sales not pursuant to revolving charge account the seller must disclose the actual cash price, taxes and other fees, the amount and a description of all seller charges, and a breakdown of the loan repayment schedule. § 5-2-306. Credit extensions to the government, the sale of insurance by an insurer, regulated public utilities and common carriers, the rates and charges of a licensed pawnbroker, and the disclosure of rates and

charges dealing with securities transactions by a broker dealer registered with SEC are excluded from the provisions of the state truth-in-lending disclosure requirements. § 5-1-202.

Remedies: A creditor who fails to disclose required information to a person entitled to the information is liable to that person in an amount equal to the sum of: (A) twice the credit service charge (but not less than $100 nor more than $1,000), and, (B) in a successful action to enforce liability, the costs of the action plus reasonable attorney's fees. § 5-5-203. A creditor is not liable in an action brought against him/her, if within sixty days after discovery of an error and prior to written notice of the error or institution of a civil or criminal action, the creditor makes the adjustments and notifies the debtor. § 5-5-203(2). A creditor who willfully fails to provide information which he/she is required to disclose is guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $5,000, or by imprisonment not to exceed 1 year, or both. § 5-5-302.

UNFAIR AND DECEPTIVE TRADE PRACTICES

COLO. REV. STAT. § 6-1-101 (1973 & Supp. 1992).

Prohibited Practices: 33 enumerated deceptive practices, §6-1-105.

Special Requirements: Statue of limitations is 3 years after act occurred or after consumer discovers or should have discovered the act: An additional 1 year is available if plaintiff can show that timely filing was prevented by defendants' conduct (inducing plaintiff not to commence action) § 6-1-115.

Scope: Practices in course of a person's business, vocation or occupation §6-1-105.

Exclusions: Conduct complying with rules or statutes administered by state or federal agency; publishers, advertising agencies, broadcasters or printers who disseminate information without knowledge of deception §6-1-106.

Private Remedies: § 6-1-113. Except in a class action, defendant is liable for:

(1) 3 times the amount of actual damages or $250, whichever is greater;

(2) if action is successful, costs of action plus reasonable attorney fees.

Colorado

State Remedies: AG or DA enforces; injunction; costs of investigation; action for restitution to injured; civil penalties include maximum of $2,000 per offense if it is a separate offense as to each consumer, maximum $100,000 for violation of injunction; rulemaking; costs and attorneys fees if successful action. §§ 6-1-107 through 110/§6-1-112, § 6-1-113(4).

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 4-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 4-2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing and such exclusion or limitation must be "conspicuous". Commonly understood expressions like "as is", "with all faults" or others which draw the buyer's attention to the exclusion of warranties makes plain no implied warranty exists. Remedies for breach of warranty also can be limited. § 4-2-316.

Colorado

The following summary was reviewed and updated on in July, 1993 by Major Jonathan J. Klein, IMA Trial Counsel, 24th Infantry Division (Mechanized), Fort Stewart, Georgia, Braunstein and Todisco, P. C., 965 White Plains Road, Trumbull, Connecticut 06611, Telephone Number: 203-452-9700, FAX: 203-459-0004.

Connecticut

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - A creditor must furnish to a consumer the name and address of the credit rating agency which issued a report which the creditor will use partially or wholly as a basis for adverse action against a consumer applying for credit for personal, family or household purposes. After proper identification and a written request by the consumer, a credit rating agency shall disclose the nature and substance of all information in its files (except medical information), for purposes of verification and correct any misinformation contained in its files upon satisfactory presentation of proof or error. Such disclosure shall be made without charge to the consumer if the request is made not more than 30 days after notification to the consumer of an adverse action by a creditor. C.G.S. Section 36-432(a).

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No creditor shall use any abusive, harassing, fraudulent, deceptive or misleading representation, device or practice to collect or attempt to collect any debt. C.G.S. Section 36-243b.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - In addition to any right otherwise to revoke an offer, the buyer has the right to cancel a home solicitation sale until midnight of the third business day following the buyer's execution of an agreement or offer to purchase. C.G.S. Section 42-137(a). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address specified in the notice of cancellation attached to the agreement or when deposited in a mailbox, properly addressed. C.G.S. Section 42- 137(b). Notice of cancellation is effective if it indicates an intention on the part of the buyer not to be bound by the agreement. C.G.S. Section 42-137(c). The sales agreement must have attached to it an easily

detachable notice of this cancellation right in ten-point bold-face type. C.G.S. Section 42-135a(2).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. If the seller fails to take possession of goods within 20 days after cancellation, the goods become the property of the buyer without obligation to pay for them. C.G.S. Section 42-139(a) and (b). The seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness within 10 business days after cancellation of the sale. C.G.S. Section 42-138(a).

The following types of sales are not included in the protections provided by this statute:

(1) A sale made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed location;

(2) A sale in which the buyer initiated the contact and the goods or services were needed to meet a bona fide immediate personal emergency of the buyer, with the buyer's handwritten description of the emergency situation expressly acknowledging and waiving the cancellation right;

(3) A sale conducted entirely by mail or telephone;

(4) A sale in which the buyer initiated the contact and requested the seller to visit his/her home for personal property repairs or maintenance;

(5) A sale pertaining to the sale or rental of real property, the sale of insurance or newspapers, or the sale, by a registered broker-dealer, of securities or commodities;

(6) A sale made pursuant to a home party plan sales and demonstration; and

(7) A sale for less than $25, whether under single or multiple contracts, excluding magazine sales or subscriptions. C.G.S. Section 42-134(a).

MINOR'S CONTRACT

Age of majority to contract - 18 (C.G.S. Section 1-1d) or until emancipation (C.G.S. Section 46b-150d(b)). A minor 15, or over, may contract for life, health and accident insurance on his/her person for his/her benefit or for the benefit of his/her parent, spouse, child or sibling. (C.G.S. Section 38a-284). A

minor veteran and the minor spouse or unmarried widow of an eligible veteran may contract for a loan, or guaranty or insurance of a loan pursuant to the Servicemen's Readjustment Act of 1944, as amended (38 U.S.C. Sections 1501 et seq.). C.G.S. Section 36-4.

Contractual liability - Under common law, a minor is liable only for reasonable value of necessaries received as a result of a contractual relationship. Barnes v. Barnes, 50 Conn. 572, 574 (1883); Gregory v. Lee, 64 Conn. 407, 413, 30 A. 53 (1894); Ennis v. Beers, 84 Conn. 610, 612-13, 80 A. 772 (1911).

REPLEVIN REQUIREMENTS

In an action for replevin, the creditor or some other credible person must make an affidavit that the property in question belongs to him/her and that he/she is entitled to its immediate possession. The affidavit must contain a statement of the true and just value of the goods. The creditor also must execute a bond with at least one surety, in an amount at least double the sworn value of the property. C.G.S. Section 52-518. If the creditor seeks to replevy the property upon the commencement or during the pendency of the action, the debtor is entitled to a hearing before such a prejudgment remedy replevin of the property is ordered, withnotice being served on him/her at least 4 days prior to the hearing. C.G.S. Section 52-278c. The hearing is limited to a determination of whether or not there is probable cause to sustain the validity of the plaintiff's claim. C.G.S. Section 52-278d.

STATUTE OF LIMITATIONS

Simple or implied contract or written contract (including promissory notes and open accounts) - 6 years. C.G.S. Section 52-576(a).

Contract for sale of goods - 4 years. The original agreement of the parties may reduce the period to not less than one year, but may not extend it. C.G.S. Section 42a-2-725(1).

Oral contracts - 3 years. C.G.S. Section 52-581(a).

Judgments - An execution to enforce a Connecticut judgment for money damages may not be issued after 20 years (10 years for a small claims judgment). An action based on a Connecticut judgment for money damages may not be instituted after 25 years (15 years for a small claims judgment). C.G.S. Section 52-598.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

Connecticut

State - The Connecticut Truth-in-Lending Act requires the creditor to disclose all credit and lease terms before credit is extended to the prospective debtor in the interest of promoting competition. This allows prospective debtors the opportunity to compare the various credit and lease terms available. C.G.S. Section 36-393a(a). These disclosures are required for loans and sales and leases of consumer goods or services. All transactions exempt under Section 104 of the Federal Consumer Credit Protection Act (15 U.S.C. Section 1603) are also exempt from the provisions of the state truth-in-lending act. C.G.S. Section 36-393b(b).

A creditor who fails to disclose required information is liable to that person in an amount equal to the sum of: (1) actual damage sustained by the debtor; (2) in an individual action, twice the amount of any finance charge connected with the transaction or, if relating to a consumer lease, 25 percent of the total amount of monthly payments (but not less than $100 or more than $1000); (3) in a class action, a total of not more than $500,000 or one percent of the net worth of the creditor, whichever is less, with no minimum recovery applicable to each member of the class; and (4) in a successful action to enforce liability or in any action in which the debtor seeks to exercise a right of rescission, the costs of the action plus attorney's fees. C.G.S. Section 36-407(a). A creditor is not liable in an action brought against him/her, if within 60 days after discovery of an error and prior to receipt of written notice of the error from the debtor or the institution of a civil action, the creditor makes the adjustment and notifies the debtor. C.G.S. Section 36-407(b). A creditor who willfully and knowingly gives false or inaccurate information or fails to provide information that he/she is required to disclose shall, upon conviction, be fined not more than $5,000 and/or be imprisoned for not more than one year. C.G.S. Section 36-399.

UNFAIR AND DECEPTIVE TRADE PRACTICES:

See also Title 21a. Consumer Protection.

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. C.G.S. Section 42-110b(a).

Special Requirements: None specified.

Scope: Trade or commerce means the advertising, sale, rent or lease, or offer for sale, rent or lease, of any services or property, tangible or intangible, real, personal or mixed, or anything else of value. C.G.S. Section 42-110a(4).

Connecticut

Exclusions: Actions permitted under law as administered by any regulatory board or officer of state or U.S.; advertisements done by disinterested publisher, radio and television media, with no knowledge of the false, misleading, unfair or deceptive character of the advertisement. C.G.S. Section 42-110c(a).

Private Remedies: Actual damages; punitive damages and injunctive or other equitable relief in the court's discretion; class actions; court may award costs and attorney's fees to consumer or class in addition to other relief (even if class receives monetary recovery); receiver. C.G.S. Section 42-110g.

Limitations: Ascertainable loss of money or property suffered; mail complaint to AG; 3 year limitation period. C.G.S. Section 42-110g.

State Remedies: Enforced by Commissioner of Consumer Protection or AG; injunction; restraining order; restitution; receivership; equitable relief; suspension of corporate charter, certificate of authority to do business or licenses; civil penalty of $25,000 per injunction or restraining order violation; $2,000 for each willful violation; rulemaking by Commissioner. C.G.S. Sections 42-110b, k, m and o.

Precedential Value of FTC Interpretations: Guided by FTC. C.G.S. Section 42-110b(b).

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. C.G.S. Section 42a-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose.

C.G.S. Section 42a-2-315. Unless excluded or modified, other implied warranties may arise from course of dealing or usage of trade. C.G.S. Section 42a-2-314(3). Conversely, a course of dealing, course of performance or usage of trade may operate to exclude or modify an implied warranty. C.G.S. Section 42a-2-316(3)(c).

Connecticut

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Remedies for breach of warranty also can be limited. All implied warranties are excluded by the use of expressions like "as is", "with all faults", etc. This provision, however, does not apply to sales of new or unused consumer goods, except for those goods clearly marked "irregular", "factory seconds", or "damaged." In the case of such new or irregular consumer goods, any language, oral or written, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. C.G.S. Section 42a-2-316. Also, the ability to restrict implied auto warranties may be affected by 15 U.S.C. Section 2308.

Delaware

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale of $25 or more until midnight of the third business day following execution of an agreement or offer to purchase. Notice is effective when mailed or delivered, or by sending a telegram to the seller at his/her place of business. 6 § 4404(2). The sales agreement must contain a notice of this cancellation right printed in an ink of conspicuous color other than that used for the rest of the contract and/or receipt. 6 § 4404(1).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller does not pick them up within 20 days of the date on the notice of cancellation. The seller must return any negotiable instruments or payments received from the buyer within 10 business days after cancellation of the sale. 6 § 4404(2).

The following sales are not included in the protections provided by this statute:

(1) Sales under $25;

(2) A previously negotiated sale made during a visit by the buyer to a retail business establishment having a fixed permanent location;

(3) A buyer-initiated emergency sale, accompanied by a written buyer's statement waiving the right to cancel;

(4) A buyer-initiated transaction conducted entirely by mail or telephone;

(5) A buyer initiated contact for the repair or maintenance of the buyer's personal property; and

(6) A transaction relating to the sale or rental of real property, and the sale of insurance or securities or commodities by a broker-dealer regi with the Securities and Exchange Commission. 6 § 4403(1).

MINOR'S CONTRACT

Age of majority to contract - 18. 6 § 2705.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. 6 § 1-103.

REPOSSESSION REQUIREMENTS

The creditor must bring an action stating that he/she is entitled to possession of the property in question. 10 § 3905. The bringing of the action serves as a sufficient demand for all purposes. T.10 § 3907. There is no requirement for the making of an affidavit, posting a bond, or giving notice to the debtor.

For Retail Installment Sales - See 6 § 4346.

STATUTE OF LIMITATIONS

Contract under seal - No statutory provision.

Simple written contract (include actions on open accounts) - 3 years. 10 § 8106.

Contract for sale of goods - 4 years. 6 § 2-725.

Oral contracts - 3 years. 10 § 8106.

Judgments - Courts of record - 5 years. 10 § 5072.

Actions on promissory notes - 6 years. 10 § 5108.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Disclosures made under the federal Truth-in-Lending Act, as amended [15 U.S.C.A. § 1601 et seq.], are deemed to comply with comparable, but literally inconsistent, disclosure requirements of the state law. 6 § 4351, 5 § 2912.

Delaware

Retail Installment Sales - See 6 § 4301 et seq.

Sale of Motor Vehicles - See 5 § 2901 et seq.

UNFAIR AND DECEPTIVE TRADE PRACTICES

DEL. CODE ANN. tit. 6 § 2531 (1974 & Supp.).

Prohibited Practices: 12 enumerated deceptive practices, other conduct creating likelihood of misunderstanding; complainant need not prove actual confusion or misunderstanding; test is "likelihood", does not apply to sale of real estate. Del Code 6 § 2532.

Special Requirements: None specified.

Scope: In course of business, vocation or occupation.

Exclusions: Conduct complying with local, state or federal statute or rule; publishers, broadcasters, printers or other person who disseminates information without knowledge of deception.

Private Remedies: Injunction; attorney's fees "may" be awarded successful party in exceptional cases; costs and attorneys fees assessed only in cases of wilful deception; treble damages if damages available under common law or other state statutes. 6 § 2533.

Limitations: The statute does not apply to publishers, broadcasters, or printers who publish, broadcast or reproduce material without knowledge of its deceptive character. 6 § 2534.

State Remedies: None specified.

Precedential Value of FTC Interpretations: None specified.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. 6 § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose.

Delaware

6 § 2-315. Unless excluded or modified, other implied warranties may arise from course of dealing or usage of trade. 6 § 2-314.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Remedies for breach of warranty also can be limited. The language of the exclusion or limitation applies only to the extent that it is reasonable. The warranty exclusion must be conspicuous and in writing. All are implied warranties are excluded by expressions like "as is", "with all faults", etc. If, prior to entering into the contract the buyer has fully examined or refused to examine the goods, there is no implied warranty with regard to defects which an examination ought to have revealed. A course of dealing or performance or usage of trade may also exclude or modify an implied warranty. In addition to the provisions listed above, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308. 6 § 2-316.

Delaware

The following summary was reviewed and updated in March 1994 by First Lieutenant Gregory E. Maggs, Associate Professor of Law, George Washington University National Law Center, 2000 H Street, N.W., Washington, DC 20052. Telephone Number: 202-994-6031, FAX: 202-994-9446.

District of Columbia

(All citations to "D.C. Code Ann." unless indicated.)

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - All debt collectors are prohibited from using any of the following methods in an attempt to collect a consumer debt (owed to a seller or lender):

(1) Threats or coercion of a debtor; attempt to coerce;

(2) Oppression, harassment, or abuse of a debtor;

(3) Any unreasonable publication of information relating to an alleged indebtedness or debtor;

(4) Any fraudulent, deceptive or misleading representation;

(5) Any unfair or unconscionable means; and

(6) The use, distribution or selling of any written communication which fails to conform to U.S. postal laws and regulations. Any debt collector that is found to have willfully violated any of the foregoing provisions is subject to liability to any person affected by the violation for all proximately caused damages. Punitive damages may also be awarded for willful violations by a debt collector. § 28-3814.

Delaware

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 28-3811(b). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. § 28-3811(c). Notice is effective, if given by mail, when deposited in the mail properly addressed to the seller, postage prepaid. 28-3811(d). The sales agreement must contain a conspicuous notice of this cancellation right. § 28-3811(g). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. § 28-3811(g)(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the merchandise if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. § 28-3811(i).

The buyer may not cancel a home solicitation sale if the buyer requested the services due to an emergency, and (A) the seller makes a substantial beginning of performance before notice of cancellation, (B) the goods cannot be returned to the seller in as good condition as when received by the buyer, and (C) the buyer has signed a waiver of his/her right to cancel. § 28-3811(f).

The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 28-3811(h). The seller is neither entitled to a cancellation fee nor compensation for any services performed prior to cancellation of the agreement. §§ 28-3811(h), (i).

A sale of farm equipment, a sale under a pre-existing revolving credit account, and a previously negotiated sale are not included in the protections provided by this statute. § 28-3811(a).

MINOR'S CONTRACT

Minors have capacity to contract for necessaries. At their option, they may avoid contracts for non-necessaries. See Harrod v. Kelly Adjustment Co., 179 A.2d 431 (D.C. Ct. App. 1962).

The age of majority is 18 years for contracts covered by the Uniform Commercial Code. See § 28: 1-103. The District of

Delaware

Columbia does not appear to have a statute establishing an age of majority for other contracts. Court decisions do not make clear the current common law age of majority for such contracts.

The age of minority is reduced to 15 for certain contracts for insurance. See § 35-430. The disability of minority is removed for loans guaranteed by the Serviceman's Readjustment Act of 1944, 58 Stat. 284. See § 45-2301.

REPOSSESSION REQUIREMENTS

The creditor must file a complaint in replevin and an affidavit stating the following:

(1) That the creditor is entitled to possession of the chattels, and a brief description of the property;

(2) That the debtor has seized or detains such chattels; and

(3) That the chattels were not subject to seizure or detention and were not taken upon a writ of replevin between the parties. § 16-3703.

The creditor also must enter into an undertaking with surety, approved by the clerk, to abide by and perform the judgment of the court. § 16-3704. Notice to the debtor is required. § 16-3706.

The creditor may request the Calendar Control Judge to set a date for hearing at which the plaintiff will be required to prove the validity of his/her claim. The debtor also will be allowed to be heard. D.C.R. CIV. P. 64-2(b). Notice must be served on the debtor at least 5 court days prior to the hearing date. D.C.R. CIV. P.64-2(c). If there is immediate danger that the debtor will destroy or conceal the property, repossession can be obtained without a prior adversary hearing. D.C.R. CIV. P. 64-2(f). The debtor may move for the return of the property. The court may order the property to be returned and require the debtor to enter into an undertaking with surety, similar to that required of the creditor. § 16-3708.

See also Limitation on Creditors' Remedies - § 28-3812(e).

Delaware

STATUTE OF LIMITATIONS

Contract under seal - 12 years. § 12-301.

"Simple contract, express or implied" (including actions on promissory notes and open accounts) - 3 years. § 12-301.

Contract for sale of goods - 4 years. § 28: 2-725.

Judgments - Courts of record - 3 years. § 12-301.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The District of Columbia has adopted specific sections of the federal "Truth in Lending Act," as amended, and incorporated them into the D.C. Municipal Regulations (D.C.M.R.) by reference. The following sections of the federal Act were adopted: 15 U.S.C. §§ 1605, 1606, 1631, 1632, 1634, 1637, 1638, 1661, 1662, 1663, 1664, and 1665. Title 16 D.C.M.R. § 101. Disclosure is required for sales and revolving credit transactions. Consumer Retail Credit Regulation, Paragraph 6503, 6544 and 6548.

Extension of credit for business, commercial or agricultural purposes, extension of credit for more than $25,000 not secured by real property or a dwelling, motor vehicles, 90-day unsecured credit with no charge, prices, tariffs regulated by the government D.C.CRC Paragraph 6651, extension of credit for public utility services, transactions in securities or commodities accounts, home fuel budget plans and certain guaranteed federal student loans are excluded from the D.C. Truth in Lending disclosure requirements. 16 D.C.M.R. 101, 12 C.F.R. 226.3.

UNFAIR AND DECEPTIVE TRADE PRACTICES

D.C. CODE ANN. § 28-3901 et seq. (1981 & Supp. 1986). See also Automobile Consumer Protection Act, Chapter 13 of Title 40.

Prohibited Practices: 29 enumerated deceptive, unfair or unlawful trade practices, including unconscionable terms.

Special Requirements: None specified.

Scope: Trade practices defined as "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services."

Delaware

Exclusions: Non-consumer practices, personal injury for tort; landlord-tenant relations; Public Service Commission; professional services of clergy, lawyers, physicians, Christian Scientists; advertisements done by publisher, radio and television media of others' goods with no knowledge of falsity; acts of government agency.

Private Remedies: If consumer suffered damages by violation, consumer may receive actual damages, treble damages, attorney's fees or other remedy; punitive damages; receive civil penalties if violation of consent decree or order.

Limitations: Consumer must suffer damage for private action.

State Remedies: Office of Consumer Protection; rulemaking; order restitution for money, time or property lost by consumer, rescission, reformation, repairs and replacement; suspend license if no other board oversees it; maximum $1000 for each violation of order or consent decree; court "may" order: injunction, treble damages,

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 28: 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purposes. § 28: 2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Such a limitation or exclusion must be "conspicuous". Expressions like "as is" and "with all faults" may also exclude all implied warranties. Remedies for breach of warranty also can be limited. § 28: 2-316.

Delaware

MISCELLANEOUS

1. Consumer Credit Sales and Installment Loans.

Consumer credit sales not exceeding $25,000 and direct installment loans (not including loans secured on real estate or direct motor vehicle installation loans) are subject to various protections. In particular: (a) certain balloon payments are prohibited (§ 28-3803); (b) assignment of earnings and authorization to confess judgment are prohibited (§ 28-3804); (c) attorney fees for creditors in excess of 15% are prohibited (§ 28-3806); (d) negotiable instruments in consumer credit sales are prohibited (§ 28-3807); (e) assignee is subject to all claims and defenses of consumer not exceeding amount owed at time of assignment (§ 28-3808); (f) lender who makes direct installment loan to consumer is subject to all claims and defenses of consumer not exceeding amount of loan (§ 28-3809); (g) cross-collateral arrangements are regulated (§ 28-3805); (h) creditor remedies are defined by statute (§ 28-3812); (i) consumer remedies are defined by statute (§ 28-3813).

2. Health Spa Sales. § 28-3817.

Every contract must contain, in close proximity to the space reserved for buyer's signature and in boldface type, a notice which includes the fact that the buyer has 15 days to cancel by sending a letter to that effect either certified or registered mail. The contract may also be canceled at any time due to death, illness, injury, or change of residence or in the location of the spa. Cancellation due to illness or injury requires a certificate from a doctor.

3. Consumers may seek redress for a trade practice in violation of the law by (1) filing suit in the Superior Court, see § 28-3905(k)(1); or (2) filing a complaint with the Office of Compliance, Complaint Division, Department of Consumer and Regulatory Affairs ("DCRA"), see § 28-3905(a).

Consumers may arbitrate claims against any provider of consumer goods who agrees to arbitrate by submitting a claim to the Consumer Claims Arbitration Board of DCRA §40-1303(h).

4. Sales of Automobiles and other Vehicles

For special remedies available in connection with the sale of defective vehicles, see § 40-1302. For disclosures required upon the sale of certain used vehicles, see § 40-1305.

Florida

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision. However, see also Florida statutes, section 817.7001 et. seq. dealing with credit service organizations.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No person in collecting consumer claims shall communicate or threaten to communicate with a debtor's employer prior to obtaining final judgment, unless the debtor consents in writing. No person in collecting consumer claims shall disclose any information affecting a debtor's reputation to anyone other than the debtor or his/her family, with knowledge that the other person has no legitimate business purpose for the information. No such person shall disclose the existence of a known disputed debt to anyone without also disclosing the dispute. If the debtor is advised of the possible disclosure of a disputed debt, the debtor must be told that the dispute will also be disclosed. No such person shall post or publish for the general public, the names of consumers with outstanding debts. § 559.72. Violations of the above provisions are punishable by the greater of actual damages or $500, plus attorney's fees and court costs. The award of punitive damages lies within the discretion of the court. § 559.77.

In collecting consumer claims, whether or not licensed, no person shall:

(1) Falsely represent that they are acting on behalf of a law enforcement office or governmental agency;

(2) Use or threaten force or violence;

(3) Disclose to another information affecting the debtor's credit reputation, without also disclosing the existence of a dispute or disclosing to any person information affecting the debtor's general reputation with knowledge or reason to know that the information is false or the other person has no legitimate business need for the information;

(4) Communicate or threaten to communicate with the debtor's employer before obtaining a final judgment against the debtor, unless the debtor has acknowledged existence of the debt after it was placed for collection;

(5) Use profane, obscene, vulgar or abusive language while communicating with the debtor or a member of his/her family;

(6) Attempt or threaten to enforce a nonlegitimate claim or to use a nonexistent legal right;

(7) Use a communication which simulates legal process or which appears to have been prepared by a governmental agency or attorney-at-law or orally misrepresenting oneself as being an attorney or associated with an attorney;

(8) Publish or threaten to publish the debtor's name on a "deadbeat list";

(9) Refuse to provide adequate identification when requested to do so by a debtor;

(10) Mail any communication, with words printed on the outside which are calculated to embarrass the debtor. § 559.72.

A debtor may bring a civil action against a person for violations of the prohibited acts provisions. Recovery by the debtor is limited to the greater of actual damages or $500; punitive damages and other equitable relief may be awarded in the discretion of the court; attorney's fees and costs are also recoverable by the prevailing party. § 559.77.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - "Home solicitation sale" means a sale, lease, or rental of consumer goods or services in excess of $25. The term includes unsolicited phone transactions where there are no further contacts prior to delivery. 501.021. The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. The buyer must give the seller written notice of cancellation at the address stated on the agreement or offer to purchase. If the notice is mailed, it becomes effective upon postmarking. The notice of cancellation is sufficient if it indicates the intention of the buyer not to be bound by the agreement. Notice of the buyer's right to cancel must appear on all notes and other evidences of indebtedness. § 501.025.

Seller must obtain buyer's signature on the agreement/offer to purchase; the date of signature must be set forth and the buyer's right to cancel specifically noted on the document. Other mandatory language must also be set forth. § 501.031.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods without obligation to pay for them if the seller fails to demand such possession within 40 days after cancellation. § 501.045. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 501.041. Upon cancellation of the sale, the seller may not keep any part of any cash down payment. § 501.031.

The Act does not apply to a sale, lease, or rental: of $25 or less; made at a commercial exhibit; of insurance; of farm equipment; made by a specific request by the purchaser or lessee; or of a motor vehicle dealer which occurs at a location or facility open to the general public or to a designated group. §§ 501.021, 501.035.

The seller must provide the buyer with a "business card," contract or receipt indicating the seller's name, address, phone number, description and signature; the parent company's name, address and phone number. In phone solicitations, sales materials and contracts sent to the buyer must disclose the name, address, and phone number of the parent company or sponsor. § 501.046.

The seller shall not misrepresent the terms or conditions of the sale; misrepresent his/her company affiliation; misrepresent his/her reasons for soliciting the sale (e.g., contest) or his/her inability to perform another job; or allege or imply that the agreement is noncancellable. § 501.047.

Home solicitation permits are required under limited circumstance. § 501.022.

MINOR'S CONTRACT

Age of majority to contract is 18. § 743.07. Disability is removed for a minor who is or has been married. § 743.01.

Contractual liability - Generally a minor is liable only for necessaries received as a result of a contractual relationship. § 671.103. However, for purposes of borrowing money for their own higher educational expenses, all persons who have reached the age of 16 are authorized to execute such contracts. See also §§ 743.04, 743.065. Disability of minority removed for liens. § 45-2301.

Florida

REPOSSESSION REQUIREMENTS

The creditor must file a complaint showing the following information:

(1) A description of the property, a statement of its value and its location;

(2) A statement that the creditor is the owner of the property or entitled to its possession, describing the source of that title or right;

(3) A statement that the property is wrongfully detained and the cause of the debtor's detention of the property;

(4) A statement that the property has not been taken for tax, assessment or fine pursuant to law, or seized under an order of execution or attachment against the creditor's property. § 78.055.

(5) A statement that the property has not been taken under an execution or attachment against the property of the plaintiff, or if so taken, that it is exempt by law from such taking, setting forth a reference to the exemption law relied upon.

The creditor is not required to execute a bond unless he/she is seeking a prejudgment writ of replevin, in which case, he/she must post bond in amount of twice the value of the goods, or the amount owing, whichever is less. Prejudgment writ requirements are stringent. § 78.068. Notice to the debtor of the time and place of the show-cause hearing is required unless it is waived by the debtor. Suggested language is found in § 78.075. The hearing cannot be held sooner than 5 days after service of notice on the debtor. § 78.065.

The debtor can stay the issuance of a writ of replevin by posting a written undertaking with surety, approved by the court, in an amount equal to the value of the property. § 78.067. The debtor may obtain the release of property seized under a prejudgment writ of replevin by posting bond within 5 days of service of the writ in an amount of one and one-fourth the amount due and owing on the property. § 78.068 (4). He/she may within 10 days of service of the writ file a motion to dissolve a prejudgment writ. § 78.068(6).

STATUTE OF LIMITATIONS

Contracts:

Contract under seal - No statutory provision.

Florida

Simple written contract - 5 years. § 95.11(2).

Oral contracts - 4 years. § 95.11(3)(k).

Action to rescind a contract - 4 years. § 95.11(3)(l).

Specific performance of contract - 1 year. § 95.11(5)(a).

Contract for sale of goods - 4 or 5 years, depending upon whether contract written or oral. §§ 95.11(2), 95.11(3).

Other:

Taking or detaining personal property - 4 years. § 95.11(3)(h).

Action to recover specific personal property - 4 years. § 95.11(3)(i).

Fraud - 4 years. § 95.11(3)(j).

Judgment of a court of record - 20 years. § 95.11(1).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - A creditor shall deliver to the debtor, at the time the loan is made, a statement showing in clear terms the amount and date of the loan and the date of its maturity; the nature of any security; the names and addresses of the creditor and the debtor; and the rate of interest charged. § 516.15. For retail installment sales provisions - § 520.34. Motor vehicle sales provisions - § 520.07.

Creditor must provide borrower a "plain and complete" receipt for each payment or provide an annual statement showing interest paid and outstanding balance. § 516.15.

UNFAIR AND DECEPTIVE TRADE PRACTICES

FLA. STAT. ANN. § 501.201-210 (West 1985 & Supp. 1988).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. 501.204.

Scope: Trade or commerce; consumer transactions include sales and leases of consumer services and intangibles for personal, family

or household purpose or business opportunity requiring personal services and expenditure of funds.

Exclusions: Practice permitted by federal or state law; personal injury or death actions; actions for property other than subject of consumer transactions; good faith holder of negotiable instrument or transferee of credit agreement without knowledge; banking and insurance activities regulated by state or federal agencies; publisher, broadcaster, printer or other person who disseminates information for others without actual knowledge of violation.

Private Remedies: Declaratory judgment, injunction, actual damages awarded consumer who has suffered loss, provided retailer not in good faith and acted with knowledge; damaged consumer may be reimbursed by Consumer Fraud Trust Fund; attorney's fees and costs to prevailing party of consumer transaction.

Limitations: For state and department actions for class or declaratory judgment, need probable cause hearing and notice letter; statute of limitations for state or department is later of 4 years from violation or 2 years from last payment of consumer transaction. § 501.207.

State Remedies: Enforced by Department of Legal Affairs or state attorney; substantive rulemaking in department; declaratory judgment; injunction; class actions for actual damages, appoint receiver; modify unconscionable contracts; other relief; unjust enrichment damages if supplier commits bona fide error with reasonable procedures; department brings cease and desist order if in public interest, with $10,000 for each violation of order; attorney's fees and costs if is "complete absence of justiciable issue" or bad faith claim. § 501.2075.

Precedential Value of FTC Interpretations: Due consideration and great weight given. § 501.204.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 672.314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified,

an implied warranty that the goods shall be fit for such purpose. § 672.315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Such limitation or exclusion must be "conspicuous". A full examination of the goods or refusal to examine by the buyer may negate any warranty regarding defects the examination should have revealed. A course of dealing or performance or usage of trade may also exclude or modify an implied warranty. Remedies for breach of warranty also can be limited. § 672.316.

MISCELLANEOUS

1. Credit Cards. §§ 501.011-.0017.

It is unlawful for an institution or person to mail or deliver any credit card unless mailed or delivered in response to an application for the credit card or as a replacement for a credit card. No credit card bearer is liable for any unauthorized use of the card issued on an unsolicited basis.

It is unlawful for any producer or refiner or subsidiary thereof to distribute credit cards for purchases at a retail service station unless the card is valid at each such retail service station and the card includes restrictions on sales equally applicable to all such sales at said retail service stations.

A seller or lessor in a sales or lease transaction may not impose a surcharge on buyer or lessee for electing to use a credit card.

Georgia

The following summary was reviewed and updated in April 1994 by CPT Martin J. Sendek, OSJA, Fort Benning, Georgia, Department of Veteran's Affairs, 801 I Street NW, Washington, D.C. 20420, Telephone Number: 202-273-6325, FAX: 202-273-6404.

Georgia

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No debt collector shall collect or attempt to collect any money due or alleged to be due from a debtor by the use of:

(1) Threats or coercion;

(2) Unreasonable harassment, oppression, or abusive language;

(3) Unreasonable publication of information relating to an indebtedness or a debtor;

(4) Fraudulent, deceptive, or misleading representations; or

(5) Any unfair or unconscionable means.

A collection agency or debt collector that engages in unlawful conduct to collect a debt is subject to having its license suspended or revoked. § 7-3-25. Attempts to make collections by means of personal visits, telephone calls, and the like shall be deemed to occur at an unreasonable hour of the night if they occur between 10:00 pm and 5:00 am. § 7-3-25(a)(5).

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of the agreement. § 10-1-6(a). Notice of cancellation is effective when given to the seller at his/her place of business, by certified mail, return receipt requested. § 10-1-6(b). The

buyer's notice of cancellation is effective if it just indicates an intention of the buyer not to be bound by the sale. § 10-1-6(f).

The buyer must return any merchandise received in the same condition as he/she received it. § 10-1-6(e). The seller must return any funds or goods received to the buyer within 10 days after cancellation of the sale. § 10-1-6(c). The seller must pick up the goods within a reasonable time after cancellation of the sale and at that time, he/she may recover from the buyer the lesser of the actual costs of picking up the merchandise or $5. § 10-1-6(e). The seller also may receive 5% of the gross sales price of the merchandise or $25, whichever is less, as liquidated damages. § 10-1-6(d). A cash sale is not included in the protections provided by this statute. § 10-1-2(a)(4).

MINOR'S CONTRACT

Age of majority to contract - 18. § 39-1-1(a). An infant doing business by permission is bound. (§ 13-3-21).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 11-1-103. The contract for necessaries is binding on the minor as if he/she were an adult, but the party furnishing the necessaries must prove that the parent or guardian of such minor has failed or refused to supply sufficient necessaries for him/her. § 13-3-20(b). On any pre-majority contract, enjoyment of consideration or property after majority is attained is a ratification of the pre-majority contract. However, reconveyance at time of majority is voidance of prior conveyance during minority. (§ 44-5-41).

REPOSSESSION REQUIREMENTS

There are no statutory provisions dealing with repossession in general. There are specific statutes for attachment of property (see § 18-3-1 et seq.); trover (see § 44-12-150 et seq.); and equitable remedies, such as ne exeat (restraining a person from leaving the state) (see § 23-3-20 et seq.). (see § 10-1-36 Disposition of motor vehicle repossessed.).

STATUTE OF LIMITATIONS

Contract under seal - 20 years. § 9-3-23.

Simple written contract (includes actions on promissory notes) - 6 years. § 9-3-24.

Contract for sale of goods - 4 years. §§ 11-2-725, 10-1-14.

Georgia

Oral contracts (includes actions on open accounts) - 4 years. § 9-3-25.

Judgments - Contracts of record - 7 years. § 9-12-60.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - No statutory equivalent. For retail installment provisions. See § 10-1-3 et seq. Buyer entitled to "exact copy" of signed agreement. Acknowledgment of receipt must be in "clear and conspicuous" type. § 10-1-4. Motor vehicle sales provisions - §§ 10-1-32, 10-1-33.

UNFAIR AND DECEPTIVE TRADE PRACTICES

GA. CODE ANN. § 10-1-370 et seq. (Uniform Deceptive Trade Practices Act) and § 10-1-390 et seq. (Fair Business Practices Act).

Prohibited Practices: The UDPTA lists 12 practices likely to create misunderstanding, confusion, or deception. Emphasis is on fair competition between competitors; FBPA lists 25 examples of prohibited practices; act designed to protect consumer from false, confusing, or misleading business practices.

Scope: UDPTA: actions in the course of business, vocation, or occupation. FBPA: consumer transactions including sale, lease, rental of goods, services, real or personal property for personal, family, or household purposes; trade or commerce involving the sale, or offer for sale, lease, advertising, distribution of any goods, services, real or personal property, intangible, or thing of value. A merchant is now precluded from requesting or recording personal or business information as a condition for a credit card sale. § 10-1-393.3.

Exclusions: Conduct in compliance with federal, state, or local rules or statutes; publishers, broadcasters, others who disseminate deceptive or false information without knowledge of its character.

Private Remedies: For UPTPA related cases: injunction is only recourse; costs of action to prevailing party; attorney's fees to prevailing party in discretion of court if loser's conduct egregious. For FBPA: cases, consumer may obtain injunction, general damages, exemplary and treble damages for intentional violations; costs and attorney's fees in some cases, actual damages

if violation is a result on non-negligent error occurring despite reasonable preventive procedures.

Limitations: None for UDTPA; complainant need not prove actual confusion or misunderstanding to prevail; "likelihood" is test. For FBPA, consumer must suffer some injury or damage; 2 year statute of limitations if should have known of violation or after state action terminated; no statute of limitations for set off.

State Remedies: None specified under UDTPA; under FBPA, administrator enforces; injunction; receiver; general damages; substantive rulemaking; $25,000 per violation of injunction; $2,000 per intentional violation.

Precedential Value of FTC Interpretations: Construction to be interpreted consistently with FTC.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 11-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 11-2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Writing must contain "conspicuous" exclusionary language. Use of language such as "as is", with all faults" may also exclude implied warranties. Course of dealing and performance or usage of trade may also exclude or modify warranty. Remedies for breach of warranty also can be limited. § 11-2-316. Also, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MOTOR VEHICLE WARRANTY RIGHTS - LEMON LAW

1. Overview of Motor Vehicle Warranty Rights Act O.C.G.A. § 10-1-780-784

a. Each new motor vehicle dealer must provide an owners manual published by the manufacturer which includes a list of

addresses and phone numbers which consumers may use to contact the manufacturer to resolve repair issues concerning the consumer's new motor vehicle. §10-1-780(a).

b. The "Lemon Law Rights period" is the period ending one year after the date of sale of the new vehicle, or the first 12,000 miles after delivery, whichever occurs first.

c. The dealer must provide the consumer with a written explanation of his/her rights under the Georgia Lemon Law. § 10-1-783(b). If a vehicle has a nonconformity which is reported by the consumer during the rights period, the vehicle shall be repaired by the manufacturer at the manufacturers expense, regardless of whether such repairs are made after the expiration of the rights period. § 10-1-783. No manufacturer, its agent or new motor vehicle dealer may refuse to diagnose or repair a nonconformity for the purpose of avoiding liability.

2. Non Repair of Vehicle Under the Georgia Lemon Law

a. If the manufacturer, after a reasonable number of attempts to correct a nonconformity, is unable to correct the problem the consumer must notify the manufacturer by certified mail, return receipt requested, that the problem has not been corrected. The manufacturer must then notify the consumer of a reasonably available repair facility where the repairs will take place.

b. After the consumer delivers the motor vehicle to this facility, the manufacturer must conform the vehicle to the warranty. If the manufacture is unable to conform the vehicle to the warranty, the consumer may request the replacement or repurchase of the motor vehicle. §10-1-784.

Practice Note: The Georgia Lemon Law is complex and contains very specific requirements for both the consumer and the manufacturer/dealer. A review of the statute is necessary during or *prior* to client consultation. *This law applies only to new vehicles.*

MISCELLANEOUS

1. Buying services. § 10-1-590 to 604. Buying Services Act of 1975.

A buying service or club is organized to provide benefits to members from the cooperative purchase of service or merchandise and desires to effect such purpose through direct solicitation or other

business activity in the state. The service must be licensed. The contract of membership must be in writing, signed by the member, and dated. The contract must state clearly and conspicuously in bold face type that the buyer has the right to cancel the contract before midnight of the third business day after signing. The club must give, within 10 business days, a total refund. Any contract which does not contain the above may be cancelled at any time. § 10-1-598.

No contract is valid for a term over 18 months. However, the club may allow conversion into a contract for a longer period after 6 months.

2. Lease-Purchase Agreements. § 10-1-680 to 689. Lease Purchase Agreement Act.

A lease-purchase agreement includes agreements for the use of personal property by a lessee primarily for personal, family, or household purposes, for an initial period of four months or less and is renewable with each payment afterwards and permits lessee to become the owner. § 10-1-681.

The agreement must contain: a description of the property, including whether it has been rented before; total amount of initial payment; amount and timing of payments; liability for loss, damages, etc.; and the total cost of lease and fair market value at time of lease. § 10-1-682.

An advertisement for the lease-purchase agreement cannot state a specific lease at specific amounts or terms unless lessor usually leases or will lease at those terms and amounts. § 10-1-683.

The agreement shall not: require garnishment of wages or power of attorney to confess judgment; allow a breach of the peace; require waiver of any defense, counter claim, and so on; or provide lessee cannot return property at end of any term. §10-1-684.

Guam

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

Territory - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

Territory - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

Territory - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. C.C. § 1802.502(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. C.C. § 1802.502(2). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. C.C. § 1802.502(3). The sales agreement must contain a conspicuous notice of this cancellation right. C.C. § 1802.503(2). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. C.C. § 1802.503(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. C.C. § 1802.505. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. C.C. § 1802.504(1,2). The seller may retain as a cancellation fee five percent (5%) of the cash price but not exceeding $15 or the amount of the cash down payment, whichever is less. C.C. § 1802.504(3).

The following transactions are not included in the protections provided by this statute:

(1) A sale made pursuant to a pre-existing revolving charge account;

(2) A sale made pursuant to a pre-existing agreement between the parties at the seller's place of business; and

(3) A cash sale. C.C. § 1802.501.

MINOR'S CONTRACT

Age of majority to contract - 18. C.C. § 25.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. C.C. § 36.

REPOSSESSION REQUIREMENTS

The creditor must file an affidavit showing:

(1) That the creditor is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;

(2) That the property is wrongfully detained by the debtor;

(3) The alleged cause of the detention;

(4) That it was not taken for a tax, assessment, or fine pursuant to law or seized, under an execution or an attachment against the property of the creditor; or if so seized that it is by law exempt from seizure; and

(5) The actual value of the property. C.P.C. § 510.

The creditor also must file a bond executed by two or more sureties, approved by the court, in double the value of the property as stated in the affidavit for prosecution of the action. C.P.C. § 512.

After the creditor has filed his/her affidavit and bond, the marshal must forthwith take the property described in the affidavit. The debtor must be served with a copy of the affidavit, notice and undertaking. C.P.C. § 512. The marshal also must file the notice, undertaking, and affidavit, with his/her proceedings thereon, with the clerk of court within 5 days after taking the property mentioned therein. C.P.C. § 520. At any time before delivery of the property to the creditor, the debtor may, if he/she does not except to the creditor's sureties, require the return of the property to his/her possession by giving the marshal a bond executed by two or more sufficient sureties in double the value of the property as stated in the creditor's affidavit. C.P.C. § 514.

STATUTE OF LIMITATIONS

Contract under seal - 4 years. C.P.C. § 337.

Guam

Simple written contract - 4 years. C.P.C. § 337.

Contract for sale of goods - 4 years. C.P.C. § 337.

Oral contracts - 2 years. C.P.C. § 339.

Judgments - Courts of record - 5 years. C.P.C. § 336.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

Territory - The Guam Uniform Consumer Credit Code - Credit Sales Law and Loans Law require a creditor to disclose to the buyer, usually before credit is extended, his credit charges in dollars and cents and as an annual percentage rate. Disclosure is required for credit sales, revolving credit transactions and loans. §§ 1802.306, 1802.310, 1803.306. Sales in which the amount financed is $25,000 or more and leases in which the amount payable under the lease is $25,000 or more are excluded from coverage under the Guam UCCC Credit Sales Law. C.C. § 1802.301. Loans in which the principal is $25,000 or more are excluded from coverage under the Guam UCCC Loans Law. C.C. § 1803.301.

A creditor who fails to disclose information to a person entitled to the information may be held liable to that person in an amount not in excess of the greater of either $100 or an amount twice the credit service charge or loan finance charge, provided that the amount may not exceed $1,000 on any credit transaction. C.C. § 1805.202(1). A creditor is not liable in an action brought against him/her if within 15 days after his/her discovery of an error and prior to written notice from the debtor of the error or institution of the action, the creditor makes the proper adjustments and notifies the debtor. C.C. § 1805.202(2). A creditor who willfully fails to provide information which he/she is required to disclose is guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $5,000, or by imprisonment not to exceed one year, or both. C.C. § 1805.302.

WARRANTIES

In a contract to sell or a sale, unless a contrary intention appears, there is an implied warranty that:

(1) The seller has the right to sell the goods and in the case of a contract to sell he/she will have a right to sell the goods at the time the property is to pass;

(2) That the buyer shall have the quiet possession of the goods against any lawful claims; and

(3) That the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract sale is made. C.C. § 1733.

Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. C.C. § 1734. There is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purposes for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he/she be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose;

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality;

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed;

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose;

(5) An express warranty or condition does not negative a warranty or condition implied under this Act unless inconsistent therewith. C.C. § 1735.

In the case of a contract to sell or a sale by sample:

(1) There is an implied warranty that the bulk shall correspond with the sample in quality;

(2) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in § 1767(3);

(3) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. C.C. § 1736.

Guam

Hawaii

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No state statutory provisions. But see Prohibited Acts and Practices of Collection Agencies -

(1) Threats or coercion;

(2) Harassment or abuse;

(3) Unreasonable publication;

(4) Fraudulent, deceptive, or misleading representations;

(5) Unfair or unconscionable means; and

(6) Unfair competition, unfair or deceptive acts or practices. § 443B.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. In order to cancel the sale, the buyer must mail or deliver a notice of cancellation to the seller's place of business. The buyer also may send a telegram to the seller. § 481C-2.

The buyer must take reasonable care of the goods and tender the goods at his or her residence. However, the buyer takes title to the goods if the seller fails to pick them up within 20 days of the date of the buyer's notice of cancellation. If the buyer fails to make the goods available to the seller or if he/she fails to return the goods pursuant to an agreement with the seller, the buyer remains liable for the performance of all obligations under the contract. The seller must return any funds received or goods traded in to the buyer within 10 business days following receipt of the notice of cancellation. § 481C-2.

A previously negotiated sale at a business establishment, an emergency sale with a buyer's handwritten statement expressly waiving the right to cancel the sale, a sale conducted entirely by mail or telephone, a sale in which the buyer initiated the contact and requested the seller to visit his/her home for repair work, and a sale under $5 or $25 if the merchandise can be delivered at one time are not included in the protections provided by this statute. § 481C-1.

MINOR'S CONTRACT

Age of majority to contract - 18. § 577-1, or until emancipation.

Minor married persons are considered adults except for the right to vote and criminal penalties.

A person 15 or over may contract for life or disability insurance. (§ 431: 10-203).

Contractual liability - Minor is liable only for the reasonable price of necessaries received as a result of a contractual relationship. § 490:1-103.

Disability of veteran and spouse is removed. § 577-2.

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit stating:

(1) That the creditor is entitled to immediate possession of the property;

(2) The value of the property;

(3) A description of the property;

(4) That the property was not taken for tax, assessment, or fine pursuant to law, or seized under execution against the creditor or his property;

(5) That the property is in the possession of the debtor and the facts relating to the possession thereof by the debtor; and

(6) In actions for immediate possession of the property, the names of all persons other than the debtor who claim or may claim an interest in the property. § 654-1.

The creditor also must execute a bond to the debtor in such sum and with such sureties as may be approved by the court. § 654-2. Neither prior notice nor a hearing are required to be given to the debtor. The debtor can regain possession of the property prior to its delivery to the creditor by making an affidavit of his/her interest stating his/her right to possession and by executing a bond to the creditor in such an amount and with such sureties as may be approved by the court, conditioned that he/she will appear in and defend the action, and deliver the property to the creditor and pay all costs, should the creditor be adjudged entitled to possession of the property. § 654-5.

STATUTE OF LIMITATIONS

Contract under seal (includes actions on open accounts and promissory notes) - 6 years. § 657-1.

Simple written contract (includes actions on open accounts and promissory notes) - 6 years. § 657-1.

Contract for sale of goods - 4 years. § 490:2-725.

Oral contracts - 6 years. § 657-1.

Judgments - Courts of record - 10 years. § 657-5.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - For disclosure requirements under the Industrial Loan Companies Act, Retail Installment Sales Act, and Small Loan Act, see §§ 408-17, 476-2 to 476-7, 409-2.1, 409-17. No requirement to make any disclosure which is "inconsistent" with Truth-in Lending Act.

UNFAIR AND DECEPTIVE TRADE PRACTICES

HAWAII REV. STAT. § 481A et seq - Uniform Deceptive Trade Practice Act.

Prohibited Practices: Unfair methods of competition and unfair or deceptive trade practices. Practice is "unfair" when it offends public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Special Requirements: None specified.

Scope: Trade or commerce.

Hawaii

Exclusions: Acts permitted by state insurance law and labor organizations and securities transactions.

Private Remedies: Minimum $1,000, actual damages; attorney's fees and costs; injunction with attorney's fees and costs for successful plaintiff; treble damages; contract in violation of statute void and unenforceable.

Limitations: Four year statute of limitations after accrual; limitations suspended during pendency of state or county action except for damages to its property and one year thereafter.

State Remedies: AG or director of consumer protection awarded treble damages not less than $500 or exceeding $10,000; injunction; $500 to $10,000 for injunction violation; AG brings class actions for actual compensatory damages; AG, DA or City Attorney for treble damages to its property or business.

Precedential Value of FTC Interpretations: Given "due consideration."

HAWAII REV. STAT. § 481B Unfair and Deceptive Practices.

Prohibited Practices: 12 enumerated deceptive practices including catchall prohibiting conduct creating likelihood of misunderstanding or confusion.

Special Requirements: None specified.

Scope: Actions in course of a person's business, vocation, or occupation including individuals, corporations, partnerships, trusts, estates, government agency, or any commercial entity.

Exclusions: Conduct complying with rules or statutes of federal, state or local government; publishers, broadcasters, printers, or others who disseminate information without knowledge of deceptive character.

Private Remedies: Injunction; costs unless court directs otherwise; attorney's fees to prevailing party "may" be awarded if suit is groundless or willful violation.

Limitations: None specified.

State Remedies: None specified.

Precedential Value of FTC Interpretations: None specified.

Hawaii

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 490:2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 490:2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Unless otherwise indicated, use of words like "as is", "with all faults", etc. serves to exclude all implied warranties. Remedies for breach of warranty also can be limited. § 490:2-316. Also, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

Health Clubs. § 486N.

A written contract is required and a copy must be given to the buyer. The contract must include the name and address of both the buyer and club, and a list of the names and addresses of other clubs, if the contract is transferable. The contract must also contain a right to cancellation clause which gives the buyer 5 business days to cancel the contract. The clause must be in large bold type. The contract may also be cancelled at any time due to death or disability.

The contract shall not have a duration longer than 36 months and cannot be measured by the life of the buyer or life of the club. The Act provides for private remedies if buyer is damaged as a result of violating the Act. Also, if club violates the Act, it cannot enforce a contract against the buyer.

Hawaii

Idaho

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Under the Idaho Credit Code, if it is understood at the time either consumer or nonconsumer credit is extended that late payment or nonpayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person, the extension of credit is unenforceable.

A separate law governs the activities of those engaged in the business of debt collection and other licensees. Any person wishing to engage in debt collection practices under state law must be permitted and provided a specified bond to the state. Also, any licensee of a person permitted under state law must obtain a license and provide a specified bond to the state.

The following collection practices are prohibited under state law:

(1) Collecting or attempting to collect any interest or other charges, fees or expenses incidental to the principal obligation unless the interest or incidental fees, charges or expenses are legally chargeable against the debtor or have been judicially determined;

(2) Selling, distributing or making use of collection letters, demand forms or other printed matter which are similar or resemble governmental forms or documents or legal forms used in civil or criminal proceedings;

(3) Using any trade name, address, insignia, picture, emblem or any other means which creates the impression that the person is connected with or is any agency of the government.

Any person doing business as defined under the law governing collection agencies without a permit is guilty of a felony, punishable by a fine not to exceed $5,000 or by imprisonment for not more than 5 years, or both. Also § 48-603(17) prohibits practices which are misleading, false or tend to deceive. State ex rel Kidwell v. Master Distrib., Inc., 101 Idaho 447, 615 P.2d 116 (1980). § 26-2229A requires collection agencies to be open, fair and honest.

Idaho

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 28-43-402(1). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 28-43-402(2,3). The notice of cancellation only needs to indicate an intention of the buyer not to be bound by the sale. § 28-43-402(4). The sales agreement must contain a conspicuous notice of this cancellation right. § 28-43-403(2). Until the seller has notified the buyer of his/her cancellation rights, the buyer can cancel the sale by notifying the seller in any manner. § 28-43-403(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the merchandise if the seller fails to demand such possession within a reasonable time (which is presumed to be forty days) of the notice of cancellation. § 28-43-405. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 28-43-404.

A cash sale, a sale made pursuant to a pre-existing revolving charge account, a previously negotiated sale at a business establishment at a fixed location, a sale conducted entirely by mail or telephone, and a sale subject to the provisions of the Federal Consumer Credit Protection Act are not included in the protections provided by this statute. § 28-43-401.

MINOR'S CONTRACT

Age of majority to contract - 18; or if married, the person is competent to enter into contracts, mortgages, deeds of trust, bills of sale and conveyances, and sue or be sued thereon. § 32-101 (1864).

Contractual liability - Minor is liable only for the reasonable price of necessaries received as a result of a contractual relationship, for him/herself or his/her family, when he/she is not under the care of a parent or guardian able to provide for him/her or them. §§ 32-104, 28-1-103.

Idaho

REPOSSESSION REQUIREMENTS

Under Idaho's claim and delivery statutes, in order to obtain a court order for possession of personal property, the creditor must show under oath:

(1) That the creditor is the owner or entitled to possession of the property, and must give a particular description of it;

(2) That the property is wrongfully detained by the debtor, stating how the debtor came into possession of it;

(3) The actual value of the property and its location; and

(4) That the property has not been taken for tax, assessment, or fine, pursuant to a law or seized under an execution against the property of the creditor. § 8-302(1).

The creditor also must enter into a written undertaking, executed by 2 or more sufficient sureties, for a sum equal to double the value of the property, as determined by the court. § 8-303. Notice to the debtor of the date and time of the show cause hearing is required. The hearing cannot be sooner than 5 days from the issuance of the order. § 8-302(2). Unless requested by the different or holder of the property in which the time may be reduced to 48 hours. § 8-303(3)(c).

The creditor can obtain possession of the property before a hearing is held if: (a) the debtor gained possession of the property by larceny; (b) the property is perishable; (c) the property consists of negotiable instruments or credit cards. § 8-302(3). The debtor can regain possession of the property by filing with the court a written undertaking, executed by 2 or more sureties, for double the value of the property as stated by the creditor. § 8-306.

Regarding consumer credit transactions, see §§ 28-45-101 to 28-45-109.

STATUTE OF LIMITATIONS

A. Actions upon contracts in general: five years. § 5-216.

1. Contracts for sale of goods: four years. § 28-2-725.

2. Oral contracts: four years. § 5-217.

3. Actions on promissory notes - 5 years. § 5-216/Actions on open accounts - 4 years. § 5-222.

B. Enforcement of judgments: six years. § 5-215.

C. Actions for fraud or for property damage: three years. § 5-218.

D. Actions Under Idaho Consumer Protection Act: two years. § 48-619.

E. Actions for personal injury or professional malpractice: two years. § 5-219.

F. Actions for damages caused by defective products (strict liability in tort): two years. § 6-1403(3).

G. Actions under the Idaho Credit Code - Consumer Credit Sales and open-end consumer loans - 2 years, other consumer credit transactions - 1 year. § 28-45-201.

TRUTH-IN-LENDING REQUIREMENTS

Federal -

See the Idaho Credit Code (1983), which has superseded the Idaho/Uniform Consumer Credit Code (1971). The new code overrides federal preemption, § 28-49-105, but incorporates federal law on certain points as noted below.

The Idaho Code requires a creditor to make all disclosures to the borrower or buyer which are specifically mandated by the Federal Consumer Credit Protection Act. § 28-43-201. A creditor who fails to disclose the information to a consumer entitled to such information is liable to the consumer to the extent provided by the Federal Consumer Credit Protection Act. § 28-45-203. A creditor must a least once a year provide the debtor free of charge a statement listing the dates and amounts of payments made within the previous 12 months and any unpaid balance. A creditor who willfully fails to provide information which he/she is required to disclose is also guilty of a misdemeanor and upon conviction may be punished by a fine not to exceed $5,000 or imprisonment not to exceed one year, or both. § 28-45-402.

The Idaho Credit Code provides that "with respect to a loan or credit sale, the rate of finance charge shall be that which is agreed upon between the parties to the transaction." § 28-42-201. No maximum limit is set. In the absence of any written provision to the contrary, the interest rate is generally 12%. § 28-22-104.

Idaho

Selected special limitations.

a. Assignments of earnings: Creditor may not take an assignment of earnings of the debtor for payments or as security for payment. Debtor can authorize pay deductions on a revocable basis. § 28-43-304.

b. Authorizations to confess judgment: Such authorizations are void. § 28-43-305.

c. Balloon payments: With certain exceptions, the consumer has a right to refinance any payment more than twice the average amount of earlier payments. § 28-43-307.

d. Referral sales: The seller may not use rebates or discounts as a method of obtaining from the buyer the names of other prospective customers. § 28-43-308.

e. Property as security: Interests in land cannot be taken as security for loans of $1,000 or less, interests in property other than land cannot be taken for loans of $100 or less. § 28-43-301. § 28-43-309.

f. Attorney fees: A lender may not collect attorney fees on loans of $1,000 or less. Neither may a lender or credit seller collect attorney fees for an attorney who is a salaried employee. §§ 28-43-311, 312.

g. Deficiency judgments: In a consumer credit sale of goods or services for $1,000 or less, if the seller repossesses or voluntarily accepts surrender of undamaged goods sold or of undamaged property in which the seller was given a security interest, the consumer is not liable for the balance of the debt. § 28-45-103.

UNFAIR AND DECEPTIVE TRADE PRACTICES

IDAHO CODE § 48-601 (1977 & Supp.). Consumer Protection Act.

Prohibited Practices: 18 enumerated unfair methods of competition and unfair or deceptive acts or practices and a catchall prohibiting other practices which are false, misleading or deceptive. § 48-603.

Special Requirements: Respondent knows or should know of violation.

Idaho

Scope: Trade or commerce by definition means the advertising, sale or offer for sale of any goods or services including residential repair and goods repair and service.

Exclusions: Actions permitted by laws administered by state public utility commission or state or U.S. regulatory body; advertisements done by publisher, broadcasters, printers or retailers in good faith reliance on material supplied by others and without knowledge of deceptive or misleading character; actions regulated by state insurance code; actions complying with applicable FTC statutes or regulations. § 48-605.

Private Remedies: Must suffer ascertainable loss in money or property. Void contract for purchase or lease of goods or services; if suffered loss; actual damages or $1,000, which ever is greater; punitive damages in court's discretion; equitable relief "as deemed necessary" in repeated or flagrant violations; attorney's fees to prevailing plaintiff, to defendant in court's discretion if action spurious or to harass. Costs to plaintiff if prevailing; to prevailing defendant if suit spurious.

Limitations: Statute of limitations 2 years after cause accrues.

State Remedies: AG enforces; injunction if based on probable cause and in public interest and upon notice; restitution; revocation of state license for repeated violations; court makes additional orders "as may be necessary"; maximum $5,000 civil penalty or dissolution of corporation, in court's discretion for violation of injunction; substantive rulemaking. Recovery of costs, investigative expenses attorney's fees. §§ 48-604, 606, 607, 611, 612.

Precedential Value of FTC Interpretations: Given due consideration and great weight. § 48-604.

WARRANTIES

1. Warranties.

Unless conspicuously excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 28-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select

or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 28-2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Seller's use of expressions such as "as is", "with all faults", etc. will exclude implied warranties. Course of performance or dealing or usage of trade may also exclude or modify an implied warranty. Remedies for breach of warranty also can be limited. § 28-2-316.

2. Strict Liability in Tort (products).

a. Idaho recognizes strict liability in tort for property damage or personal injury caused by defective products. See, e.g., Shields v. Morton Chemical Co., 95 Idaho 674, 518 P.2d 857 (1974).

b. Such liability is limited to the "useful safe life" of the product (ordinarily ten years) and may be diminished by the "comparative responsibility" of the consumer for misusing, altering, or failing to inspect the product. §§ 6-1403 to 1405.

MISCELLANEOUS STATE STATUTORY PROVISIONS

Statutes of frauds.

1. Real property: A contract to sell real property, or to lease it for more than one year, must be in writing; but a contract fully or partially performed may be specifically enforced. § 9-508. See, e.g., Tew v. Manwaring, 94 Idaho 50, 480 P.2d 896 (1971).

2. Personal property: A contract to sell goods for a price of $500 or more must be evidenced by a writing, unless the goods are specifically manufactured for the consumer or payment has been made on the goods. § 28-2-201.

Idaho

Illinois

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - Credit Services Organization Act. 815 ILCS § 605/3. In construing this act consideration shall be given to the interpretations of the federal Fair Credit Reporting Act.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No debt collector while collecting or attempting to collect a debt shall engage in any of the following acts:

(1) The use of threats or violence against a debtor, his/her family or his/her property;

(2) The use of harassment tactics or abusive language toward a debtor, or any member of his/her family;

(3) Disclosure of the debtor's indebtedness to persons without a legitimate business need;

(4) Failure of the debt collector to properly disclose the name of his business;

(5) The use of any misrepresentations or deceptive trade practices against the debtor; and

(6) The collection of any unauthorized interest, fee, or other charge unless expressly authorized by the agreement. 225 ILCS § 425/9.

A debt collector who engages in any of the prohibited acts may have his/her license suspended or revoked. If the debt collector's actions also constitute either a deceptive collection practice or disorderly conduct, the debt collector may be punished by a fine not to exceed $1,000 per violation per complaint. If a collection agency is the violator, the fine may be up to $1,000 per licensee per complaint. 225 ILCS § 425/9.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. In order to cancel the sale,

the buyer must mail or deliver a notice of cancellation to the seller's place of business. The buyer also may send a telegram to the seller. 8/5 ILCS § 505/2B.

The buyer must take reasonable care of the goods and tender the goods at his or her residence. However, the buyer takes title to the goods if the seller fails to pick them up within 20 days of the date of the buyer's notice of cancellation. If the buyer fails to make the goods available to the seller or if he/she fails to return the goods pursuant to an agreement with the seller, the buyer remains liable for the performance of all obligations under the contract. The seller must return any funds received or goods traded in to the buyer within 10 business days following receipt of the notice of cancellation. 815 ILCS § 505/2B.

A previously negotiated sale at a business establishment, a sale in which the buyer has a right of recision under the Consumer Protection Act (15 U.S.C. § 1635), an emergency sale with a buyer's handwritten statement expressly waiving the right to cancel the sale, a sale conducted entirely by mail or telephone, a sale in which the buyer initiated the contact and requested the seller to visit his/her home for repair work, and a sale under $25 are not included in the protections provided by this statute. 815 ILCS § 505/2B.

MINOR'S CONTRACT

Age of majority to contract - 18. 755 ILCS § 5111-1.

Disabilities of minority are removed for contracts for insurance at age 15. 215 ILCS 5/242. Contractual Liability - Minor is liable only for necessaries received as a result of a contractual relationship. 810 ILCS 5/1-105. Veterans and their spouses are empowered to contract for loans 330 ILCS 95/1.

REPOSSESSION REQUIREMENTS: Replevin actions.

The creditor must file a verified complaint which states:

(1) A description of the property;

(2) That the creditor is the owner of the property or is entitled to its possession;

(3) That the property is wrongfully detained by the debtor; and

(4) That the property has not been taken for any tax, assessment or fine pursuant to any law, or seized under any

execution or attachment against the property of the creditor. 735-ILCS 5/19-104.

The creditor also must execute a bond with sufficient surety for double the value of the property. 735 ILCS 5/19-112 Notice to the debtor must be given at least 5 days before a hearing in court to contest the entry of an order for replevin. 735 ILCS 5/19-105. Notice to the debtor is not required if the plaintiff establishes and the court finds as a matter of record and supported by the evidence the summary seizure of the property is justified by reason of necessity because:

(a) The property is likely to be destroyed or concealed by the debtor;

(b) The debtor is likely to leave the state (with the property);

(c) The property is perishable or is subject to an imminent sale or transfer; or

(d) The debtor obtained possession of the property by theft. (735 ILCS 5/19-106).

(e) Plaintiff needs protection from immediate impending harm which will result from the imminent sale, transfer or assignment of the disputed property to the extent such sale, transfer or assignment is fraudulent or in derogation of the plaintiff's rights in the property.

The debtor may regain possession of the property by executing a bond and security, approved by the sheriff or other officer, in an amount double the value of the property. 735 ILCS 5/19-116.

STATUTE OF LIMITATIONS

Contract under seal - 10 years. 735 ILCS 5/13-206.

Simple written contract - 10 years. 735 ILCS 5/13-206.

Contract for sale of goods - 4 years. 810 ILCS 5/2-725.

Oral contracts - 5 years. 735 ILCS 5/13-205.

Judgments - Courts of record - 20 years. 735 ILCS 5/13-218.

Personal injury - 2 years. 735 ILCS 5/13-202.

Damage to property - 5 years. See 735 ILCS 5/13-205.

Illinois

Vendors lien or lien on mortgage - 20 years. 735 ILCS 5/13-116.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Illinois Consumer Installment Loan Act requires a creditor to disclose to the buyer, prior to making a loan, his/her finance charges in dollars and cents and as an annual percentage rate. Creditor must also disclose any other deduction from the loan or payment made by the debtor in connection with obtaining the loan. 205 ILCS 670/16.

For disclosure requirements under the Illinois Retail Installment Sales Act and the Illinois Motor Vehicle Retail Installment Sales Act, see 815 ILCS 405/1 and 815 ILCS 375/5.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Consumer Fraud and Deceptive Business Practices Act. 815 Illinois Compiled Statutes, Section 505/1.

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices including concealment or omission of any material fact with intent to cause reliance, including 15 enumerated prohibitions. 8/5 ILCS 505/2A-2.

Special Requirements: None specified.

Scope: Trade or commerce means advertising, sale, or offer for sale or distribution of any real, personal or tangible or intangible property or services, and any other thing of value, wherever situated and shall include any trade or commerce directly or indirectly affecting the people of Illinois.

Exclusions: Actions authorized under state or U.S. laws; those governed by trademark laws; advertisements done by disinterested publisher, radio and television media, with no knowledge of falsity or if did not prepare the ad; unknowing deceptive communication by licensed realtor.

Private Remedies: Actual damages or other proper relief in court's discretion; court "may" award attorney's fees and costs to prevailing party.

Limitations: AG action in public interest; statute of limitations is 3 years from accrual, action by AG tolls private action for pendency of suit and one year after.

Illinois

State Remedies: AG enforces and has rulemaking power; court has discretion to exercise all powers necessary including injunction, revoke license, receiver, restitution; maximum $50,000 civil penalty; costs.

Precedential Value of FTC Interpretations: Consideration given. 815 § 505/2.

Prohibited Practices: 11 enumerated deceptive trade practices plus a catchall prohibiting any conduct likely to cause confusion.

Special Requirements: None specified.

Scope: In course of his/her business, vocation, or occupation.

Exclusions: Conduct complying with state or federal statute; publishers, broadcasters, printers, or other persons who disseminate information without knowledge of its deceptive character.

Private Remedies: Injunctive relief; costs or attorney's fees if defendant willfully violated act. 815 § 505/10a.

Limitations: None specified.

State Remedies: None specified.

Precedential Value of FTC Interpretations: Construed to promote uniformity of states enacting.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. 810 § 5/2-315.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. 810 § 5/2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Remedies for breach of warranty also can be limited. 810 § 5/2-316.

Illinois

The following summary was reviewed and updated June 1993 by CPT J. Thomas Parker. IMA, Vanderburgh County Prosecutor's Office, 1 NW Martin Luther King, Jr. Boulevard, Rm. 108, Evansville, Indiana 47708, Telephone Number: 812-426-5022, FAX: 812-426-5180.

Indiana

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision. But see § 25-11-1-1 to -12.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision. But see § 25-11-1-1 to -12.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - Indiana law with regard to home solicitation sales was substantially recodified in 1992. The principal substantive provision 24-4.5-2-502 states as follows:

The requirement of 16 CFR 429 must be met in regard to the following provisions concerning home solicitation sales:

(1) Period within which cancellation may be made by the buyer.
(2) Notice of cancellation.
(3) Form of cancellation.
(4) Form of agreement or offer to purchase.
(5) Statement of buyer's rights.
(6) Restoration of down payment.
(7) Retention of cancellation fee.
(8) Duty of buyer.
(9) Any other relevant requirement in 16 CFR 429.

MINOR'S CONTRACT

Age of majority to contract - 18. § 34-1-2-5.5. However, a minor of 16 or more years may contract for personal life, accident, and sickness insurance or annuities. § 27-1-12-15(a). Also, any married person under the age of eighteen is competent to give consent to medical or hospital care or treatment including surgery.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 26-1-1-103. A minor is not bound by contracts into which the minor enters, but a minor's contracts are only voidable rather than void.

Indiana

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit showing (§ 34-1-9.1-2):

(1) That the creditor is the owner of the property or entitled to the possession of it;

(2) That the property has not been taken for tax assessment or fine, pursuant to statute, or seized under an execution or attachment against the property of the creditor;

(3) That the property has been wrongfully taken or detained;

(4) The value of the property and the county in which the property is located; and

(5) A description of the property.

The creditor also must execute a bond in such sum (not less than the value of the property) and with such surety as may be approved by the court. § 34-1-9.1-6. Notice to the debtor concerning the date, time, and place of the show cause hearing must be promptly given. The hearing cannot be held sooner than 5 days, excluding Sundays and holidays, from the service of the order upon the debtor. § 34-1-9.1-3.

The creditor can gain possession of the property without prior notice or a hearing being afforded the debtor if (§ 34-1-9.1-4):

(1) The debtor acquired the property by theft or criminal conversion;

(2) The property consists of negotiable instruments or credit cards; or

(3) The property is perishable or is in danger of destruction or concealment, removal from the state, or sale to an innocent purchaser.

The debtor can require the return of the property by executing a bond in an amount equal to the value of the property and with such surety as may be approved by the court. § 34-1-9.1-8.

STATUTE OF LIMITATIONS

Written contracts and promissory notes for the payment of money: If executed before 1 September 1982 - 10 years. § 34-1-2-2(5). If executed after 31 August 1982 - 6 years. § 34-1-2-2(5).

Indiana

Written contracts other than those for the payment of money: If entered into before 1 September 1982 - 20 years. § 34-1-2-2(6). If entered into on or after 1 September 1982 - 10 years. § 34-1-2-2(6). Includes promissory notes.

Contracts for the sale of goods - 4 years. § 26-1-2-725. The parties may reduce the period to not less than one year in their original agreement. They may not extend it. 15 years for realty. § 34-1-2-3.

Oral contracts - 6 years. § 34-1-2-1. Includes open accounts.

Employment agreements not in writing - 2 years. § 34-1-2-1.5.

Judgments - Courts of record - 20 years. § 34-1- 2-14.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - With respect to consumer credit sales or loans, the Indiana Uniform Consumer Credit Code (IUCCC) requires a creditor to disclose to a buyer or debtor to whom credit is extended, the information required by the Federal Consumer Credit Protection Act. §§ 24-4.5-2- 301, 24-4.5-3-301. Disclosure is required for sales, loans and revolving credit transactions, IUCCC Paragraphs 5085, 5086, 5205, 5206, 5211, 5090 and 5209.

The IUCCC does not apply to (§ 24-4.5-1-202):

(1) Extensions of credit to the government;

(2) Sale of specified insurance by insurers (except under IUCCC Chapter 4);

(3) Transactions under public or municipal utilities, or common carrier tariffs, if Indiana or the United States regulates the charges for service;

(4) Rates and charges of licensed pawnbrokers established in accord with statute or ordinance;

(5) Transactions primarily for business, commercial or agricultural purposes;

(6) Sales of goods, services, or interests in land purchased for purposes other than personal, family, or household purposes; and

(7) Loans in which the debt is incurred for purposes other than personal, family, or household purposes.

(8) An installment agreement for the purchase of home fuels in which a finance charge is not imposed.

(9) Loans made, insured or guaranteed under a program authorized by Title IV of the Higher Education Act of 1965 (20 USC 1070).

A creditor who fails to disclose information to a person entitled to the information is liable to that person in an amount equal to the sum of (A) twice the credit service charge (but not less than $100 nor more than $1,000) and (B) in a successful action to enforce liability under (A), the costs of the action together with the reasonable attorney's fees. § 24-4.5-5-203(1). The creditor is not liable to a debtor if, within 60 days after discovery of an error and prior to written notice of the error or institution of the action, the creditor makes the proper adjustments and notifies the debtor. § 24-4.5-5-203(2). A creditor who willfully fails to provide information which is legally subject to mandatory disclosure is guilty of a Class A misdemeanor and, upon conviction, shall be punished by imprisonment not to exceed 1 year, and may be fined not more than $5,000. §§ 24-4.5-5-302, 35-50-3-2.

UNFAIR AND DECEPTIVE TRADE PRACTICES

IND. CODE ANN. § 24-5-0.5-1 (Burns 1991 & Supp. 1992).

Prohibited Practices: 14 enumerated deceptive acts. § 24-5-0.5-3.

Scope: Consumer transaction defined as sale, lease, assignment, award by chance, or other disposition of personal or real property, service or intangible to individual for personal, family purpose, or a solicitation to supply any of these things. § 24-5-0.5- 2. The term excludes securities and insurance policies issued by corporations authorized to transact insurance business under Indiana law. No private actions for real property transactions except for purchases of time shares and camping club memberships. § 24-5-0.5-4.

Exclusions: Supplier in good faith reliance on representation made by another if discloses source to consumer; acts permitted by federal or state law.

Private Remedies: Actual damages for non-real property consumer transaction; attorney's fees "may" be awarded prevailing party; class actions by damaged consumers who "may" be awarded

non-contingent attorney's fees if prevailing party in non-real property consumer transaction; court may void contracts; security for costs may be imposed. § 24-5-0.5-4.

Limitations: No action may be brought unless: (1) the deceptive act is incurable, or (2) is an uncured deceptive act, in which case notice to supplier within 6 months of discovery, 1 year of act, or 30 days of warranty; statute of limitations 2 years after act; except for counterclaims on contract brought by supplier or assignee with or without notice.

State Remedies: AG enforces; injunction; restitution; court may void clauses or contract; $15,000 per violation of injunction with costs to the state; maximum $500 per knowing violation; maximum $500 per incurable violation done with intent to defraud. § 24-5-0.5-8.

In addition the AG may take action with respect to consumer real property transactions when there are patterns or incurable deception. § 24-5-0.5-4.

Precedential Value of FTC Interpretations: None specified.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. Other implied warranties may arise from course of dealing or usage of trade. § 26-1-2-314.

Where the seller at the time of contracting has reason to know both that the goods are required for a particular purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 26-1-2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. All implied warranties may be excluded by use of expressions like "as is", "with all faults', etc. Remedies for breach of warranty also can be limited. § 26-1-2-316.

Indiana

MISCELLANEOUS

Health Spa Services. § 24-5-7-1 to -18.

Every contract must be in writing and a copy given to the buyer. The contract must also contain a clause, in bold face type, providing for cancellations before midnight of the third full business day after the contract is signed. A buyer may cancel by written notice delivered in person or mailed by certified or registered mail.

The contract is also cancelled if the buyer dies, becomes totally disabled, or the spa is moved more than 5 miles, unless a similar health spa is operated less than five miles away from closed facility and the new facility accepts the contract.

The Act provides for a private remedy. See § 24- 5-7-17. Also, no contract may require payments over a period in excess of 36 months. The term of the contract may not be measured by the life of the buyer and the term may not exceed 3 years.

The following summary was reviewed and updated by 1LT David James Hanson, 103d COSCOM, Des Moines, P.O. Box 126, Fayette, Iowa 52142, Telephone Number: (319) 425-3397.

Iowa

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - A debt collector is prohibited from using any of the following practices to collect or attempt to collect a debt (Code of Iowa § 537.7103) (1991):

(1) The use of illegal threats or coercion;

(2) The use of oppression, harassment, or abusive language and conduct;

(3) The dissemination of information relating to a debt or debtor to someone other than a person who might reasonably be expected to be liable for the debt;

(4) The use of any fraudulent, deceptive or misleading representations or means to collect a debt or to obtain information concerning a debtor;

(5) Acknowledgements of obligation from a debtor which expand the debtor's obligation beyond that set in the original contract, or attempts to impose upon the debtor the creditor's costs of collection; and

(6) The distribution, selling or preparing of a written communication that violates United States postal laws and regulations.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. The sales agreement must

contain a conspicuous notice of this cancellation right, upon a copy of the contract provided to the buyer. Code of Iowa §§ 82.2, 82.3 (1991).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the merchandise if the seller fails to retrieve it within 10 days of the date of the notice of cancellation. § 82.3. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. The seller also must cancel and return any negotiable instruments executed by the buyer in connection with the sale. § 82.4(5).

The following transactions are not included in the protections provided by this statute (§ 82.1):

(a) A sale made pursuant to prior negotiations at the seller's place of business;

(b) A sale with a purchase price of less than $25;

(c) A sale in which the buyer has a right of rescission under the Consumer Credit Protection Act, 15 U.S.C. § 1635;

(d) A sale conducted entirely by mail or telephone;

(e) A buyer-initiated emergency sale with a statement signed by the buyer waiving the right of cancellation;

(f) A buyer-initiated transaction in which the buyer requested the seller to visit his/her home for the repair or maintenance of his/her personal property; and

(g) A sale of insurance, a sale of securities or commodities by a registered broker, or a sale or rental of real property.

MINOR'S CONTRACT

Age of majority to contract - 18 or when married. § 599.1.

Contractual liability - Minor is bound by contracts for necessaries and by his/her other contracts, unless he/she disaffirms them within a reasonable time after he/she attains majority and restores all money and property received and within his/her control at anytime after attaining his majority. §§ 599.2, 554.1103.

Disability removed for making loans. (veterans ONLY) § 599.5.

Iowa

REPOSSESSION REQUIREMENTS

The creditor must file a verified petition stating (§ 643.1)(1991):

(1) A particular description of the property;

(2) The actual value of the property;

(3) The facts constituting the creditor's right to possession of the property and the extent of this interest;

(4) That the property was not taken on an order or judgment of a court, nor under an execution or attachment against the creditor;

(5) The facts constituting the cause of detention; and

(6) The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.

The creditor also must execute a bond, with sureties to be approved by the court, in an amount equal to twice the value of the property to be taken. § 643.7. The court prescribes the pre-seizure notice and the opportunity for a hearing which will be afforded the debtor. § 643.5. The debtor may recover the property by executing a bond to the creditor, with sureties approved by the clerk or other officer, and by providing assurances that he/she will appear in the action and abide by the decision of the court. § 643.12.

STATUTE OF LIMITATIONS

Contract under seal - no special provision.

Simple written contract - 10 years. § 614.1(5)(1991). Same for promissory note.

Contract for sale of goods - 10 years, if written. § 614.1(5). 5 years, if unwritten. § 614.1(4). See § 554.2725 which permits reduction by agreement to one year. The four year provision generally contained 2-275 of the UCC was not proposed.

Oral contracts - 5 years. § 614.1(4). Same for open accounts.

Judgments - Courts of record - 20 years. § 614.1(6).

Iowa

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Iowa Consumer Credit Code (ICCC) requires a creditor to disclose to a consumer the information required by the Federal Truth-in-Lending Act. Iowa Code § 537.3201 (1991). The Iowa truth-in-lending disclosure requirements are not applicable to the following (§ 537.1202):

(1) Extensions of credit to the government;

(2) Sale of specified insurance by insurers (except under ICCC Art. 4);

(3) Transactions under public utility or common carrier tariffs, if Iowa or the United States regulates the charges for services;

(4) Transactions in securities or commodities with registered brokers;

(5) Licensed pawnbrokers.

A creditor who fails to disclose information to a person entitled to the information is liable to that person in an amount equal to the sum of (a) twice the finance charge (but not less than $100 nor more than $1,000), and (b) in a successful action to enforce the liability under paragraph (a), the costs of the action together with reasonable attorney's fees. § 537.5203(1). The creditor is not liable in an action brought by a debtor if, within 15 days after discovery of an error and prior to the receipt of written notice of the error or the institution of an action, the creditor makes the proper adjustments and notifies the debtor. A creditor may not be held liable if creditor can show violation unintentional and resulting from bona fide error notwithstanding the maintenance of reasonable preventive procedures. § 537.5203(2). A creditor who willfully fails to provide required information is guilty of a serious misdemeanor and, upon conviction, shall be punished by a fine not to exceed $5,000, or by imprisonment not to exceed 1 year, or both. §§ 537.5302, 903.1. Criminal liability under this section is in lieu of, and not in addition to, the creditor's criminal liability under the Federal Truth-in-Lending Act. § 537.5302(4).

Iowa

UNFAIR AND DECEPTIVE TRADE PRACTICES

IOWA CODE § 714.16 (1991).

Prohibited Practices: Deceptive acts or concealment, suppression or omission of material fact with intent to cause reliance including 10 enumerated practices.

Special Requirements: Intent to cause reliance for deceptive act; repair or replacement made to new merchandise before sale not exceeding $300 or 10 percent of cost if seller posts notice and purchaser does not request disclosure of material fact.

Scope: Sale, or offer for sale, or advertisement of any goods, commodities, intangibles, stocks, bonds, securities, realty or services.

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge of falsity; advertisements that comply with FTC rules, regulations, and statutes.

Private Remedies: None specified.

Limitations: None specified.

State Remedies: AG enforces; injunction; dissolve corporation or revoke state licenses; any other relief required; restitution; receiver for substantial and willful violation; costs; rulemaking. Civil penalty. §714.16 (1991).

Precedential Value of FTC Interpretations: None specified.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. Iowa Code § 554.2314.

Where the seller at the time of contracting has reason to know both that the goods are required for a particular purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 554.2315.

Iowa

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 554.2316. All implied warranties are excluded by the use of expressions like "as is", "with all faults", etc. Course of dealings or performance or usage of trade can also exclude or modify implied warranties. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 USC § 2308.

New Motor Vehicle Warranties (Lemon Law)

Iowa Code § 322E-1 (1991) requires conformity to express warranties. Applies to defects occurring beyond warranty period as long as purchaser reports problem during the term of the warranty or within one year of delivery whichever is earlier. Purchaser entitled to refund under limited circumstances. See § 322E.1(3). In addition to other remedies, the purchaser may recover reasonable attorney fees. § 322E.1(8).

MISCELLANEOUS

Consumer Rental Purchase Agreements. Iowa Code § 537.3601 to 537.3624.

A consumer rental purchase agreement means an agreement for an initial period of four months or less that is automatically renewable and permits the lessee to become the owner. The leased item must be for family, personal, or household purposes and it cannot exceed $25,000. The lessor must be "regularly engaged" in a rental business, and the lessee must be a natural person. § 537.3604(8).

The agreement must disclose: total schedule of payments; any down payment; description of goods; and the fact that at any time after the first periodic payment, the lessee may acquire ownership by tendering the difference between one-half of all payments actually made and the cash price of the leased property. See § 537.3608(2).

The agreement must contain, immediately above or adjacent to the place for signatures, a clear, conspicuous notice that the lessor: should read the entire agreement, make sure there are no blank spaces, has the right to an exact copy, and has the right to exercise an early buy-out. § 537.3606(6).

Private remedy may be sought for actual damages with a minimum recovery of $300 or 25 percent of the total cost to acquire ownership, whichever is greater. Attorneys fees and court costs may be awarded if the lessee is successful. § 537.3621.

The following summary was reviewed and updated by 1LT Darren E. Root, 95th JAG Detachment, Madison, 3099 East Washington Avenue, Madison, Wisconsin 53783, Telephone Number: 608-249-2111.

Kansas

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - The Kansas Fair Credit Reporting Act ($ 50-701), is substantially the same as the Federal Act. The Kansas Fair Credit Reporting Act differs from the Federal Act in its provisions for criminal liability for violations of the Act. The Kansas Act provides that any person who knowingly and willfully obtains information from a consumer reporting agency under false pretenses and any officer or employee of a consumer reporting agency who knowingly and willfully provides information to a person not authorized to receive the information shall be punished for a class A misdemeanor upon conviction. $$ 50-718, 50-719. Any person violating a provision of the Act that does not have a designated penalty shall be punished for a class C misdemeanor upon conviction. $ 50-720.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision. Sources for possible consumer protection are Consumer Protection Act, 50-623; and Consumer Protection Code, 16a-1-101.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day (any calendar day except Sunday or legal holiday as defined by K.S.A. 60-206 and amendments.) 50-640(4) (Supp. 1991). After the day on which the consumer signs an agreement or offer to purchase. $ 50-640(a) (Supp. 1991). Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. The sales agreement must contain a conspicuous notice of this cancellation right. $ 50-640(b)(1), (2) (Supp. 1991). It is an unfair and deceptive act or practice if the seller fails to inform the consumer orally at the time of the transaction of the right to cancel. 50-640(5) (Supp. 1991).

The buyer must tender to the seller the goods in substantially as good condition as when received at his or her residence to the

seller. However, the buyer takes title to the merchandise if the seller fails to pick such merchandise up within 20 days of the date of the notice of cancellation. But, if the buyer refuses to make the property available, or if the buyer does not return the property per an agreement the buyer remains liable for performance of the contract. The seller must return any funds received or goods traded in to the buyer within 10 business days after receipt of a valid cancellation notice. The seller also must cancel and return any negotiable instruments executed by the buyer in connection with the sale. And take necessary action to promptly terminate any security interest resulting from the transaction. § 50-640(b)(2) (Supp. 1991).

The following transactions are not included in the protections provided by this statute as "door-to-door sales" (§ 50-640(c)(1) (Supp. 1991):

(a) A sale made pursuant to prior negotiations during a visit to a retail establishment at a fixed permanent location where property is exhibited or goods are offered for sale on a continuing basis

(b) A sale in which the buyer has a right of rescission under the Consumer Credit Protection Act (15 U.S.C. § 1635);

(c) A buyer-initiated sale to meet a bona fide immediate personal emergency of the consumer with a statement in the buyer's handwriting, signed and dated by the buyer describing the situation requiring immediate remedy and expressly acknowledging and waiving the right of cancellation;

(d) A sale conducted entirely by mail or telephone;

(e) A consumer-initiated transaction in which the buyer requested the seller to visit his/her home for the repair or maintenance of his/her real or personal property. This exclusion does not include if in the course of the visit the supplier sells the consumer additional services or property other than what was necessary in making the repairs or maintenance; and

(f) A sale of insurance, or a sale of securities or commodities by a registered broker, and a sale or rental of real property.

MINOR'S CONTRACT

Age of majority to contract - 18 if unmarried, 16 if married or has been married. § 38-101.

Kansas

Contractual liability - Minors are absolutely liable only on contracts for necessaries. Minors are liable on other contracts unless disaffirmed within a reasonable time after the minor reaches majority and restores to the other party all money or property received and remaining in the minor's control. However, a minor cannot disaffirm where, through his/her own misrepresentations as to his/her majority or from engaging in business as an adult, the other party has good reason to believe minor is capable of contracting. §§ 38-102, 38-103, 84-1-103.

REPLEVIN: CLAIM FOR POSSESSION OF PROPERTY

In an action to recover personal property the creditor must make an affidavit or file a verified petition stating:

(1) That he/she is the owner of the property, sufficiently describing it, or that he/she is lawfully entitled to its possession;

(2) That the property is wrongfully detained by the debtor or if held due to legal process by an officer, that demand for the property has been made and refused, and

(3) The estimated value of the property. § 60-1005(a).

In lieu of the issuance of an order for delivery of the property the creditor can apply to the court for the issuance of a restraining order with necessary restraints and conditions to protect the property during the action and protect court jurisdiction. There is no bond requirement. 60-1005(b).

The creditor also must make a bond in double the value of the property as stated in the affidavit or verified petition, with one or more sufficient sureties. The debtor may challenge the sufficiency of the bond. The debtor must be notified that the creditor has applied for an order of replevin and that a hearing on the validity of the creditor's claim will be held. § 60-1005(b).

Notice to the debtor and an opportunity for a hearing are not required if:

(1) Possession of the property by the creditor is directly necessary to secure an important governmental or public interest; and

(2) There is an imminent danger that the debtor will destroy or conceal the property. § 60-1005(b).

Within 24 hours after the copy of the replevin order has been served on the debtor, he/she can cause the property to be returned to him/her by executing a bond approved by the sheriff, in double the value of the property as stated in the order, with one or more sufficient sureties. 60-1005 (f). The return day of the order of delivery is 20 days after it is issued. 60-1005 (e)(3).

STATUTE OF LIMITATIONS

Contract under seal - 5 years. §§ 60-511, 16-106. (The use of seals is abolished and their addition does not affect the contract's character.)

Simple written contract - 5 years. § 60-511.

Negotiable Instruments (Note payable upon demand, Note payable at a definite time, Unaccepted draft, Certified Check, Certificate of deposit, and Accepted draft) - See 84-3-118 (Supp. 1991).

Contract for sale of goods after the cause of action accrues - 4 years. By the original agreement the parties may reduce the time to not less than 1 year and may not extend it. § 84-2-725.

Oral contracts - 3 years. § 60-512. Same for open accounts.

Judgments - Courts of record - A judgment may be continuously kept alive by execution every 5 years. If not the judgement becomes dormant. If dormant for 2 years the judgement of record will be released by the clerk of the court. § 60-2403 (Supp. 1991).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Kansas Consumer Credit Code requires a creditor to disclose to the consumer the information required by the federal Truth-in-Lending Act and in all respects to comply with the Act. § 16a-3-206. The Kansas truth-in-lending disclosure requirements are not applicable to the following:

(1) Extensions of credit to the government or government agencies or instrumentalities;

(2) The sale of insurance by insurers (except under UCCC, Art. 4);

(3) Transactions under public utility or common carrier tariffs, if Kansas or the United States regulates the charges for services;

(4) Pawn broker transactions;

(5) Transactions covered by the Kansas Insurance Premium Finance Company Act. §§ 16a-1-202, 16a-1-301.

(6) By definition the UCCC applies only to "consumer credit transactions." 16a-1-301.

A creditor who fails to disclose information to a person entitled to the information is liable to that person in an amount equal to the sum of (a) twice the finance charge (but not less than $100 nor more than $1,000), and (b) in a successful action to enforce the liability under (a), the costs of the action together with attorney's fees. § 16a-5-203(1). The creditor is not liable in an action brought against him/her if within 15 days after discovery of an error and prior to the receipt of written notice of the error or institution of an action, the creditor makes the proper adjustments and notifies the debtor. § 16a-5-203(2). A creditor is not liable if he/she can show by the preponderance of the evidence that the violation was unintentional and resulted from a bona fide error notwithstanding the existence of reasonable preventive procedures. § 16a-5-203(3). Any action under this section must be brought within one year after the date of the violation. 16a-5-203 (5). A creditor who willfully and knowingly fails to provide information which he/she is required to disclose is guilty of a Class A misdemeanor and upon conviction shall be punished by a fine not to exceed $2,500, or by imprisonment not to exceed one year, or both. §§ 16a-5-302, 21-4502, 21-4503. Liability of a creditor under the civil or criminal sections of the UCCC is in lieu of and not in addition to the liability under the Federal Truth-in-Lending Act. § 16a-5-302(2), 16a-5-203(7).

UNFAIR AND DECEPTIVE TRADE PRACTICES

KAN. STAT. ANN. § 50-623 (1983).

Prohibited Practices: Any deceptive acts or practices or omission as to a material fact including, but not limited to, 11 enumerated prohibitions; or unconscionable practice including, but not limited to, 7 enumerated prohibitions. 50-626 (Supp. 1991), 50-627 (Supp. 1991).

Special Requirements: Deceptive acts and practices are violations whether or not any consumer has in fact been misled. What is required is that the defendant had knowledge or reason to know of

the deceptive character of the representations, or willfulness on the part of the defendant. 50-626 (Supp. 1991). Unconscionable acts only require whether under the circumstances the supplier knew or had reason to know the unconscionable nature of his/her actions. 50-627 (Supp. 1991).

Scope: Consumer transaction is a sale, lease, or assignment, or other disposition for value of property or services within Kansas to a consumer (an individual or sole proprietor) for personal, family, household, business or agricultural purposes. 50-624(b),(c) (Supp. 1991).

Exclusions: Publisher, broadcaster, printer or other person who disseminates information or reproduction of printed or pictorial matter without actual knowledge of violation. A supplier alleged to have violated the statute has the burden to show the applicability of this section. 50-635 (Supp. 1991).

Private Remedies: Declaratory judgment; injunction; actual damages or statutory penalties of up to $5000, whichever is greater; class actions for declaratory judgment or injunction and appropriate ancillary relief, except damages, if consumer seeks or entitled to actual damages or adequate remedy at law; reasonable attorney's fees to prevailing party, to supplier if suit groundless. 50-634 Supp., 50-636 (Supp. 1991).

Limitations: None specified.

State Remedies: AG shall enforce this Act throughout the state and cooperate with state and local officials. 50-628 (Supp. 1991). AG has procedural rulemaking authority. 50-630. AG may bring action for declaratory judgement; injunction; actual damages on behalf of the consumer; consent judgments for discontinuance of acts or practices declared a violation including restitutionary relief and expenses; court may make other orders "necessary" to prevent violating practices; compensate the consumer or carry out the transaction within the consumer's reasonable expectations; revoke licenses; issue temporary restraining orders or enjoin engaging in business; award reasonable expenses and investigation fees, civil penalties and costs; grant appropriate relief; maximum $5,000 per violation; maximum $10,000 per willful violation of injunction or other penalties court may deem proper. 50-632 (Supp. 1991), 50-636 (Supp. 1991). Additionally, county attorney or district attorney may investigate, institute and commence actions in like manner as provided for the AG. 50-633.

Precedential Value of FTC Interpretations: None specified.

Kansas

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 84-2-314.

Where the seller at the time of contracting has reason to know both that the goods are required for a particular purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 84-2-315.

The warranty of merchantability, can be limited or excluded in writing. The language must mention merchantability and be conspicuous. To exclude or modify the implied warranty of fitness the exclusion must be in writing and conspicuous. Unless circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults", etc. Course of dealing or performance or usage of trade can also modify or exclude warranties. Remedies for breach of warranty also can be limited. § 84-2-316.

MISCELLANEOUS

Receipt of Unsolicited Property. § 50-617 to 50-618.

When a person receives goods or services not ordered or requested by such person, the receipt of such unsolicited goods or services is deemed an unconditional gift. The recipient may dispose of the same in any manner the recipient sees fit. This is a complete defense to any action for return of goods or payment for services. 50-617 (Supp. 1991).

When a person receives a credit card which is not requested or solicited, and has neither signed nor used such card, the person to whom the card is issued is not liable for any use or misuse if the card is lost or stolen. A reissuance or renewal of a credit card is excluded from this section.

Kansas

The following summary was reviewed and updated on June 29, 1993 by CPT Gerald E. Wuetcher, HHC, 100th Division (Training), 3600 Century Division Way, Louisville, Kentucky 40205-5000; Public Service Commission of Kentucky, 730 Schenkel Lane, Frankfort, Kentucky 40601, Telephone Number: 502-564-3940, FAX: 502-564-7279.

Kentucky

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No consumer reporting agency may maintain any information relating to a criminal charge in a Kentucky court which has not resulted in a conviction. KRS 367.310. Violators are subject to $200 fine per offense. KRS 367.990.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Kentucky Consumer Protection Act, KRS 367. 170, prohibits "unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce." The Fair Debt Collection Practices Act serves as a guideline for determining what is an unfair, false, misleading, or deceptive practice. Ky. Att'y Gen. Op. 83-121.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - KRS 367.410 - .450.

The buyer has the right to cancel a home solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase. KRS 367.420(1). Notice of cancellation is effective when delivered to the address stated in agreement or when deposited in a mailbox properly addressed and postage prepaid. KRS 367.420(2) and (3). The sales agreement must contain a conspicuous notice of this cancellation right. KRS 367.430(2). Language of notice is set forth in statute. KRS 367.430(2)(b). Until the buyer is notified of his/her cancellation rights, he/she may cancel the agreement by notifying the seller in any manner and by any means of his/her intention to cancel. KRS 367.430(3).

The buyer cannot cancel the home solicitation sale if the buyer requested the seller to provide goods or services because of an emergency, and (a) the seller in good faith makes a substantial beginning of performance of the contract before the buyer gives

notice of cancellation, and (b) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer. KRS 367.420(5).

The buyer has a duty to take reasonable care of the goods in his/her possession before cancellation or revocation and for a reasonable time after cancellation. KRS 367.450(2). Buyer must tender the goods to the seller upon demand, but is not obligated to tender at any place other than his/her residence. KRS 367.450(1). If the seller fails to demand possession of goods with a reasonable time after cancellation or revocation, the buyer takes title to the merchandise the goods become the property of buyer without obligation to pay for them. KRS 367.450(1). Forty (40) days is presumed to be a reasonable time. KRS 367.450(1). Within 10 days after cancellation of the sale, the seller must return any payments made by buyer and any note or evidence of indebtedness. KRS 367.440(1). If down payment includes goods traded in, the seller must return such goods to the buyer in substantially as good condition as when received. KRS 367.440(2). Until seller makes such return, buyer may retain possession of goods. KRS 367,440(3).

Sales under $25 and insurance sales are not covered. KRS 367.450(4). Sales previously negotiated at a business establishment are not home solicitation sales and are not covered. KRS 367.410. Emergency orders and sales not returnable in good condition are not included in the protections provided by this statute. KRS 367.420(5).

Provisions of the statute cannot be waived. KRS 367.460.

MINOR'S CONTRACT

Age of majority to contract - 18. KRS 2.015.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. A minor of 15 years old can contract for insurance and be bound as a person of legal age. KRS 304.14-070.

Neither borrower nor his/her spouse may assert the defense of infancy to void a contract of loan or credit which is guarantee by the federal government under the authority of a federal law enacted for the benefit of veterans. KRS 384.090.

REPOSSESSION REQUIREMENTS

Repossession by a secured creditor holding valid security interest in collateral where debtor defaults.

Kentucky

(1) Self-help repossession. Unless otherwise agreed, a secured party has, upon default, the right to take possession of the collateral. Secured party may proceed without judicial process if repossession can be done without breach of the peace. KRS 355.9-503.

(2) Judicial action repossession. Upon commencing an action to recover possession of specific personal property, plaintiff may apply for a writ of possession by filing a written motion for the writ or an affidavit which includes: (a) A showing of the basis of plaintiff's claim and that plaintiff is entitled to possession of the property claimed (if the basis of the claim is a written instrument, a copy of the instrument must be attached); (b) A showing that the property is wrongfully detained by the debtor, a description of how the debtor came into possession of the property, and the reason(s) for the property's detention; (c) A description of the property and a statement of its value; (d) The location of the property; and (e) A statement that the property was not taken for a tax assessment or fine, pursuant to a statute, or seized under an order of execution. KRS 425.011.

The plaintiff must also execute a bond with one or more sufficient sureties, in an amount at least twice the value of the property, as determined by the judicial officer. KRS 425.111.

At least 7 and not more than 60 days before possession is sought, the plaintiff must make a formal demand for possession of the property and deliver a copy of the complaint, motion and summons to the debtor. This demand must notify the debtor that he/she has 7 days in which to request a hearing. KRS 425.012. The debtor can prevent the taking of the property or regain possession of the property by executing a bond with one or more sufficient sureties in an amount equal to the creditor's bond, or if no judicial determination has been made, the value of the property stated in the creditor's application for the writ of possession. KRS 425.116.

STATUTE OF LIMITATIONS

Contract under seal - 15 years. KRS 413.090(2).

Simple written contract - 15 years. KRS 413.090(2).

Contract for sale of goods - 4 years. KRS 355.2-725(1). Same for open accounts.

Oral contracts - 5 years. § 413.120(1).

Kentucky

Promissory Notes - 15 years. KRS 413.090(2). Where promissory note is placed upon the footing of a bill of exchange, action must be commenced with 5 years of cause of action. KRS 413.120(7).

Judgments - Courts of record - 15 years. KRS 413.090(1).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Kentucky Credit Disclosure Law. KRS 360.210 -.265. Compliance with the requirements of the Federal Truth-in-Lending Act and all regulations promulgated pursuant thereto is deemed compliance with Kentucky Credit Disclosure Law. KRS 360.212. Disclosure required for loans, KRS 360.220, revolving credit transactions, KRS 360.225, and for sales. KRS 360.230.

Kentucky Credit Disclosure Law applies to any credit transaction in which: (1) the debt incurred or to be incurred arises from a loan of money or the rewriting or refinancing of a loan or loans; (2) a finance charge is or may be payable; (3) the principal balance of the debt at the inception of the transaction is $25,000 or less; (4) the creditor is in the business of extending credit; and (5) the debtor is a natural person and not an organization. KRS 360.240(1).
360.225.

The following transactions are exempted from the Kentucky Credit Disclosure Law:

(1) Motor vehicle sales. See "Motor Vehicle Retail Installment Sales Act", KRS 190.090 - .140.

(2) Pawnbrokers. KRS Chapter 226.

(3) Sales under the Installment Sales law. KRS 371.220 - .300).

(4) Extensions of credit primarily for a business or commercial purpose. Broaddus v. National Bank of Lancaster, 709 S.W.2d 461 (Ky.App. 1986).

A creditor who willfully fails to disclose information to a person entitled to the information forfeits his/her right to recover any finance, delinquency, collection or refinancing charge. KRS 360.265(1). The creditor is not liable for non-disclosure if he/she can show by a preponderance of the evidence that the violation was due to a bona fide error. KRS 360.265(2). A

creditor who willfully fails to disclose required information to a consumer may also be guilty of a criminal violation punishable by a fine not to exceed $500, or by imprisonment not to exceed 6 months, or both. KRS 360.991.

UNFAIR AND DECEPTIVE TRADE PRACTICES

KRS 367.170 (1): "Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

Special Requirements: None specified.

Scope: "Trade" and "commerce" defined as the advertising, offering for sale, or distribution of any services, and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value. KRS 367.110(2)

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge advertisement is an unfair or deceptive practice. KRS 367.180.

Private Remedies: Private action may be brought in circuit court. The court may award actual damages and equitable relief where "necessary or proper". KRS 367.220(1). Court may also award reasonable attorney's fees and costs to prevailing party. KRS 367.220(3). Act does not limit a person's right to seek punitive damages where appropriate. KRS 367.220(1).

Limitations: Must be consumer transaction (purchase or lease of goods or services primarily for personal, family or household purposes) and suffer ascertainable loss as result of the act or practice. KRS 367.220(1). Statute of limitations is 1 year after any action of the Attorney General has terminated or 2 years after violation, whichever is later.

State Remedies: Consumer's Advisory Council and Division of Consumer Protection, Office of Attorney General, given advisory power. KRS 367.130 and 367.150. Attorney General has enforcement power. KRS 367.150. Attorney General may grant enforcement powers to county attorneys. KRS 367.300. Enforcement powers include restraining order and injunction, KRS 367.190; restitution, KRS 367.200; appointment of receiver, KRS 367.200; and revocation of licenses and corporate charters, KRS 367.290.

Precedential Value of FTC Interpretations: None specified.

Kentucky

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. KRS 355.2-314.

Where the seller at the time of contracting has reason to know both that the goods are required for a particular purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. KRS 355.2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. All implied warranties are excluded by the use of terms like "as is", "with all faults", or other language which in common understanding calls the buyers attention to the exclusion of warranties and makes plain that there is no implied warranty. Course of dealing or performance or usage of trade may also exclude or modify implied warranties. Remedies for breach of warranty also can be limited. KRS 355.2-316.

MISCELLANEOUS

1. Buying and Vacation Clubs. KRS 367.395 - .407. A buying club is a person or any type of organization which for a consideration provides or purports to provide its members with the ability to purchase goods or services at discount prices. KRS 367.395(3).

A vacation club is a person or any type of organization which for a consideration provides or purports to provide its members with a vacation, vacation plan, or services connected with the scheduling of a vacation at discount prices. KRS 367.395(6).

Any member may cancel his/her membership by giving written notice before midnight of the thirtieth business day following the date on which membership was attained. KRS 367.397(1). Such cancellation shall be without liability and shall entitle the member to refund of entire consideration paid for the contract. KRS 367.397(1)(a). After such date, the member may cancel at anytime and is only liable for a pro rata amount of the contract price up until the date of cancellation. KRS 367.397(1)(b). Notice of cancellation must be written and delivered personally or through the mail. If given by mail, notice is effective upon deposit in mail box, properly addressed and postage paid. KRS 367.397(2).

Kentucky

A copy of every contract shall be delivered to the member at the time the contract is signed. Every contract must be in writing, signed by the member designate the date on which the member signed it, and state in bold face type cancellation rights. KRS 367.399(1). Until club has complied with membership contract requirements, the member may cancel the contract by notifying the club in any manner and by any means of his/her intention to cancel and is entitled to a refund of the entire consideration paid for contract. KRS 367.399(2).

Rights of cancellation may not be waived or otherwise surrendered. KRS 367.397(4).

2. Health Spas. KRS 367.900 - .930. A fully completed copy of each contract must be delivered to the buyer at the time the contract is signed. KRS 367.910(1). A contract may not exceed a term of 36 months. KRS 367.911. Each contract must contain, in bold face type, a notice to the buyer to not sign the contract until it has been read and if it contains any blank spaces do not sign. KRS 367.910(2). Each contract must also contain, in bold face type, a notice of the buyer's cancellation rights. KRS 367.910(7). Contracts not complying with this statute are void and unenforceable. KRS 367.912(1).

Cancellation Rights. Purchaser may cancel his/her contract by notifying health spa in writing by midnight of the third business day following date of purchase of membership contract. KRS 367.910(3). Member any cancel contract and be entitled to a full or partial refund if: (1) because of death or medical disability, he/she is unable to use a substantial portion of the facilities or services for 30 or more consecutive days; (2) if the health spa relocates more than 5 miles from the location designated in contract; or (3) if member relocates 25 or more miles from residence stated in contract and health spa cannot provide comparable facilities within 5 miles of new residence.

No waiver of rights provided by statute is permitted. KRS 367.912(2). If a violation of the Act occurs, a private remedy is available. KRS 367.930.

Kentucky

The following summary was reviewed and updated in June 1993 by LTC Richard T. Simmons, Jr., USALSA; Trial Defense Services, 5611 Columbia Pike, Falls Church, VA 22014, Hailey, McNamara, Hall, Larmann, & Papale, One Galleria Boulevard, Suite 1400, P.O. Box 8288, Metairie, LA 70011-8288, Telephone Number: 504-836-6500, FAX: 504-836-6565.

Louisiana

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - Under La Rev Stat Ann 9:3571, Banks and other credit companies are prohibited from disseminating specific information as to credit transactions, except:

(1) Pursuant to subpoena duces tecum or other order, but only after giving immediate notice by personal service or registered mail and the customer has not taken legal action to prevent its release.

(2) Provision of general information to credit reporting company or other business entity having legitimate business need for information.

(3) For authorization or approval of a specific extension of credit directly or indirectly by a credit card company or a business offering credit

(4) For any requests by a law enforcement agency for information sought in connection with an investigation of any alleged crime other than an investigation into a crime which constitutes a violation of federal, state or municipal tax law.

(5) For the exchange of information between business organizations on transactions or consumer relations with the customer.

Pursuant to La Rev Stat Ann 9:3571.1:

Credit reporting agencies must provide consumers with a copy of their credit report when such is requested in writing or in person with proper identification. The agency can charge a fee for each copy provided. 9:3571.1 A

If a consumer disputes, in writing, the accuracy of an item disseminated, the credit reporting agency shall investigate the complaint and within 45 days correct the error or provide an update of the dispute status. If the dispute cannot be resolved, the consumer may file a brief statement explaining the dispute.

Thereafter, the credit reporting agency must provide the statement in any subsequent report containing the disputed information. 9:3571.1 C

Any consumer who is denied credit is entitled to a free copy of his credit report by requesting such in writing within 60 days of the denial. 9:3571.1 D

Each credit reporting agency shall maintain records of the recipients of credit reports furnished for employment purposes in the 2 years preceding the request and the recipients of credit reports for any other purpose during the 6 month period preceding the request. 9:3571.1 E

Any person damaged by an intentional or negligent violation of this section may bring an action for and is entitled to recover actual damages and reasonable attorney's fees and costs. 9:3571.1 F

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Louisiana law provides that a creditor may not contact any person, other than an extender of credit or a credit reporting agency, who is not living or residing in the debtor's household regarding the debtor's obligation to pay the debt. The debtor may waive the benefits of this section by giving consent after the debt arises. § 9:3562.

The creditor may contact anyone without the debtor's consent:

(A) To ascertain information concerning the debtor's credit worthiness, character, general reputation, or personal characteristics expected to be used in establishing the debtor's eligibility for credit or insurance provided the contacts are not designed to collect a delinquent debt.

(B) To ascertain the whereabouts of the debtor, when there is reason to believe that the debtor has moved or changed employment. § 9:3562(2).

After the debtor has defaulted on his/her promise to pay and notified the creditor in writing by registered or certified mail to cease further contact with the debtor in regard to the indebtedness, the creditor is limited to one mail contact per month to the debtor. The creditor is also limited to four personal contacts with the debtor, after receipt of notice to cease contact

with the debtor. § 9:3562(3). The creditor is not prohibited from doing the following (§ 9:3562(6)):

(A) Contacting any person in order to discover property of the debtor that may be seized to satisfy a debt reduced to judgment; or

(B) Making amicable demands and filing suit on the debt; or

(C) Contacting persons related to the debtor, if permission is given in writing at the time the debt arises or anytime thereafter. § 9:3562(4); or

(D) Obtaining a judgment and resuming contracts with the debtor, notwithstanding the provisions of § 9:3562(3).

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The consumer has the right to cancel a home solicitation sale until midnight of the third business day after the day on which the consumer signs an agreement or offer to purchase. § 9:3538A. Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid provided it is in written form and clearly expresses an intention not be to bound. § 9:3538 B, C, D.

The sales agreement must contain a conspicuous notice of this cancellation right. § 9:3539A, B. Until the seller has notified the buyer of his/her rights of cancellation, the buyer may cancel the sale by notifying the seller in any manner of his/her intention to cancel. § 9:3539C.

The buyer may not cancel a home solicitation sale if the buyer requested the goods or services because of an emergency, and (A) the seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notice of cancellation, and (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer. § 9:3538E.

In the event of cancellation, the buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. § 9:3541A, B. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. § 9:3541A. The seller must return

any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 9:3540A, B. The seller may retain a cancellation fee of five percent (5%) of the cash price but not exceeding the amount of the cash down payment. If the seller fails to comply with an obligation imposed on him/her, or if the buyer avoids the sale on a ground independent of his/her right to cancel the agreement or revokes his/her offer to purchase, the seller is not entitled to retain a cancellation fee. § 9:3540. The buyer may retain possession of goods delivered by the seller until the seller complies with these obligations. 9:3540 D.

A sale made pursuant to a pre-existing revolving charge account, a cash sale, a catalogue credit sale, a sale of a motor vehicle or farm equipment, a sale previously negotiated at the seller's place of business, or a sale initiated by the consumer at the seller's place of business are not included in the protections provided by this statute. La Rev Stat Ann 9:3516(18).

Note here also that work-at-home solicitation is regulated under La Rev Stat Ann 51:1711.

For additional Home Solicitation Sale's Provisions see La Rev Stat Ann 9:2711.1. Also, check local Parish and Municipal law. Certain Parishes, Rapides, for example, criminalize door-to-door selling.

UNSOLICITED MERCHANDISE

Unsolicited merchandise received through the mail is deemed an unconditional gift to the recipient. The recipient may enjoin the sender from billing or requesting payment. La Rev Stat Ann 51:461.

MINOR'S CONTRACT

Age of majority to contract - 18. If married -16. La Civil Code Arts. 379,382. Also, a minor 15 or over may contract for life, health or accident insurance. La Rev Stat Ann 22:612.

La Rev Stat Ann 29:285 provides that a minor eligible for benefits under the Serviceman's Readjustment Act is freed from disability of minority and is authorized to make binding contracts.

REPOSSESSION REQUIREMENTS

Effective 1 January 1991, the Louisiana Legislature adopted, in substantial part Article 9 of the Uniform Commercial Code, replacing the previous security devices known as chattel mortgage,

pledge, assignment and consignment, to the extent they relate to movables and intangibles, with the well-known UCC 9 security interest.

Louisiana's version of UCC 9 is found in Chapter 9 of the Louisiana Commercial Laws, La Rev Stat Ann 10:9-101 et seq.

The adoption of UCC 9 brings vast changes under Louisiana law in secured party's rights to repossession upon debtor default. An excellent discussion of these changes can be found in Braun, "Executory Process and Self-Help Remedies Under UCC Article 9", 38 Louisiana Bar Journal No. 5, pp 315-325 (Feb 1991). The discussion here will be confined to the three methods of repossession most often employed in Louisiana:

Self-help, Executory Process and Sequestration.

SELF HELP REPOSSESSION

Self-help repossession is generally foreign to Louisiana law. However, under La Rev Stat Ann 10:9-503, there are cases where a secured party does not have to resort to judicial process to sell the property of the debtor:

(1) Where the goods are in the possession of the secured party.

(2) Where the collateral is instruments, documents, accounts, chattel paper or general intangibles.

Thus, the only instance where the secured party must resort to executory process is where the collateral is a corporeal movable in possession of a debtor who refuses to voluntarily give up the property.

EXECUTORY PROCESS

Executory process is the most common method of repossession in Louisiana in cases where the collateral is corporeal movables in possession of the debtor. The procedures used can be found in La. Code of Civil Procedure art. 2631 et seq.

Executory process is an in rem summary proceeding. It does not result in a judgment, but merely seizes and sells property subject to a mortgage. There is no personal liability against the debtor; creditor is going after property.

Executory process is the opposite of ordinary process, where a creditor already has a judgment and can collect as much as the

judgment provides under a writ of fieri facias until paid for. Note however that an executory proceeding can be turned into an ordinary proceeding.

Before a writ of seizure and sale will issue under executory process, a secured party must file 3 documents with the court:

(1) verified petition describing the property to be seized.

(2) authenticated (e.g. passed before a notary and two witnesses) mortgage or promissory note.

(3) an authenticated security agreement containing a confession of judgment. Note that under La Rev Stat 10:9-508, a written security agreement carries with it the presumption that there is a confession of judgment. In other words, it is deemed authentic.

The court will review these documents for sufficiency. Once judicial authorization is obtained, the seizure process can proceed.

The debtor is given three days (exclusive of legal holidays) to pay the debt before seizure begins. Demand need not be made if it has been waived by the debtor in the act of mortgage or privilege.

Citation is not necessary in the executory proceeding, even when the sheriff makes a demand from the debtor. Some authorities indicate that under Louisiana statutory law, it suffices to give a debtor's appointed attorney written notice of the seizure of the debtor's property. However, Louisiana Code of Civil Procedure article 2721 requires that notice of seizure and sale be served on the defendant in an executory proceeding. The type of notice required appears to be personal as opposed to domiciliary. Failure to comply with notice requirements will almost assuredly bar a deficiency judgment. See First Federal Savings and Loan Association v. Burrows, 539 So.2d 685 (La App. 3d Cir. 1989). Moreover, Federal and State Constitutional law may also require actual notice to the debtor. See Mennonite Board of Mission v. Adams, 462 U.S. 791 (1983); Magee v. Amiss, 502 So.2d 568 (La. 1987).

After seizure of property, the sheriff shall advertise the sale of the property (once for movables and twice for immovables).

Louisiana

The UCC 9 deficiency judgment statue, La Rev Stat Secs 10:9-502 through 505, does not apply where executory process is employed.

The Deficiency Judgment Act, La Rev Stat 13:4106, provides that if a creditor takes advantage of a waiver of appraisement by a debtor, and the proceeds of the judicial sale are insufficient to satisfy the debt, the debt, nevertheless, is regarded as fully satisfied and is discharged. The creditor cannot, thereafter, proceed against the debtor for the deficiency except as otherwise provided by law. If 2 or more properties are involved, the sale without appraisement does not prevent the enforcement of the mortgages against any other property affected. This section shall not apply to public or private sales of collateral.

The purpose of the Deficiency Judgment Act is to protect debtors from overreaching creditors. It was intended to prevent inequity inherent in creditor foreclosing on debtor's property without appraisal, buying property for a low price, and thereafter obtaining personal judgment against debtor for a greater amount than if the property had been sold pursuant to a valid appraisal. First Nat. Bank of Houma v. Bailey, 583 So. 2d 559 (La. App. 3d Cir. 1991).

Where order and seizure have been issued the debtor has two remedies:

(1) prior to completion of sale - injunction;

(2) after completion of sale - appeal (if suspensive must post bond).

STATUTE OF LIMITATIONS

Contract under seal - 10 years. CC Art. 3499.

Simple written contract - 10 years. CC Art. 3499.

Torts - 1 year (generally) - CC 3492.

Actions on Promissory notes - 6 years. CC Art 3498. Louisiana law on prescription is codified in La CC Arts. 3445 through 3491.

Suits on open accounts - 3 years. CC Art 3494.

Contract for sale of goods - 10 years. CC Art. 3499.

Oral contracts - 10 years. CC Art. 3499.

Louisiana

Judgments - Courts of record - 10 years, subject to revival within the time period for another 10 years. CC Art. 3501.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Louisiana law provides for consumer prepayment of unpaid balance on consumer credit transactions at any time. It is within the creditor's discretion to accept the amount paid as a pre-payment in full if the amount paid is within $5 of the amount owed. If the amount paid exceeds the amount owed, the creditor can retain that amount. La Rev Stat Sec 9:3531. But see La Rev Stat Sec 9:3509.3.

INTEREST RATES

Louisiana has maximum legal interest rates which vary according to the type of loan. The maximum rate is inapplicable to banking institutions of the state, to consumer credit transactions, or to loans made for business purposes. La CC Art 2924; La Rev Stat Secs 9:3501 et seq.

Louisiana law requires that creditors disclose the annual percentage rate of interest that will be charged on the loan. This figure must be included in the loan contract.

The business exception to 12% ceiling on interest rates applies to articles addressing conventional interest rates and those addressing real estate loans. The Second Circuit has applied the business exception to a loan in which the majority of the proceeds were used to pay a home mortgage because the debtor revealed initially that the purpose of the loan was to open a business. Spencer v. Boucher, 587 So. 2d 97 (La. App. 2d Cir. 1991), writ denied, 590 So. 2d 1208.

CONSUMER CREDIT OPPORTUNITY LAW

Extenders of credit are prohibited from discriminating against persons because of race, color, religion, natural origin, sex or marital status, or from requiring any major or emancipated minor to meet credit qualification standards not required of other persons similarly situated. La Rev Stat Sec 9: 3583.

INSURANCE CANCELLATION

La Rev Stat Sec 22:636 et seq., amended in 1985, provides that insurers normally give at least 20 days notice to policy holders

whose policies are being cancelled or non-renewed for reasons other than nonpayment of premiums. Cancellation for nonpayment of premiums requires not less than 10 days' notice.

Upon written request, the insurer shall provide written reasons for the cancellation. No insurer shall cancel any group or family health and accident insurance until 60 days after the insurer has mailed written notice and reasons of cancellation, except for non-payment of premiums or failure to meet group requirements.

Written notice must be actually delivered or mailed to the insured before cancellation is effective. Talley v. First of Georgia Underwriters, 596 So. 2d 408 (La. App. 4th Cir. 1992). Mere denial of receipt of notice is insufficient to invalidate a cancellation. Id. Actual, verbal notice is sufficient when a policy is terminated because an employee has left employment. Carr v. K & B Inc., 560 So. 2d 504 (La. App. 1st Cir. 1990).

TIMESHARING

Extensively regulated through the Louisiana Timesharing Act, La Rev Stat Ann 9:1131.1 et seq.

UNFAIR AND DECEPTIVE TRADE PRACTICES

LA. REV. STAT. ANN. § 51:1401 (West Supp. 1984).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices. La. Rev. Stat Ann 51:1404.

Specia Requirements: None specified.

Scope: Trade or commerce defined as advertising, sale, offers for sale of any service, property, intangible, and any thing of value. La. Rev. Stat Ann 51:1402(a).

Exclusions: Actions subject to State Public Service Commission or public utility regulatory body, banking or insurance commissioner; advertisements done by publisher, radio and television media, with no knowledge of falsity, no direct financial interest; acts complying with FTC; seller of products or services who disseminates advertisements of promotional material received from manufacturer except for consumer actions.

Further exclusions include: Securities transactions: Taylor v. First Jersey Securities, Inc., 533 So. 2d 1383 (La. App. 4th Cir. 1988), writ denied, 538 So. 2d 593.; actions on state chartered savings and loan institutions: RTC v. Murray, 935 F2d

89 (5th Cir. 1991); and tortious interference with a contract which is not otherwise actionable: Amer. Waste and Pollution Control v. Browning Ferris, Inc., 949 F2d 1384 (5th Cir. 1991).

Private Remedies: Actual damages; treble damages for knowing violation done after notice given by director or AG; attorney's fees and costs to successful consumer, to defendant if suit in bad faith and groundless or brought for harassment.

Limitations: Need ascertainable loss for private action; statute of limitations one year from transaction for private action; investigation by AG if in public interest. 51:1409 and 51:1411

State Remedies: Governor's Consumer Protection Division has rulemaking, subject to AG approval; AG and DA enforces; injunction; court "may" issue additional relief necessary as compensation; a maximum of $5000 per violation of injunction. 51:1405, 1407, 1408, 1416.

Only the state, through the Attorney General, is authorized to seek injunctive relief. Monroe Medical Clinic v. Hospital Corp of Amer, 522 So. 2d 1362 (La. App. 2d Cir. 1988).

Precedential Value of FTC Interpretations: FTC acts control over state act.

* Trade practice is "unfair" within meaning of this section when it offends public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Gautreau v. Southern Milk Sales, Inc., 509 So. 2d 495 (La. App. 3d Cir. 1987).

WARRANTIES

When the parties make no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose. CC Art. 2054.

Louisiana has not adopted the sales article of the Uniform Commercial Code. See La Civil Code 2476. Seller warrants freedom of "Hidden defects of the things sold or its redhibitory vices." The latter are "some vice or defect . . . which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he/she known of the vice. La Civ Code Ann Art 2520 (West 1952). Although warranties of fitness can be waived, the ability to waive

redhibitory vices is extremely difficult; the terms "As is" or no warranty may not be sufficient especially in used car sales. See Hendricks v. Horseless Carriage, Inc., 332 So.2d 892 (La Ct App 1976). See also 15 U.S.C. § 2308.

Remember that a vice or defect discoverable by simple inspection or disclosed by the seller prior to or at the time of sale does not give rise to redhibition. See Estopinal v. Bourshie, 420 So.2d 749 (La. App. 4 Cir. 1982). But, if the defect appears "soon after a thing is placed in use," a reasonable inference arises that the defect existed at the time of sale. See Rey v. Cuccia, 298 So.2d 840 (La. 1974).

Concerning waiver, there are three strict requirements for an effective waiver of warranty. The waiver must be:

1. contained in the sale

2. written in clear and unambiguous terms

3. brought to the attention of the buyer or explained to him/her.

Absence of one of these requirements will defeat any waiver of warranty.

Another area to be concerned with in redhibition is the concept of tender. Tender is Louisiana's way of allowing a seller an opportunity to fix an item or return the buyer to the status quo prior to the buyer's resort to the courts. La. CC Art 2531.

Generally a tender for repair must be made. however, there is no need for tender for repair when:

1. the buyer wants only a reduction in price

2. seller is in bad faith (knew or should have known of defect)

3. seller is the manufacturer or artisan who made the product. If tender for repair has been made, but without correction of the vice or defect within a reasonable time, or, if tender for repair is not necessary, then tender for recision or resolution must be made (offer by buyer of return to the resale status quo). Tender for recision or resolution is not necessary when:

1. it is impossible (e.g., seeds are planted, item destroyed)

2. seller has made it clear that tender would be fruitless

3. seller waives

Failure to follow the rules on tender prior to filing suit may result in the seller either delaying or defeating (if prescription is a problem) the action by pleading an exception of prematurity.

Prescription (statute of limitations) for redhibition actions are as follows:

1. seller did not know of vice - one year from date of sale. La. CC Art 2534

2. seller knew of vice but failed to disclose it - one year from date of discovery. La. CC Art. 2546.

3. 10 years from either sale or discovery of vice if seller was fraudulent.

Note that prescription does not run during tender for repair, until the seller has abandoned all attempts to repair. First National Bank v. Miller, 329 So.2d 243 (La. App. 2 Cir. 1976).

What a buyer can recover in these actions depends upon the good or bad faith of the seller. A good faith seller is one who did not or could not have known of the defect. Only the purchase price and expenses may be recovered from a good faith seller. However, if the seller is in bad faith or is a manufacturer (manufacturers are presumed to know of defects), the buyer may recover the purchase price, expenses, attorney's fees and damages. La. CC Art. 2545.

NEW HOME WARRANTIES

La Rev Stat Ann 9:3141 to 3150, enacted in 1986, establishes the New Home Warranty Act. This comprehensive legislation provides for certain express and exclusive warranties by builders to new home purchasers and sets out remedies for breaches. Warranties on new homes revolve around compliance with local building standards.

Subject to certain enumerated exclusions (La Rev Stat Ann 9:3144B), every builder warrants the following to the purchaser:

1. One year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards.

2. Two years following the warranty commencement date, the plumbing, electrical, heating, cooling and ventilating systems exclusive of any appliance, fixture and equipment will be free from any defect due to noncompliance with the building standards.

3. Ten years following the warranty commencement date, the home will be free from major structural defects due to noncompliance with the building standards.

MOBILE HOME REGULATION

La Rev Stat Ann 51:911.21 provides for the design and construction of mobile homes, and licensing of mobile home dealers.

NEW CAR LEMON LAW

The 1984 Legislature enacted La Rev Stat Ann 51:1941 through 51:1946 as a means of resolving disputes between owners of new vehicles and manufacturers.

The Act, which requires manufacturers and/or their dealers to abide by the terms of any warranty, provides for vehicle replacement or refund by the manufacturer in those cases where there have been four (4) or more attempts within the warranty period to cure the same nonconformity or where the vehicle has been out of service for repairs for a cumulative of at least 30 days. La Rev Stat Ann 51:1944.

The Act requires, however, that before such replacement or refund can be demanded, the consumer must first resort to any applicable informal dispute resolution procedure established by the manufacturer. La. Rev. Stat Ann 51:1944 D.

La Rev Stat Ann 51:1945.1 provides that upon the sale of a second-hand vehicle, written notice must be given to the buyer that the vehicle was returned to the manufacturer because it did not conform to its warranty.

La Rev Stat Ann 51:1947, added in 1985, allows for the awarding of attorneys fees to prevailing customers.

Actions under the "Lemon Law" are founded in redhibition and are governed by the statute of limitations for actions in redhibition. Ford Motor Credit Co v. Bower, 589 So. 2d 571 (La. App. 1st Cir. 1991).

MISCELLANEOUS

Credit Services Organizations. § 3573.1 to 3573.8.

Louisiana

A credit service organization is a person who represents that he can or will provide, in return for the payment of money, any of the following: improving a buyer's credit record, history, or rating or advise or assist a buyer in improving his/her credit record, history, or rating. The definition does not include: non-profit organizations, a licensed lender or person authorized to extend credit, banks and savings associations, credit unions, attorneys, consumer reporting agencies, and accountants. 9:3573.2

La Rev Stat Ann 9:3573.3 and 9:3573.4 prohibit credit repair service organizations from: charging a buyer without first obtaining a surety bond or a trust account in the amount of $25,000, using false or misleading representations in the offer or sale of services, and making false or misleading statements about a buyer's credit standing.

Certain precontract language is required. An information statement must include: a complete statement of the buyer's rights to review all files maintained by any consumer reporting agency, the buyer's right to dispute the information, a description of the services to be performed, a statement explaining the buyer's right to proceed against the bond or trust account, and the availability of non-profit credit counseling services.

The contract must contain a conspicuous notice that the buyer has until midnight of the fifth business day after signing the contract to cancel and must set forth the terms and conditions of payment. Any waiver by buyer of the requirements of the Act is void. La. Rev. Stat Ann 9:3573.7,3573.8. Private actions are authorized.

Maine

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - Issuance of Consumer Reports - Information may only be released for the purposes set forth in 10 § 1313, i.e., court order; consumer request, credit, employment, insurance or other legitimate business needs.

Investigative Consumer Reports - Substantially the same as under federal law. 10 § 1314.

Disclosures

Agency to consumer - Substantially the same as under federal law, except the consumer has a right to disclosure of medical information withheld to a licensed physician of his/her choice. 10 § 1315(1)(A). A copy of the customer's file can be mailed to him/her, upon written request with proper identification, at a charge not to exceed the agency's actual costs for reproduction and mailing. 10 § 1316(2)(C). If the disclosure is made in person, then the costs shall not exceed the actual costs of photocopying. If the request for a copy of the file is made after an adverse consumer determination, there is no charge to the customer for the disclosure. 10 § 1316. A disclosure fee, may be charged when the consumer is not entitled to a free disclosure of the report. 10 § 1316 (2-A).

User to Consumer - Substantially the same as under federal law.

Investigative Reports - Maine prohibits adverse information from being included in subsequent reports unless the information is a matter of public record, has been verified, or was received within 3 months before the subsequent report. The report must be in writing and retained in the file of the consumer to whom it relates for a period of 2 years following its completion, if it was compiled or reported for employment purposes, and 6 months for all other purposes. 10 § 1319.

Disputed Accuracy - Substantially the same as under federal law, except Maine allows the reporting agency to retain the inaccurate report, as long as it is kept separate from the other reports and is conspicuously marked. "Inaccurate information" includes materially incomplete information. 10 § 1317.

Public Record Information for Employment Purposes - Substantially the same as under federal law. 10 § 1318.

Maine

Violation and Penalties

Civil Liability - Substantially the same as under federal law, except that treble damages are allowed for willful noncompliance with the statute and additional damages of not less than $100 for each violation involving negligence and for each inaccurate consumer report contributing to an adverse action. 10 §§ 1322, 1323.

Criminal Liability - The state and federal penalties are the same for obtaining information under false pretenses and the unauthorized disclosure of information by employees or officers. 10 §§ 1325, 1326.

Enforcement - The state provisions relating to jurisdiction of the courts and limitations of actions are substantially similar to the federal law. 10 § 1324.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Maine Fair Debt Collection Practices Act. 32 § 11001 to 11054. Any debt collector communicating with any person other than the debtor for purposes of acquiring the location of the debtor shall: identify him/herself, state he/she is confirming location, and if requested, identify his/her employer. A debt collector shall not: state that debtor owes money, communicate with such person more than once, communicate by postcard, use language or symbols on an envelope indicating sender is in debt collection business, or communicate with debtor directly if the collector knows the debtor has an attorney.

A debt collector may not, without prior consent, communicate with the debtor at an unusual time or place, usually defined as before 8 a.m. and after 9 p.m.

A debt collector may not engage in any conduct to harass, oppress, or abuse any person in connection with the debt collection including 7 listed examples. A collector may not use any false, deceptive, or misleading representations including 16 listed examples. Also, a debt collector may not use unfair or unconscionable means to collect any debt including 14 listed examples.

A debt collector who fails to comply with the Act is liable for any actual damages and additional damages as the court may allow, not exceeding $1,000. In the case of a class action, an

additional recovery not to exceed $500,000 or 1% of net worth of debt collector, whichever is less.

In attempting to collect an alleged debt arising from a consumer credit sale, consumer lease, or loan, a person shall not:

(A) Use or threaten force or violence;

(B) Threaten criminal prosecution;

(C) Disclose or threaten to disclose information affecting the debtor's reputation for credit worthiness with knowledge or reason to know the information is false;

(D) Communicate more than twice to the debtor's employer information concerning the existence of the debt before or after obtaining final judgment;

(E) Disclose or threaten to disclose to a person other than the debtor or his/her spouse information affecting the debtor's reputation, with knowledge that the other person does not have a legitimate business need for the information;

(F) Disclose or threaten to disclose information about a disputed debt without disclosing that fact;

(G) Claim or attempt to enforce a right barred by statute or a final order of the Supreme Judicial Court or a United State's court;

(H) Use any communication which gives the appearance of being authorized when it is not; or

(I) Engage in conduct in violation of an administrative rule, after like conduct has been restrained or enjoined by a final order of a court. 9-A § 5-116.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. 9-A § 3-502(1). Written notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. 9-A § 3-502(2,3). If the agreement or offer to purchase requires seller to affix goods permanently to real estate, then

seller may not begin performance as long as buyer has right to cancel. § 2502(5).

The sales agreement must contain a conspicuous notice of this cancellation right. 9-A § 3-503(2). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may cancel the sale by notifying the seller in any manner of his/her intention to cancel. 9-A § 3-503(4).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand; however, the buyers takes title to the goods without obligation to pay for them, if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. 9-A § 3-505(1,2). The seller must return any funds received or goods traded in to the buyer within 20 days after cancellation of the sale. 9-A § 3-504(1,2). The seller may not retain a cancellation fee. 9-A § 3-504(4). The seller may not affix goods permanently to real estate or appurtenances until the buyer's right of cancellation has lapsed. 9-A § 3-502(5).

A sale made pursuant to a pre-existing open-end credit account, a previously negotiated sale at the seller's business, a sale subject to rescission under the Federal Truth-in-Lending Act, a sale of farm equipment, and a sale of securities by a registered broker are not included in the protections provided by this statute. 9-A §§ 3-501, 3-506.

Maine's laws relating to consumer solicitation sales is substantially the same as the home solicitation sales law. 32 §§ 4661 to 4670. The only differences are that the buyer must tender the goods at his or her residence within 20 days after the notice of cancellation and the seller must return the down payment within 15 days after receipt of the notice of cancellation. 32 §§ 4665, 4666. A violation of the consumer solicitation sales law by a seller is punishable by a fine not to exceed $500, or by imprisonment for not more than 6 months, or both. 32 § 4667. A sale where the gross price, including interest, is less than $25, a sale covered by Title 9-A, Home Solicitation Sales, any sale of insurance, and a sale of securities by a registered broker are not included in the protections provided by this statute. 32 § 4668.

MINOR'S CONTRACT

Age of majority to contract - 18 or upon emancipation. 1 § 73. A minor, 15 or over, may contract for insurance and annuities. 24A, § 2407.

Maine

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship or real estate to which he/she receives title and retains benefits. Also, any minor 16 years of age or over receiving assistance for educational purposes is subject to those obligations as if the person was of full age. 33 § 52.

Disability of veteran and spouse as to loan removed (Tit. 9-B, § 435).

REPOSSESSION REQUIREMENTS

The creditor is required to make an affidavit and move for approval. Maine R. CIV. P. 64(c). When goods unlawfully detained from the owner or person entitled to the possession thereof, or attached or taken on execution, are claimed by any person other than the defendant in the action in which they are so attached, the owner or person may replevy the goods. 14 § 7301. Prior to serving the writ, the creditor must execute a bond to the debtor, with sufficient sureties or a surety company authorized to do business in Maine as surety, in double the value of the property to be replevied. 14 § 7303. The writ of replevin may not be executed unless both it and the amount of the replevin bond are approved by the Court. The order of approval may be entered only after notice to the debtor and hearing and upon a finding by the court that there is a reasonable likelihood that the creditor will prevail in the action. Rule 64(c), Maine R. CIV. P.

An order approving a writ of replevin and the amount of the bond may be entered ex parte, and without notice to the debtor, upon findings of the court that the creditor will likely prevail and he/she has satisfied the bond requirements and that either:

(1) The person of the debtor is not subject to the jurisdiction of the court; or

(2) There is clear danger that the debtor if notified in advance of replevin of the property, will remove it from the state or conceal it; or

(3) There is immediate danger that the debtor will damage or destroy the property. Rule 64(h), Maine R. CIV. P.

On two days' notice to the creditor, a debtor subjected to an ex parte order, can move for the return of the property to him/her, and the court shall proceed to hear and determine the motion as expeditiously as justice requires. Rule 64(i), Maine R. CIV. P.

Maine

STATUTE OF LIMITATIONS

Contract under seal - 20 years. 14 § 751.

Simple written contract - 6 years . 14 § 752.

Actions on promissory notes and open account - 6 years. 14 § 752.

Contract for sale of goods rs. 11 § 2-725.

Oral contracts - 6 years. 14 § 752.

Judgments - Courts of record - 20 years. 14 § 864.

Malpractice (medical) slander, assault - 2 years. 14 § 753.

General personal injury (non malpractice) - 6 years. 14 § 752.

Property Damage - 6 years. 14 § 752.

Ski area accidents - 2 years. 14 § 752-B.

Wrongful death - 2 years. 18A § 804(b) (1981).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Maine Consumer Credit Code - truth-in-lending provisions require the creditor to disclose to the buyer, usually before extending credit, his/her credit charges in dollars and cents and as an annual percentage rate. Disclosure is required for sales, loans, and revolving credit transactions. 9-A §§ 8-205, 8-206. The following transactions are excluded from coverage under the Maine truth-in-lending provisions, 9-A § 1-202:

(1) Extensions of credit to the government, or for business or commercial purposes;

(2) Transactions under public utility or common carrier tariffs if Maine or the United States regulates the charges for the services;

(3) Transactions in securities or commodities with a registered broker-dealer;

(4) Agricultural transactions;

(5) A loan or consumer credit sale exclusively for deferring or financing educational expenses;

(6) A loan credit sale made by a creditor to finance or refinance the acquisition of real estate or initial construction of a dwelling.

(7) Transactions not secured by real property or dwelling where amount financed exceeds $25,000.

A creditor who fails to disclose information to a person entitled to the information is civilly liable to that person in an amount equal to the sum of (9-A § 8-208(1)):

(A) Actual damages;

(B) Twice the finance charge, or in the case of a consumer lease, twenty-five per cent (25%) of the total amount of monthly payments under the lease, but in either case, the liability shall not be less than $100 nor greater than $1,000; and

(C) In a successful action to enforce the foregoing liability, the costs of the action together with attorney's fees. A creditor is not liable in an action brought against him/her if within 60 days after discovery of an error and prior to receipt of written notice of the error from the debtor or institution of an action, the creditor makes the proper adjustments and notifies the debtor. 9-A § 8-208(2). A creditor who willfully and knowingly fails to provide information which he/she is required to disclose is guilty of a Class D crime punishable by a maximum fine of $1,000, or imprisonment of up to 1 year, or both. 9-A § 8-109; 17-A §§ 1252, 1301.

UNFAIR AND DECEPTIVE TRADE PRACTICES

ME. REV. STAT. ANN. tit. 5 § 205-A et seq. (1979 & Supp. 1983-1984).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices. 5 § 207.

Special Requirements: None specified.

Scope: Trade or commerce defined as advertising, sale or offer for sale or distribution of any services, real or personal property, intangibles or any thing of value.

Exclusions: Actions permitted under laws administered by state or U.S. regulatory board.

Maine

Private Remedies: Restitution; other equitable relief court may deem necessary; attorney's fees and costs if violation proven.

Limitations: AG acts in public interest and upon notice; private actions require consumer transaction resulting in damage.

State Remedies: AG enforces and has rulemaking power; injunction; restitution; $10,000 maximum for violation of injunction; costs of investigation and suit if permanent injunction granted to AG; to prevailing party if action frivolous; maximum $10,000 for intentional avoidance or knowledgeable concealment.

Precedential Value of FTC Interpretations: Guided by FTC.

ME. REV. STAT. ANN. tit. 10 § 1211 (1969).

Prohibited Practices: 11 enumerated deceptive practices including a catchall provision prohibiting any conduct likely to create confusion or misunderstanding.

Special Requirements: None specified.

Scope: Actions done in the course of a persons's business, vocation or occupation.

Exclusions: Conduct complying with federal, state or local statute or rules; publishers, broadcasters, printers or other persons who disseminate information without knowledge of deceptive character.

Private Remedies: Injunction; attorneys fees to prevailing party "may" be awarded in exceptional cases; costs or attorney's fees against defendant only if willful violation.

Limitations: None specified.

State Remedies: None specified, but does not preclude existing remedies. See tit. 10 § 1213. See, e.g., M.R.S.A. 5 § 208.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. 11 § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select

or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. 11 § 2-315.

Implied warranties including the warranty of merchantability, may be limited in writing. Remedies for breach of warranty also can be limited. Implied warranties may be excluded by the use of expressions like "as is", "with all faults", etc. Course of dealing or performance or trade usage may also exclude or modify implied warranties. However, implied warranties on consumer goods and remedies for breach of implied warranties, cannot be limited. "Consumer goods" include mobile homes. 11 § 2-316.

Maine

The following summary was reviewed and updated June 1993, by Major Douglas R. Wright, Covington & Burling, 1201 Pennsylvania, Ave., N.W., P.O. Box 7566, Washington, DC 20044. Telephone Number: 202-662-6000, FAX: 202-662-6291.

Maryland

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - The Maryland Consumer Credit Reporting Agencies law is substantially the same as the Federal Fair Credit Reporting Act.

Issuance of Consumer Reports - Substantially the same as the federal law except that the eligibility for insurance need not necessarily be for a personal, family or household purpose. Commercial Law (CL) §§ 14-1202, 14-1205.

Disclosures

Agency to Consumer - Substantially the same as the federal law except that an additional written explanation of codes or trade language used is required. The federal law requires that disclosure be made of any consumer report, for employment purposes furnished within the two year period preceding the request, or for any other purpose in the six month period preceding the request, but the state law does not have this requirement. CL § 14-1206.

User to Consumer - Same as the federal law. CL §§ 14-1204, 14-1212.

Prohibited Disclosures - Obsolete Information - Same as the federal law. CL § 14-1203.

Investigative Reports - Same as the federal law. CL § 14-1204, § 14-1211.

Report Procedures - Compliance - Same as the federal law. CL § 14-1205.

Disputed Accuracy - If a consumer disputes the completeness or accuracy of any information in his/her file and notifies the consumer reporting agency in writing of this fact, the agency must reinvestigate the information within 30 days unless it has reasonable grounds to believe that the dispute is frivolous. If the information cannot be verified or is found to be inaccurate, the consumer reporting agency must delete the information within 7 days and mail written notice of the correction to the consumer and anyone who received a copy of the erroneous information. CL § 14-1208. Other provisions allow consumer to file statement/

summary of the dispute, and require reporting agency to note dispute in its reports.

Public Record Information for Employment Purposes - Same as the federal law. CL § 14-1210.

Violations and Penalties

Civil liability - Same as the federal law. CL §§ 14-1204, 14-1207, 14-1212, 14-1213, 14-1214.

Criminal liability - Same as the federal law. CL §§ 14-1214 to 14-1218.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Maryland Consumer Debt Collection Act - In collecting or attempting to collect an alleged debt a collector may not (CL § 14-202):

(1) Use or threaten force or violence;

(2) Threaten criminal prosecution, unless the transaction involved the violation of a criminal statute;

(3) Disclose or threaten to disclose information which affects the debtor's reputation for credit worthiness with knowledge that the information is false;

(4) Except as permitted by statute, contact a person's employer with respect to a delinquent indebtedness before obtaining final judgment against the debtor;

(5) Except as permitted by statute, disclose or threaten to disclose to a person other than the debtor or his/her spouse or, if the debtor is a minor, his/her parent, information which affects the debtor's reputation, whether or not for credit worthiness, with knowledge that the other person does not have a legitimate business need for the information;

(6) Communicate with the debtor or a person related to him/her with the frequency, at the unusual hours, or in any other manner as reasonably can be expected to abuse or harass the debtor;

(7) Use obscene or grossly abusive language in communicating with the debtor or a person related to him/her;

(8) Claim, attempt, or threaten to enforce a right with knowledge that the right does not exist; or

(9) Use a communication which simulates legal or judicial process or gives the appearance of being authorized, issued, or approved by a government, governmental agency, or lawyer when it is not.

A collector who violates any provision of this subtitle is liable for any damages proximately caused by the violation, including damages for emotional distress or mental anguish suffered with or without accompanying physical injury. CL § 14-203.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - Maryland Door-to-Door Sales Act - The buyer has the right to cancel a door-to-door (home solicitation) sale until midnight of the third business day following execution of an agreement or offer to purchase. CL § 14-302(1)(ii). Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. The sales agreement must contain a conspicuous notice of this cancellation right. CL § 14-302(2).

The buyer must make available to the seller at the buyer's residence, in substantially as good condition as when received, any goods delivered to said buyer under the sale; or may, at said buyer's option, comply with the seller's instructions regarding return of the goods. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to pick up the goods within 20 days of the date of the notice of cancellation. The seller must notify the buyer, within 10 business days after receipt of the notice of cancellation, whether he/she intends to repossess or to abandon the delivered goods. The seller also must return any funds received or goods traded in to the buyer and cancel and return any negotiable instruments within 10 business days after receipt of the notice of cancellation. CL § 14-302(2), (9).

The following transactions are not included in the protections provided by this statute (CL § 14-301(d)):

(1) A sale, lease, or rental with a purchase price of less than $25;

(2) A previously negotiated sale at the seller's place of business;

(3) A sale subject to rescission under the Federal Consumer Credit Protection Act;

(4) A buyer initiated emergency sale, with a handwritten statement from the buyer waiving the right to cancel the sale, and the seller in good faith has made a substantial beginning of performance of the contract;

(5) A sale conducted and consummated entirely by mail or telephone;

(6) A buyer initiated sale, where the buyer requests the seller to visit his/her home for repair or maintenance of his/her personal property; and

(7) A sale or rental of real property, a sale of insurance, and a sale of securities or commodities by a registered broker-dealer.

Any person who violates any provision of this subtitle is liable to the person affected by a violation for all damages proximately caused by the violation and for reasonable attorney's fees incurred by the person damaged. CL § 14-304.

MINOR'S CONTRACT

Age of majority to contract - 18. CL § 1-103. Minors 15 or over may contract for life, health, casualty, or property insurance (Estates Trusts Act, § 13-503 (C)).

Contractual liability - Minor is liable only for necessaries received as result of a contractual relationship. Anderson v. Smith, 33 Md. 465 (1871).

Disability removed for veterans and spouses. Estates and Trusts Act, § 13-503 (B).

REPOSSESSION REQUIREMENTS

A lender may repossess goods securing a loan under an agreement if the borrower is in default in payment of any sum due under the agreement; performance of any other condition which the agreement lawfully requires him/her to perform in order to obtain unencumbered title to the goods; or the performance of any promise the breach of which is expressly made a ground for repossessing the goods. The lender may repossess goods only by legal process or self help without use of force. At least 10 days before he/she repossesses any goods, a lender may serve a written notice on the borrower of his/her intention to repossess the goods. Within 5

days after he/she repossesses the goods, the lender shall deliver to the borrower personally or send to him/her at his/her last known address by registered or certified mail, a written notice which states: the rights of the borrower to redeem the goods, and the amount payable for them; the rights of the borrower as to resale, and his/her liability for a deficiency; and the exact location where the goods are stored and the address where any payment is to be made or notice delivered. For 15 days after the lender gives this notice, the lender must retain the repossessed goods. During the 15 day period following the lender's notice the borrower may redeem and take possession of the goods; and resume the performance of the agreement. To redeem the goods, the borrower shall: tender the amount due under the agreement at the time of redemption, without giving effect to any provision which allows acceleration of any installment otherwise payable after that time; tender performance of any other promise for the breach of which the goods were repossessed; and if the discretionary written warning notice to repossess the goods was given 10 days before the repossession, pay the actual and reasonable expenses of retaking and storing the goods. CL § 12-115. Provisions go on to include lender's right to sell property at public auction or through private sale, and duty to account to borrower in writing.

STATUTE OF LIMITATIONS

Contract under seal - 12 years. CJ § 5-102.

Simple written contract - 3 years. CJ § 5-101.
Promissory notes and open accounts - 3 years.

Contract for sale of goods - 4 years. CL § 2-725.

Oral contracts - 3 years. CJ § 5-101.

Judgments - Courts of record - 12 years. CJ § 5-102.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Maryland Interest and Usury Law requires that a lender disclose to the borrower, before the extension of a loan, the total principal amount of the loan and the total amount of finance charge in dollars, and annual effective rate of simple interest charged stated in percentage rate. CL § 12-106(b) (i) and (ii). A disclosure that complies with the Federal Truth-in-Lending Act is sufficient to meet the requirements of this title. CL § 12-106(b)(4). A loan made to a corporation, a commercial loan in excess of $15,000 not secured by residential real property, or

a commercial loan in excess of $75,000 secured by residential real property, are excluded from the disclosure requirements of the interest and usury law. CL § 12-106(a). A lender who fails to disclose information to a person entitled to the information is guilty of a misdemeanor and upon conviction is subject to a fine not exceeding $1,000, or imprisonment not exceeding one year, or both. CL § 12-114.

For Retail Credit Account and Installment Sales Disclosure Requirements - see CL §§ 12-503, 12-606.

UNFAIR AND DECEPTIVE TRADE PRACTICES

MD. COMM. LAW CODE ANN. § 13-301 et seq.

Prohibited Practices: Numerous enumerated unfair or deceptive trade practices. See Md. Comm. Law Code Ann. § 13-301.

Special Requirements: Maryland does not require that the consumer in fact be misled, deceived, or damaged as a result of a prohibited practice. CL § 13-302.

Scope: Trade practices in sale, rental, offer for sale, or lease of consumer goods, realty or services; extension of consumer credit or consumer debt collection. § 13-303.

Exclusions: Professional services (e.g. CPA, architect, engineer, lawyer, veterinarian); insurance company licensed in Maryland; insurance agent licensed by state; Christian Science practitioner; a public service company to the extent regulated by public service commission § 13-104 (1984); advertisements done by publisher, radio and television media, with no knowledge of falsity; must be a consumer transaction.

Private Remedies: Actual damages and reasonable attorneys fees. If court finds action brought in bad faith, court may award attorneys fees to defendant. § 13-408.

State Remedies: More stringent rulemaking by county or municipal agency; Division of Consumer Protection may issue cease and desist order and suspend license if fails to and has rulemaking power; injunction; AG can recover costs; $1,000 per merchant violation; $5,000 per repeat violation; criminal penalties; restitution. §§ 13-410, 13-411.

Precedential Value of FTC Interpretations: Due consideration and weight given.

Maryland

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. CL § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. CL § 2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. CL § 2-316. The provisions of CL § 2-316 do not apply to sales of consumer goods. Maryland prohibits the disclaimer of implied warranties in consumer sales. CL § 2-316.1.

MISCELLANEOUS

1. Health Club Services. § 14-12B-01 to 14-12B-08.

The Act applies to agreements in which the buyer purchases or becomes obligated to purchase, health club services to be rendered over a period longer than 3 months and the seller collects more than 3 months payment in advance. A buyer has a right, if disabled, to extend membership for a period equal to duration of disability. If a health club closes for longer than 1 month, the contract may be extended for that period or refund prorated. If a club is not in existence on the date the agreement is executed, buyer may cancel in event facility is not open on date provided for. Also, the buyer may cancel within 3 business days after opening of facility. Facility must refund deposits, fees, etc.

The contract must contain the club's registration number, description of bond, and the buyer's right to cancel within 3 business days after receipt of a copy of the agreement.

2. Video Movie Sales and Rentals. §§ 14-1601 to 14-1603.

Any agreement for membership in a video club (person, corporation, partnership, or other in business of selling at retail or renting videos or video equipment) that requires member to leave a signed credit card authorization shall include provisions that: specify maximum amount and type of fees club may charge on the card

authorization without member's approval and state maximum length of time, no longer than 6 months, that the club may charge fees to the authorized credit card. § 1602.1.

3. Maryland Credit Services Business Act. §§ 14-1901 to 14-1916.

A credit service business means a person who sells, provides, or represents that such person will provide the following services: improving credit record, history, or rating, obtain extension of credit, or advise or assist in the above. The service must provide an information statement prior to entrance into an agreement. The statement must contain the consumer's rights to review and obtain a copy of his or her consumer report files.

The contract must include a conspicuous statement, close to the signature line, that the buyer may cancel prior to midnight of the third business day after entrance into the contract. A form for cancellation must also be provided.

Consumer may void the contract if the seller violates the Act. For willful noncompliance buyer may receive actual damages, punitive damages, and attorneys fees, if successful. For negligent noncompliance - actual damages. Consumer may also claim against the seller's security bond or trust account for actual damages. § 14-1910, 14-1912. A two year statute of limitations applies. § 14-1913.

Massachusetts

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - The Massachusetts Fair Credit Reporting Act is substantially the same as the Federal Fair Credit Reporting Act.

Issuance of Consumer Reports -- Same as the federal law except that a report can be issued to a person who, the agency believes intends to use the information in connection with a transaction entered into or being negotiated with a consumer, if, by the terms of the transaction, either party transfers an interest in real or personal property, pays money or renders services, or becomes obligated to transfer property, pay money or render services or use the information for the enforcement of child support orders. 93 § 51(3)(e) and (f).

Disclosures

Agency to Consumer - Same as the federal law but the agency must disclose the contents as well as the nature and substance of all non-medical information in its files. 93 § 56.

User to Consumer - Same as the federal law with the additional requirement that the notification and agency identification requirement applies also to instances where the user terminates a consumer's credit, insurance or employment. 93 § 62.

The agency may report child support arrears reports by support enforcement agencies. See 93 § 52A (West 1986).

Procedure - Same as the federal law, except that in relation to disputed information which is not resolved by reinvestigation, the consumer reporting agency cannot limit the length of the statement on the dispute filed by the consumer. 93 § 58.

Violations and Penalties

Willful non-compliance - actual damages, punitive damages, reasonable attorney's fees, costs.

Negligent non-compliance - actual damages, attorney's fees.

Civil liability - The remedies pertaining to negligent non-compliance are non-exclusive. 93 §§ 63 and 64.

Criminal liability - Same as the federal law.

Massachusetts

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - A creditor, an attorney of a creditor and an assignee of a creditor are prohibited from using any unfair, deceptive or unreasonable method to collect or attempt to collect a debt incurred for personal, family, or household purposes from a natural person present or residing in Massachusetts. Collecting or attempting to collect a debt shall be deemed unreasonable if (93 § 49):

(A) The creditor communicates or threatens to communicate about the debt to someone other than the person who might be reasonably expected to be liable therefor. (This includes language on an envelope indicating that the communication relates to the collection of a debt);

(B) The creditor communicates with the debtor after notification from the debtor's attorney to address all further communications concerning the debt to him/her;

(C) The creditor communicates with the debtor in such a manner as to harass or embarrass the debtor; and

(D) The creditor communicates with the debtor through the use of instruments that simulate the form and appearance of judicial process.

See also Collection Agencies, 93 §§ 24-26.

HOME SOLICITATION SALES

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. The sales agreement must contain a conspicuous notice of this cancellation right. 93 § 48(A), (B), (C).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller does not pick the goods up within 20 days after the date of the notice of cancellation. The seller must return any funds received or goods traded in to the buyer and cancel and return any negotiable

instruments within 10 business days after cancellation of the sale. The seller shall notify the buyer of any intention to repossess or abandon the goods within ten business days of receipt of the notice of cancellation. 93 § 43(B),(D).

The following transactions are not included in the protections provided by this statute (93 § 48(A), (K); 140D § 2):

(1) A sale or lease for $25 or less;

(2) An emergency sale initiated by the buyer with a handwritten statement of the buyer waiving the right to cancel the sale;

(3) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations;

(4) Transactions in securities or commodities accounts with a broker-dealer registered with the Securities and Exchange Commission;

(5) Credit transactions other that those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds twenty-five thousand dollars;

(6) Transactions under public utility tariffs, if the commissioner determine that the public utilities commission regulates the charges for such public utility services involved, the charges for delayed payment, and any discount allowed for early payment; and

(7) Loans made, insured, or guaranteed pursuant to a program authorized by 20 U.S.C. 1070 et seq. of Title IV of the Higher Education Act of 1965.

(8) Sales of motor vehicles and insurance.

(9) Sale pursuant to a revolving credit agreement.

(10) Time sale not over 3 monthly payments and finance charge not over $1.

Massachusetts

MINOR'S CONTRACT

Age of majority to contract - 18. 231 § 850. Minors, 15 or over, may contract for life or endowment insurance (Ch 175, § 128). Minors, 16 or over may contract for vehicle liability insurance (Ch 175, § 113k).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. 106 § 1-103.

REPOSSESSION REQUIREMENTS

For repossession of consumer goods upon default - see 255 §§ 13I, 13J; 255D §§ 21, 22.

See also Replevin - 247 §§ 7-22. As to notice requirement, see Mass R. Civ. P. Rule 160 (1987).

Massachusetts provides for action in Replevin.

There is no affidavit requirement. If goods exceeding $20 in value are unlawfully taken or detained from the owner or person entitled to their possession, or if goods of that value, which have been attached or taken on execution, are claimed by a person other than the defendant in the action in which they have been so attached or taken, the owner or such other person may cause them to be replevied. (Ch 247, Sec 7).

Before the officer will serve the writ of replevin, the plaintiff must have executed a bond payable to the defendant in a sum equal to double the value of the goods, with sufficient sureties, conditioned to prosecute the replevin to final judgment and to pay such damages and costs as the defendant will recover and to return the goods if such is the final judgment. (Ch 247, Sec 8). The sureties may be approved by the officer, the defendant, or master in chancery. In the event that the officer is not the one to approve the sureties, he/she is not responsible for their sufficiency. (Ch 247, Sec 14).

STATUTE OF LIMITATIONS

Contract under seal - 20 years. 260 § 1.

Simple written contract - 6 years. 260 § 2.

Promissory Notes - 6 years. 260 §§ 2, 6.

Contract for sale of goods - 4 years. 106 § 2-725.

Massachusetts

Oral contracts - 6 years. 260 § 2.

Open Accounts - 6 years. 260 §§ 2, 6.

Judgments - Courts of record - 20 years. 260 § 20.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Massachusetts' Consumer Credit Cost Disclosure Act requires the creditor to disclose to the buyer, usually before extending credit, his/her credit charges in dollars and cents and as an annual percentage rate. See generally 140D § 1. Disclosure is required for sales, loans, and revolving credit transactions. 140D §§ 11, 12. The following transactions are exempt from coverage under the Massachusetts' Consumer Credit Cost Disclosure Act (140D § 2):

(A) Extensions of credit to the government, or primarily for business, commercial or agricultural purposes;

(B) Transactions in securities or commodities with a broker-dealer registered with the Securities and Exchange Commission;

(C) Credit transactions in which the amount financed exceeds $25,000;

(D) Transactions under public utility tariffs, if the public utilities commission regulates the charges for the services;

(E) Loans made, insured or guaranteed pursuant to a program authorized by 20 U.S.C. § 1070 et seq. of the Title IV of the Higher Education Act of 1965.

A creditor who fails to disclose information to a person entitled to the information is civilly liable to that person in an amount equal to the sum of actual damages; twice the finance charge (but not less than $100 nor more than $1,000); and in a successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney's fees. 140D § 32(a). A creditor is not liable in an action brought against him/her, if within 60 days after discovery of an error and prior to the receipt of the debtor's written notice of the error or institution of an action, the creditor makes the proper adjustments and notifies the debtor. 140D § 32(b). A creditor who willfully and knowingly fails to provide information which he/she is required to disclose will be punished by a fine not to exceed $5,000, or by imprisonment of not more than one year, or both. 140D § 31.

Massachusetts

The Massachusetts' Retail Installment Sales and Services Act (RISS) and the Motor Vehicle Retail Installment Sales Act (MVRIS) are substantially similar to the Consumer Credit Cost Disclosure Act, with a few exceptions. The RISS Act does not apply to loans and the MVRIS does not apply to loans or revolving credit transactions. The civil penalties under both Acts for a failure to disclose required information is forfeiture of the finance charge. 255D § 29, 255B § 22. The criminal penalties under both acts for the willful failure to disclose information is a fine not to exceed $500, imprisonment of not more than six months, or both. 255D § 30, 255B § 21.

UNFAIR AND DECEPTIVE TRADE PRACTICES

MASS. GEN. LAWS ANN. ch, 93A (West 1975 & Supp. 1984).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices.

Special Requirements: None specified.

Scope: Trade or commerce includes advertising, offers or consummation of sale, rent or lease, of any services, real or personal property, intangibles, or any other article of value.

Exclusions: None specified.

Private Remedies: Actual damages and equitable relief, including injunction, as court deems necessary and proper; class actions; minimum $25 damages; double or treble damages for willful or knowing violation or bad faith refusal to settle with reason to know of violation; attorney's fees and costs to prevailing plaintiff unless rejected reasonable offer of settlement.

Limitations: AG acts in public interest and upon notice for injunction; consumer action if injured and provides notice letters; consumer limited to reasonable relief tendered if rejects a settlement offer; respondent may suspend court action to bring action before appropriate regulatory board if court action would require acts inconsistent with regulatory scheme or regulatory board has substantial interest; court may issue interlocutory orders to preserve status quo.

State Remedies: AG has rulemaking consistent with FTC laws and federal court interpretations; AG enforces; injunction; restitution; maximum $10,000 per injunction violation; maximum $5000 for noncompliance with discovery procedures; dissolve corporation for habitual injunction violations. 93A § 4.

Massachusetts

Precedential Value of FTC Interpretations: Guided by FTC interpretations.

WARRANTIES (Uniform Commercial Code)

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. 106 § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. 106 § 2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. 106 § 2-316. The provisions of 106 § 2-316 do not apply to sales of consumer goods, services, or both. Massachusetts prohibits the disclaimer of implied warranties in consumer sales. 106 § 2-316A. See 15 U.S.C. § 2308.

MISCELLANEOUS

1. Unsolicited Merchandise. 93 § 43.

Any person who receives unsolicited goods, wares, or merchandise offered for sale, but not ordered or requested by the person orally or in writing, shall be entitled to consider them an unconditional gift, and can use or dispose of them as he or she sees fit.

2. Credit Service Organizations. 93 § 68A-68E (West 1991).

A credit service organization is a person who, with respect to the extension of credit by others, sells, provides, performs, or represents to do so, for the payment of money or other consideration, any of the following: improving a buyer's credit rating, history, or records; obtaining an extension of credit; or providing assistance or advice with respect to the above.

The service cannot: charge or receive money prior to completion of the contract; charge or receive money solely for the referral of a buyer to a retail seller; or make or advise to make, any statement that is misleading or untrue.

Massachusetts

Before entrance into the contract, an information statement must be provided the buyer containing: a statement of buyer's right to obtain credit files, the cost and allotted time, buyer's right to dispute the findings, and description of services.

The contract must contain a conspicuous statement providing that the buyer has a right to cancel within 3 business days following entrance into the contract.

3. Health Club Service Contracts. 93 § 78-88 (West 1991).

The contract cannot be for a term measured by the life of the buyer nor can it be for longer than 36 months at a time. Every contract must provide clearly and conspicuously that it may be cancelled within 3 business days after the receipt by buyer of signed contract. A contract may also be cancelled after the initial 3 days in the event of the buyer's death, if the buyer becomes significantly disabled for more than 3 months, or if the health club fails to open or discontinues business. The contract may also be cancelled if the buyer moves more than 25 miles from the club or a substantially similar club which will accept the obligation. No contract can be assigned by one health club to another health club without written consent of the buyer.

4. Written Leases or Rental Agreements of Personal Property Primarily for Household or Family Use. 93 § 90-94 (West 1991).

A consumer lease is a contract for the use of personal property by a natural person for a period of time of 4 months or less, and not to exceed $25,000 in amount. A written statement containing 10 enumerated disclosures must be given prior to execution of the lease.

Michigan

All citations, unless otherwise noted, are to Michigan Compiled Laws Annotated.

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - All debt collectors, including attorneys acting to collect a client's claim, are prohibited from doing any of the following acts to collect a consumer debt:

(A) Using misleading or deceptive communications;

(B) Using forms or instruments which simulate judicial process or official sanction;

(C) Making an inaccurate, misleading, untrue, deceptive statement or claim in a communication to collect a debt;

(D) Misrepresenting the debtor's legal rights;

(E) Communicating with the debtor without accurately disclosing the caller's identity;

(F) Communicating with a debtor represented by an attorney, without first contacting the attorney;

(G) Communicating with a debtor's employer without the debtor's written consent, unless responding to the employers inquiry or in an earnest attempt to locate the debtor;

(H) Using or employing, in connection with the collection of a debt, a person acting as a peace or law enforcement officer;

(I) Using or threatening physical violence;

(J) Publishing or threatening to publish a list of debtors or publicizing that a consumer is a debtor;

(K) Using a harassing, oppressive or abusive method to collect a debt, e.g. calling after 9:00 PM and before 8:00 AM unless creditor proves that call is not inconvenient;

(L) Using profane or obscene language;

(M) Using a method contrary to postal laws and regulations;

(N) Failing to implement a procedure designed to prevent violations by employees; and

(O) Communicating with a consumer regarding a debt by postcard. § 445.252.

(P) Using a "shame card" or otherwise bring to public notice that the consumer is a debtor except with respect to instituted legal proceedings.

(Q) Using profane or obscene language.

Any person who engages in prohibited conduct in an attempt to collect a debt is liable to the consumer for actual damages or $50, whichever is greater. If the method or practice is a willful violation, then treble damages can be awarded, but not less than $150, and an award of reasonable attorney's fees and court costs is mandatory. § 445.257. If the action against the debt collector is brought by the Attorney General, then the amount recoverable may not exceed $500 per violation. § 445.256(1).

See also Collection Agencies. § 339.901-339.916.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Cancellation occurs when the buyer mails or delivers written notice of cancellation, or sends a telegram, to the seller at the address stated in the agreement. Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 445.112(1-3).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller in good faith makes a substantial beginning of performance before the buyer gives notice of cancellation, (B) the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy, expressly acknowledging and waiving the right to cancel the sale within 3 business days, and (C) in the case of goods, the goods cannot be returned to the seller in as good condition as when

received by the buyer. § 445.112(5). The sales agreement must contain a conspicuous notice of this cancellation right. § 445.113(1). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner and by any means of his/her intention to cancel. § 445.113(4).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. § 445.115(1). The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 445.114(1). If seller has performed any services pursuant to a home solicitation sale before its cancellation, the seller is not entitled to compensation. § 445.115(2).

In the absence of a buyer request for delivery "without delay in an emergency" the seller shall deliver an agreement which shall be signed and sealed by the buyer and shall advise of the right to cancel, right to return of any sum paid, obligation to make goods available to seller at buyer's residence, right to retain goods if seller fails to retrieve goods and form of notice cancellation with seller's return address. § 445.113 (1978).

The following transactions are excluded from the protections provided by this statute:

(1) A sale for $25 or less;

(2) A sale made pursuant to a preexisting revolving charge account;

(3) A sale made pursuant to prior negotiations between the parties at a fixed business establishment;

(4) A sale of insurance by a licensed insurance agent;

(5) A sale of services by a licensed real estate broker or salesperson; and

(6) A sale of agricultural or horticultural equipment and machinery which is demonstrated to the consumer by the vendor at the request of either or both of the parties. § 445.111.

(7) An emergency order with signed waiver and work has begun or goods not returnable in good condition. § 445.113.

Michigan

MINOR'S CONTRACT

Age of majority to contract: marriage, attaining age 18 years, military active duty, court order, or written and filed instrument or conduct of parent indicating release of parental rights. § 722.4.

A minor, 16 or older, may contract for life and disability insurance. § 500.2205.

Veteran and spouse free of disability. § 35.541.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 440.2103. The minor may not assert his/her age as a defense if he/she willfully misrepresents his/her age to be 18 or over. § 600.1403.

REPOSSESSION REQUIREMENTS

Michigan no longer authorizes actions in replevin. Repossession actions follow guidance of the Uniform Commercial Code. §§ 440. 9503 and 440.9504.

A right of repossession of a motor vehicle provided in an installment sale contract shall be exercised only in the manner provided in sections 440.9503 and 440.950. (see 492.114).

STATUTE OF LIMITATIONS

Contract under seal - 6 years. § 600.5807.

Simple written contract - 6 years. § 600.5807.

Promissory notes - 6 years. § 600.5807.

Contract for sale of goods - 4 years. § 440.2725.

Oral contracts - 6 years. § 600.5807.

Open accounts - 6 years. § 600.5807.

Judgments - Courts of record - 10 years. § 600.5809.

Assault, battery, false imprisonment and malicious prosecution - 2 years. § 600.5805.

Defamation - 1 year. § 600.5805.

Wrongful death - 3 years. § 600.5805.

Michigan

Personal injury and property damage - 3 years.

Malpractice - 2 years. § 600.5805.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Creditor compliance with the Federal Truth-in-Lending Act constitutes compliance with the disclosure provisions of Michigan's Regulatory Loan Act of 1963, § 493.14a, Retail Installment Sales Act, § 445.851a, and Home Improvement Finance Act, § 445.1111. See Motor Vehicle Retail Installment Sales Act, § 566.302, for disclosure provisions involving motor vehicle sales.

UNFAIR AND DECEPTIVE TRADE PRACTICES

MICH. COMP. LAWS ANN. § 445.901 (Supp. 1983-1984).

Prohibited Practices: 29 enumerated unfair, unconscionable or deceptive practices. § 445.903.

Special Requirements: None specified.

Scope: Trade or commerce defined as business providing for personal, family, household purposes, including advertising, sale or offer for sale, lease of service, real or personal property, intangibles, or any other article, or a business opportunity (as defined in § 445.902).

Exclusions: Franchises; non-consumer transactions; conduct authorized by state or U.S. statute; advertisements done by disinterested publisher, radio and television media, with no knowledge of falsity; 8 enumerated Michigan statutes except for private actions.

Private Remedies: Declaratory judgment; injunction; actual damages, $250 minimum damages plus attorney's fees; class action for actual damages; restitution; strike unconscionable clauses; receiver or other appropriate relief. § 445.911.

Limitations: AG acts upon probable cause with notice given; statute of limitations for private actions or class action by AG is later of 6 years from act or 1 year from last payment; private party must suffer loss for civil penalty or class action; no statute of limitations for counterclaim in private action; if violation occurs by bona fide error despite reasonable procedures, then limited to actual damages. §§ 445.905, 445.910.

Michigan

State Remedies: AG enforces and has procedural rulemaking power; injunction with costs to prevailing party; maximum $25,000 for persistent and knowing violation; maximum $5000 per injunctive or judgment violation; restitution; criminal penalties; $5000 per knowing failure to appear or acts in avoidance or concealment after notice of investigation; class actions for actual damages or restitution, strike unconscionable contract clause, or other appropriate relief, such as receiver. §§ 445.905, 445.908.

Precedential Value of FTC Interpretations: None specified.

WARRANTIES

Unless excluded or modified, a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 440.2314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 440.2315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 440.2316.

MISCELLANEOUS

Rental-Purchase Agreement Act. §§ 445.951 - 445.968.

Applies to agreements for use of personal property by a lessee primarily for personal, family, or household purposes for an initial period of not more than 4 months. The contract must be written and contain the following: description of property, total amount and timing of all payments, party liable for losses, responsibility for maintenance, cash price if purchased, and any warranties. A lessor shall not require: purchase of insurance from lessor, payment in excess of normal periodic payments, penalty for early termination, or processing fee. Act does not provide for private remedies.

The following summary was reviewed and updated by CPT John J. Linder, Unit/organization, Evavold and Linder, 305 S. Elm, P.O. Box 39, Rushford, Minnesota 55791, Telephone Number: (507) 864-7748, FAX: (507) 864-2379.

Minnesota

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - The Minnesota Fair Information Reporting Act, added by Laws 1989, Ch 516, approved June 1, 1989, effective August 1, 1989 while following the format of the Fair Credit Reporting Act applies only to insurance transactions involving some individuals eligibility for insurance coverage or benefits, or the servicing of an insurance application or policy.

See also the Minnesota Fair Information Reporting Act.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Collection agencies are prohibited from using any of the following methods in an attempt to collect a consumer debt (§ 332.37):

(1) Threatening garnishment or suit by a particular lawyer, unless the lawyer has been actually retained;

(2) Using off-duty sheriff or process servers to collect the debt;

(3) Using collection methods which violate State or Federal law;

(4) Furnishing legal advice;

(5) Misleading a debtor through the use of false legal documents;

(6) Employing a lawyer without specific creditor authorization;

(7) Publishing a debtor list, using shame cards or shame automobiles, advertising for sale the claim as a means to force payment, or use similar methods of intimidation;

(8) Using name or manner which implies the agency is part of any governmental department;

(9) Holding itself out as a debt prorater or adjuster unless here is no charge to the debtor;

(10) Violating any provision of the Fair Debt Collection Practices Act of 1977 while attempting to collect on any indebtedness.

(11) Refusal to return any claim and all valuable papers deposited with a claim upon written request of creditor, claimant, or forwarded after tender of amounts due the agency within 30 days after the request.

(12) Commingling money collected for a customer with agency's own;

(13) Communicating with a debtor by use of recorded message utilizing automatic dialing unless preceded by a live operator who discloses the collection agency's purpose.

(14) In collection letters or publications, or in any communication, oral or written, imply or suggest that health care services will be withheld in an emergency situation.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective, if given by mail, when deposited in the mail properly addressed to the seller, postage prepaid. § 325G.07. Notice of cancellation need not take any particular form; sufficient if it indicates by any form of written expression, buyer's intent not to be bound. The sales agreement must contain a conspicuous notice of this cancellation right. Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. § 325G.08.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the merchandise if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. § 325G.09.

The buyer may not cancel a home solicitation sale if the buyer requested the services due to an emergency, and (A) the seller in

good faith makes a substantial beginning of performance before notice of cancellation and (B) in the case of goods, the goods cannot not be returned to the seller in as good condition as when received by the buyer, and (C) the buyer has signed a separate dated statement describing the emergency and waiving his/her right to cancel. § 325G.06. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. The seller is not entitled to compensation for any services performed prior to cancellation of the agreement. § 325G.09.

The following transactions are not included in the protections provided by this statute (§ 325G.06):

(1) A sale for $25 or less;

(2) A sale of farm equipment;

(3) A previously negotiated sale between the parties at a fixed business establishment;

(4) A sale where the buyer requests the seller to visit his/her home to repair the buyer's property;

(5) A sale in which the buyer initiates the contact and requests the seller to visit his/her home to negotiate the sale, and the buyer acknowledges and waives his cancellation rights on a separate statement;

(6) A sale of insurance, securities, or real property;

(7) A sale of a motor vehicle when the agreement is made at a place other than the buyer's residence;

(8) Emergency order with signed waiver and work has begun or goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18. § 645.45.

Contractual liability - In the absence of fraud, a minor is liable for necessaries and for the value of benefit conferred in all other contracts. § 336.1-103.

Disability for veteran relieved for loan. § 48.245.

Minnesota

REPOSSESSION REQUIREMENTS

A creditor seeking to recover possession of property after service of a summons and complaint but prior to final judgment shall proceed by motion. The creditor must make a motion accompanied by an affidavit which identifies the property, explains his/her right to possession, shows why the debtor is wrongfully detaining the property, gives the surrounding facts and circumstances and estimates the property value. § 565.23. The creditor must enter into a bond approved by the court of 1 1/2 times the property value. The debtor may retain or recover the property by filing a security equal to 1 1/4 of fair market value of the goods or 1 1/2 of claim alleged, whichever is less with court approval. § 565.25. The creditor may recover the property prior to notice and hearing if the creditor shows that notice to the debtor is either impracticable or would endanger the creditor's ability to recover property, a probability of success on the merits, and the creditor will suffer irreparable harm if possession is not obtained prior to hearing. § 565.24. Notwithstanding, the debtor may retain the property and have the action stayed up to six months if the alleged default is caused by, among other things, unforeseen economic circumstance beyond their control, the property is needed to help earn a living, and the property is insured. § 565.251 (1985). Otherwise, notice and hearing are conducted as a motion with a minimum of 5 days between the service and hearing date. § 565.23; Rule 6.04, Minnesota Rules of Civil Procedure.

See also Consumer Transactions, Deficiency Judgments. § 325G.22.

STATUTE OF LIMITATIONS

Contract under seal - 6 years. § 541.05

Simple written contract - 6 years. § 541.05.

Promissory notes - 6 years. § 541.05.

Contract for sale of goods - 4 years. § 336.2- 725.

Oral contracts - 6 years. § 541.05.

Open accounts - 6 years. § 541.05.

Judgments - Courts of record - 10 years. § 541.04.

Strict product's liability - 4 years. § 541.05.

Personal injury and malpractice - 2 years. § 541.07.

Minnesota

Defamation, assault - 2 years - § 541.07.

Property damage - 6 years. § 541.05.

Wrongful death - 3 years. § 573.02.

If caused by medical malpractice - 2 years.

No limitation if murder is cause of death. § 573.02.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Disclosure statements comparing the graduated payment mortgage with a conventional mortgage are required for the prospective borrower when a graduated payment mortgage is contemplated. § 47.201. For disclosure requirements regarding Industrial Loan and Thrift Companies, Regulated Loans, and Motor Vehicle Retail Installment Contracts--see §§ 53.04(4a), 56.14, and 168.71, respectively.

See also Consumer Warranties - § 325G.18.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Emphasis on antitrust and unfair competition as opposed to protecting rights of individual consumer, e.g. §§ 325D.45; anti-trust § 325F.67; false and fraudulent advertising § 325D.67; price discrimination in sale of petroleum § 3325D.68; monopolization of food products, § 325F.69 - consumer fraud (misrepresentation and pyramid sales - unlawful practices). For consumer remedies, see § 8.31.

Special Requirements: None specified.

Scope: In business, commerce or trade.

Exclusions: None specified.

State Remedies: AG enforces; injunction; civil penalties maximum of $25,000, if AG sues for consumer may obtain actual damages, equitable relief, costs and attorney's fees. Minn. Stat. Ann. § 8.31 (1985).

Prohibited Practices: 11 enumerated deceptive trade practices plus a catchall prohibiting any conduct likely to create confusion.

Minnesota

Special Requirements: None specified.

Scope: In course of business, vocation, or occupation.

Exclusions: Conduct complying with federal, state, or local statute; publishers, broadcasters, printers, or other persons who disseminate information without knowledge of deception or financial interest in goods.

Private Remedies: Injunction; costs to prevailing party unless court directs otherwise; court "may" award attorney's fees to prevailing party if suit groundless or willful violation found. § 325D.45.

State Remedies: Injunctive relief and civil penalties up to 25,000. See § 8.31.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 336.2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 336.2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 336.2-316.

The following summary was reviewed and updated on April, 1994, by COL William M. Bost, Jr., USAR JAGC, Senior Military Judge, Ellis & Bost, Ltd., P.O. Drawer 1099, 901 Belmont Street, Vicksburg, Mississippi 39181, Tel: 601-636-5433, Facsimile: 601-638-2938

Mississippi

CREDIT REPORTING

Federal - Fair Credit Reporting Act. See Chapter 2 supra.

State - No statutory provisions.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act. See Chapter 2 supra.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule. See Chapter 2 supra.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective, if given by certified or registered mail, when deposited in the mail properly addressed to the seller, postage prepaid. § 75-66-3. The sales agreement must contain a conspicuous notice of this cancellation right. Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. § 75-66-5.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the merchandise if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. § 75-66-9.

The buyer may not cancel a home solicitation sale if the buyer requested the services due to an emergency, and (A) the seller in good faith makes a substantial beginning of performance before notice of cancellation and (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when

received by the buyer. § 75-66-3. The seller must return any funds received or goods traded in and cancel all indebtedness within 10 days after cancellation of the sale. § 75-66-7.

The seller is entitled to a cancellation fee of five percent (5%) of the cash price or all of the down payment, whichever is less. § 75-66-5. The seller is not entitled to compensation except the cancellation fee for any services performed prior to cancellation of the agreement. § 75-66-9.

A sale initiated by the buyer, a sale under a preexisting revolving credit account, a previously negotiated sale at a fixed business establishment, a sale regulated by the Mississippi Public Service Commission, and emergency order where work has begun or goods not returnable in good condition are all excluded from the protections of this statute. § 75-66-1.

MINOR'S CONTRACT

Age of majority to contract - 21 years. § 1-3-27. Married persons 18 and older may execute contracts, sales and purchase agreements, mortgages, deeds or other legal documents pertaining to their residence. § 93-3-11. Any person age 15 or older may contract for life, health or accident insurance. § 83-7-19. All persons 18 or older, unless otherwise disqualified, may contract for personalties. § 93-19-13.

Contractual liability - Minor under 18 years of age is liable only for necessaries received as a result of a contractual relationship. § 75-1-103.

No disability to veteran and spouse as to loans. § 35-3-19.

REPOSSESSION REQUIREMENTS

The creditor must make a complaint under oath that describes the property, gives its value, and sets forth why the creditor is entitled to the property, and declares that the debtor has wrongful possession of the property. The creditor must post a bond double the value of the property. § 11-37-101. A writ of replevin is issued which commands the sheriff to seize and take possession of the property, deliver it to the creditor after 2 days, unless bonded by the debtor, and summon the debtor to appear before the court. § 11-37-109. The debtor may within 2 days from the seizure of the property, have the property restored if he/she posts a bond double the property's value. § 11-37-115. Trial of a replevin action shall be no earlier than 5 days after the debtor is served. § 11-37-125.

Mississippi

STATUTE OF LIMITATIONS

Contract under seal - 3 years, 6 years for contracts prior to 1 July 1989. § 15-1-49.

Simple written contract - 3 years, 6 years for contracts prior to 1 July 1989. § 15-1-49.

Promissory notes - 3 years, 6 years for contracts prior to 1 July 1989. § 15-1-49.

Contract for sale of goods - 6 years, 3 years for contracts on or after 1 July 1989. § 75-2-725.

Oral contracts - 3 years, except that an oral employment contract has a 1 year limitation. § 15-1-29.

Open Accounts - 3 years. § 15-1-29.

Judgments - Courts of record - 7 years. 15-1-43.

If the person against whom a foreign judgment or decree was or shall be rendered, was or shall be at the time of the institution of the action, a resident of this state, such action, founded on such judgment or decree, shall be commenced within the 3 years next after the rendition thereof, and not after. § 15-1-45.

TRUTH-IN-LENDING ACT

Federal - Truth-in-Lending Act. See Chapter 2 supra.

State - See Small Loan Regulatory Law - §§ 75-67-101, 75-67-135.

For Motor Vehicle Sales - see § 63-19-31.

UNFAIR AND DECEPTIVE TRADE PRACTICES

MISS. CODE ANN. § 75-24-1 (Supp. 1990).

Prohibited Practices: 11 enumerated unfair methods of competition and unfair or deceptive practices. § 75-24-5.

Special Requirements: For a private right of action, the person must suffer, as a result of purchasing or leasing goods or services primarily for personal, family, or household purposes, ascertainable loss of money. No class actions allowed. § 75-24-15. Recovery limited to damages plus reasonable attorney's fees.

Mississippi

Scope: Trade or commerce defined as advertising or offer for sale of any service, real or personal property, intangibles, and any other thing of value.

Exclusions: Advertisements done by disinterested publisher, radio and television media, with no knowledge of falsity; officer acting under court order. § 75-24-7.

Private Remedies: Actual damages; restitution in set off or counterclaim action; attorney's fees for prevailing party. § 75-24-15.

Limitations: AG action in public interest; private action based on consumer transaction resulting in loss.

State Remedies: AG through Office of Consumer Protection, district and county attorney enforces; injunction; court may make judgments necessary including: restitution, receiver, revocation of license; $5000 per injunction violation; maximum $500 per willful violation. §§ 75-24-9, 75-24-19.

Precedential Value of FTC Interpretations: None specified.

WARRANTIES

A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 75-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose. § 75-2-315.

Any limitation of remedies which would deprive the buyer of a remedy to which he/she may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose shall be prohibited. § 75-2-719(4).

There shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose. §11-7-18.

MISCELLANEOUS

Mississippi

1. Health Spas. § 75-83-1 to 75-83-15. (Supp. 1990)

A buyer must receive a completed copy of the contract. Each contract must state in bold face type: NOTICE TO BUYER: DO NOT SIGN THIS CONTRACT UNTIL YOU HAVE READ ALL OF IT. ALSO, DO NOT SIGN THIS CONTRACT IF IT CONTAINS ANY BLANK SPACES. Every purchaser has 5 business days to notify spa in writing to cancel the contract after the date of signing such contract. The contract must also contain this right. § 75-83-5.

No spa contract shall be for longer than 24 months. The contract must also provide for cancellation on account of death or disability. § 75-83-5.

Any person who suffers ascertainable loss of money or property as a result of fraud, dishonesty, or violation of the Act may recover actual and/or punitive damages. If successful, buyer will receive reasonable attorneys fees and costs. If the action is found to be groundless or brought in bad faith, the court may award reasonable attorneys fees and costs to the defendant. § 75-83-9.

2. Unsolicited Goods. § 75-65-101.

The receipt of any unsolicited goods, wares, or merchandise is deemed an unconditional gift to the recipient who may use or dispose of the same in any manner and without obligation to the sender.

Missouri

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 407.705(1). Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 407.705(2). The buyer may not cancel the home solicitation if the buyer requested the seller to provide goods or services due to an emergency and (A) the seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notice of cancellation, and (B) in the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer. § 407.705(3). The sales agreement must contain a conspicuous notice of this cancellation right. § 407.710(2). Until the seller has notified the buyer of his/her cancellation rights, the buyer may cancel the sale by notifying the seller in any manner of his/her intention to cancel. § 407.710(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. § 407.720. The seller must return any funds or notes of indebtedness received or goods traded in to the buyer within 10 days after cancellation of the sale. § 407.715.

A cash sale, a sale of real property, a sale of personal property which is incident to the sale of real property, a sale made pursuant to a pre-existing revolving charge account, a sale previously negotiated at the seller's place of business, and buyer initiated sale for emergency and work has begun or goods not returnable in good condition are not included in the protections provided by this statute. § 407.700.

Missouri

MINOR'S CONTRACT

Age of majority to contract - 18. § 431.055 (Supp. 1988).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. However, § 431.060 states a minor will be liable for any contract if, after reaching majority, the person ratifies the contract by: writing, partial payment, disposal of part or all of property for which debt was contracted, or refusing to deliver property in his/her possession for which the debt was contracted, to the creditor on demand in writing. § 400.1-103. See § 431-061 (Supp. 1988) - minor may consent for certain medical procedures, e.g. pregnancy (excluding abortion) and venereal disease and may consent for any medical or surgical treatment if lawfully married.

Disability of veteran not under 18 and spouse removed to acquire and convey property. § 442.100.

REPOSSESSION REQUIREMENTS

Prejudgment seizures are governed by rule 99.01 et seq. Mo Sec, Rule of Civil Procedure (Supp. 1991).

The creditor must make an affidavit showing:

(1) That the creditor is the owner of the property or is lawfully entitled to the possession thereof;

(2) A description of the property with sufficient clarity to identity it;

(3) That the property is wrongfully detained by the debtor;

(4) The actual value of the property;

(5) That the property has not been seized under any process, execution or attachment against the property of the creditor; and

(6) That the creditor will be in danger of losing his/her property unless it is taken from the debtor's possession. Rule 99.03. The court then determines need for immediate possession. Rule 99.09. The court order is served by the sheriff together with notice of right to file delivery bond and request a hearing. Rule 99.05.

The creditor also must execute a bond with two or more sureties, approved by the sheriff, in double the value of the property stated in the affidavit. The creditor may pledge bearer

securities issued by the United States in lieu of executing a security bond. Rule 99.06. Before the sheriff delivers the property to the creditor, the debtor can regain possession of the property by executing a bond to the creditor, with two or more sufficient sureties, to be approved by the sheriff, in double the value of the property as stated in the creditor's affidavit. Rule 99.07. Pending trial on the merits, the debtor may ask for a hearing which will be held within 10 days. Rule 99.09.

STATUTE OF LIMITATIONS

Contract under seal - 10 years. § 516.110.

Simple written contract - 10 years. § 516.110.

Promissory notes - 10 years. § 516.110.

Contract for sale of goods - 4 years. § 400.2-725.

Oral contracts - 5 years. § 516.120.

Open Accounts - 5 years. § 516.120.

Judgments - Courts of record - 10 years. § 516.350.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Every retail sales contract requiring the buyer to make one or more deferred payments shall be in writing and shall contain the following (§ 408.260):

(1) The cash sales price;

(2) The amount of any down payment and a description of the items used to make any noncash portion of such down payment;

(3) The difference between (1) and (2);

(4) The amount of any charges for credit life insurance or other benefits;

(5) the amount of any official fees;

(6) The sum of (3), (4), and (5);

(7) The amount of any "time charge" (the difference between the cash sales price and the amount the retail buyer pays or agrees to pay);

(8) The total amount of the deferred payments, which is the sum of (6) and (7), and the amount and due date of each such payment.

(9) The total amount to be paid by the buyer.

The seller shall provide the buyer with a signed copy of t: contract. § 408.260. Penalties for failing to disclose information required to be disclosed under § 408.260 are set forth at § 408.370. To bring a private cause of action, buyer must sustain ascertainable loss. § 408.370(4).

For disclosure requirements in small loan contracts see Consumer Finance Act § 408.130.

UNFAIR AND DECEPTIVE TRADE PRACTICES

MO. REV. STAT. § 407.010 (1979 & Supp. 1984).

Prohibited Practices: Deceptive acts or concealment or omission of material fact intentional. § 407.020.

Scope: Sale, offer for sale, or advertisement of any merchandise including goods, commodities, intangibles, realty, or services.

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge of falsity; advertisements complying with FTC statutes; institutions supervised by director of division of saving and loans, insurance, or finance unless director authorizes AG to act.

Private Remedies: Actual damages, punitive damages discretionary; court "may" award attorney's fees to prevailing party; equitable relief necessary or proper; class action for actual damages; injunction. § 407.025.

Limitations: For private action, must purchase or lease goods or services for personal, family, household purposes and suffer ascertainable loss; AG gets injunction only after notice to defendant.

State Remedies: AG enforces; injunction after notice to defendant; court may make necessary orders including: receiver, restitution; maximum $1000 per injunction violation; costs. §§ 407.040, 407.100.

Missouri

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 400.2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 400.2-315.

Implied warranties, including the warranty of merchantability, can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 400.2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

Unsolicited Merchandise. § 407.200.

Where unsolicited merchandise is delivered to a person for whom it is intended, such person has the right to refuse to accept delivery or may deem it a gift and use or dispose of it in any manner without obligation to the seller.

Missouri

Montana

All citations, unless otherwise noted, are to the Montana Code Annotated (MCA).

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - Issuance of Consumer Reports. - Substantially the same as the federal law. §§ 31-3-111, 31-3-121.

Disclosures

Agency to Consumer - Every consumer reporting agency must, upon request and proper identification of the consumer, clearly and accurately disclose to the consumer: (a) the nature and substance of all information (except medical information) in its files at the time of the request; and (b) the sources of the information. § 31-3-122. The disclosures are to be made during normal business hours and on reasonable notice. Disclosures may be made in person after proper identification of the consumer, or by telephone if the consumer has made a written request. Trained personnel must be on hand to explain the information. The consumer is allowed to have one other person accompany him/her during the interview, but the agency can require the consumer to provide them with a written statement granting that permission. § 31-3-123. When the reporting agency reports public record information for employment purposes which is likely to have an adverse effect on ability to gain employment, the agency must either notify the consumer that the information is being reported, or it must maintain strict procedures to insure that the information is complete and up to date. § 31-3-126.

User to Consumer

A person may not procure or cause to be prepared, or distribute an investigative consumer report unless the consumer is notified in a writing mailed or delivered to the consumer within 3 days after the date on which the report was first requested. A statement also must be included that the consumer can request a detailed disclosure of the nature and scope of the investigation. The requested disclosure must be made in a writing mailed or delivered to the consumer within 5 days after the date on which the consumer request was received or such report was first requested, whichever is the latter. If the report is used for employment purposes, the reporting agency does not have to follow these provisions. § 31-3-113. Whenever credit or insurance is denied, or the costs for such credit or insurance is increased because of information contained in a consumer report from a consumer agency, the consumer must be notified of that fact along with the name of the reporting

agency. If credit or insurance is denied or the costs for such credit or insurance increased, because of information provided by a person other than a reporting agency, the user must disclose the nature of the information to the consumer upon written request of the consumer within 60 days after the consumer learned of such adverse action. § 31-3-131. The consumer must be advised at that time of his/her right to make such a request.

Prohibited Disclosures

Obsolete Information - A consumer report may not contain any of the following information (§ 31-3-112):

(1) Bankruptcies which antedate the report by more than 14 years;

(2) Suits and judgments which antedate the report by more than 7 years or until the governing statute of limitations has expired, whichever is longer; and

(3) Paid tax liens, accounts placed for collection, criminal records, or any other adverse information which antedates the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than 7 years.

(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than 7 years.

(6) Any other adverse item of information which antedates the report by more than 7 years.

Investigative Reports - No adverse information (other than matters of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making the subsequent consumer report. § 31-3-115.

Report Procedures - Compliance - Every consumer reporting agency must maintain reasonable procedures designed to avoid violations and the furnishings of consumer reports for unauthorized purposes. They must identify all users of the information and certify the purposes for which the information is sought. A consumer reporting agency cannot furnish a consumer report to anyone if it has reason to believe that the consumer report will not be used for a permitted purpose. The agency must use procedures to assure the accuracy of the information on an individual, and it must keep a record of all persons using the information and the source of the

information. Any person supplying information must be told that they are liable for supplying false information. § 31-3-114.

Disputed Accuracy - If a consumer's dispute of the accuracy of his/her consumer report is directly conveyed to the agency, the agency must reinvestigate unless it has reasonable grounds to believe the dispute is irrelevant or frivolous. Inaccurate or unverifiable information must be deleted and all users of it notified. The consumer may file a brief explanation of an unresolved disputed item and each subsequent user of the report must be notified of the statement's contents. The consumer is notified of all users who have the disputed information. § 31-3-124.

Violations - Penalties

Civil - A consumer reporting agency or user which willfully fails to comply with the law is liable to the consumer for any actual damages sustained, any punitive damages awarded by the court, and in a successful action, court costs plus reasonable attorney's fees. §§ 31-3-142, 31-3-143. Consumer may recover actual damages and attorney's fees and costs for negligent noncompliance.

Criminal - A violation of the law is considered an unfair trade practice. (§ 31-3-153), punishable by a fine of $2,000 and/or 1 year in prison.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - Title 30, Chapter 14, part 5 (§ 30-14-501 et seq.) is substantially similar to the "Uniform Unfair Trade Practices & Consumer Protection Law." The buyer has the right to cancel a personal solicitation sale (a sale made by telephone or at a place other than seller's place of business) until midnight of the third business day following execution of an agreement or offer to purchase. § 30-14-504(1). If the personal solicitation was made by phone, buyer may cancel at any time prior to his/her execution of sale document. § 30-14-504(1). Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 30-14-504(3). The notice of cancellation must be mailed by certified mail, unless the

seller fails to fulfill all of his/her notice obligations. § 30-14-505. The sales agreement must contain a conspicuous notice (copy in statute) of this cancellation right. Until the seller notifies the buyer of his/her cancellation rights, the buyer can cancel the sale by notifying the seller in any manner of his/her intention to cancel. § 30-14-505(2). The buyer cannot cancel if the goods cannot be returned to the seller in substantially the same condition as when received by the buyer. § 30-14-504(5).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand, so long as seller has returned any down payment. § 30-14-507(2) and 30-14-506(4). However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to demand such possession within 40 days after cancellation or revocation of the sale. § 30-14-507(1). The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 30-14-506(1, 2).

The following transactions are not included in the protections provided by these statutes (§ 30-14-502):

(A) An attempted sale in which the buyer personally knows the seller, the name of the business or organization he/she represents, and the identity or kind of goods or services offered for sale;

(B) A sale where the buyer initiated the contact;

(C) A sale of a newspaper subscription in which the seller is a minor engaged in both delivery and sale of the newspaper;

(D) A sale of an insurance policy; and

(E) A sale for less than $25.00.

(F) Goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18. Mont. Const. Art. II, § 14 and 28-2-201.

Disabilities of minority are removed for contracts for insurance at age 15. § 33-15-103. Minors may contract to borrow money for expenses of higher education beyond the high school level. § 41-1-103.

Contractual liability - Minor is iable for necessaries received as a result of a contractual relationship and obligations

entered into by him/her under the express authority or direction of a statute or after being granted limited emancipation (§ 41-3-408). §§ 41-1-305, 41-1-306.

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit stating:

(1) Facts which establish reasonable belief that he/she is the owner of the property or entitled to its possession and that seizure is necessary to prevent removal or destruction of the property;

(2) That the property is wrongfully detained by the debtor;

(3) That the property has not been taken for a tax, assessment or fine, pursuant to statute, or seized under an execution or an attachment against the property of the creditor; and

(4) The particular description of the property and its actual value. § 27-17-201.

The creditor also must execute a bond with two or more sufficient sureties approved by the sheriff, in double the value of the property as stated in the creditor's affidavit. § 27-17-205.

The sheriff cannot seize any property unless an order from the judge of the court having jurisdiction of the cause is attached to the affidavit. (§ 27-17-203). The judge will only sign the order of seizure if he/she is satisfied:

(1) That the creditor has made a prima facie showing of his/her right to possession of the property at a show cause hearing before him/her with at least 3 days' notice to the debtor or by publication; or

(2) That the delay caused by notice and a hearing would seriously impair the remedy sought by the creditor. Evidence of impairment must be presented in open court, and the court must specify the reasons explicitly.

At any time before delivery of the property to the creditor, the debtor can require the return of the property to him/her, by giving the sheriff a bond executed with two more sufficient sureties, in double the value of the property as stated in the creditor's affidavit. § 27-17-304.

Montana

STATUTE OF LIMITATIONS

Contract under seal - 8 years. §§ 27-2-202(1), 1-4-204.

Simple written contract - 8 years. § 27-2-202(1).

Promissory notes - 8 years. § 27-2-202(1).

Contract for sale of goods - 4 years. § 30-2-725 (original agreement may reduce it to as little as one year, but not extend).

Oral contracts - 5 years. § 27-2-202(2).

Open accounts - 5 years. § 27-2-202(2).

Judgments - Courts of record - 10 years. § 27-2-201.

Justice Court - 5 years. § 27-2-201.

Medical malpractice - 3 years from discovery but not later than 5 years from date of injury - unless fraudulently concealed. § 27-2-205.

Personal injury and wrongful death - 3 years. § 27-2-204.

Property damage - 2 years. § 27-2-207.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Every retail installment sales contract shall be in writing, signed by both the buyer and the seller and completed as to all essential provisions prior to the signing of the contract by the buyer. § 31-1-231.

The contract shall contain the following:

(a) the cash sale price of the goods or services;

(b) the amount of the buyer's down payment and whether made in money or goods or partly in money and partly in goods, including a brief description of the goods traded in;

(c) the difference between items (a) and (b);

(d) the amount, if any, included for insurance and other benefits if a separate charge is made therefor, specifying the types of coverage and benefits;

(e) the amount of official fees;

(f) the principal balance which is the sum of items (c), (d), and (e);

(g) the amount of the finance charge;

(h) the total amount of the time balance, stated as one sum in dollars and cents, which is the sum of items (f) and (g), payable in installments by the buyer to the seller;

(i) the number of installments;

(j) the amount of each installment; and

(k) the due date or period of installments.

The seller may, instead of complying with the Montana Law comply with all sections of the federal Truth in Lending Act (15 U.S.C. 1601-1667e). § 31-1-231(8).

UNFAIR AND DECEPTIVE TRADE PRACTICES

MONT. CODE ANN. § 30-14-101 et seq. "Montana Unfair Trade Practices and Consumer Protection Act of 1973".

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. 30-14-103.

Scope: Trade or commerce defined to include advertising, sale, or offer for sale of any services, real or personal property, intangibles or any thing of value.

Exclusions: Transactions permitted by state or U.S. law administered by public service commission; advertisements done by disinterested publishers, radio and television media, advertising agency or retail merchants with no knowledge of falsity; national advertising. § 30-14-105.

Private Remedies: $200 or actual damages (whichever is greater); treble damages discretionary; court may provide equitable relief necessary or proper; attorney's fees may be awarded prevailing party. § 30-14-133.
Limitations: Must purchase or lease goods or services primarily for personal or family purposes and suffer an ascertainable loss. § 30-14-133.

Montana

State Remedies: Rulemaking in department of commerce consistent with FTC; enforcement by department and county attorney or AG if requested; injunction if in public interest and upon notice; court may make additional orders necessary, including; restitution, receiver, revoke license, suspend charter or license and other relief required; court has discretion to dissolve corporate franchise or maximum $10,000 per injunction violation; $500 per willful violation of act; criminal penalties for fraudulent conduct. §§ 30-14-111, 30-14-113, 30-14-134, and 30-14-142.

Precedential Value of FTC Interpretations: Due consideration and weight. § 30-14-104.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 30-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 30-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 30-2-316.

NEW MOTOR VEHICLE WARRANTIES ("Lemon Law") § 61-4-501 to 533.

Applicability--

(1) New motor vehicle (excludes motorcycles, motor homes or trucks with a gross vehicle weight of 12,000 pounds or more) sold in Montana after October 1, 1983;

(2) Bought by a consumer (not for purpose of resale);

(3) Which does not conform to all express warranties; and

(4) Which the manufacturer/dealer/agent has attempted to repair four or more times, or the vehicle has been out of service for 30 or more business days.

Montana

Remedy--Manufacturer shall replace defective vehicle with a new vehicle of same model and style and of equal value OR its equivalent OR may recover the vehicle and refund to the consumer the full purchase price plus reasonable collateral charges and incidental damages (less taxes, fees and reasonable allowance for consumer's use of the vehicle). Choice is up to the manufacturer. 61-4-503.

Warranty Period--A period ending 2 years after the date of original delivery to consumer or first 18,000 miles of operation, whichever is earlier. 61-4-501-(b).

Arbitration Procedure--State Dept. of Commerce provides arbitration between consumer and manufacturer in an attempt to settle disputes. The arbitration takes place in the state at a location reasonably convenient to the consumer. The Department also may certify procedures for arbitration submitted by manufacturers as an alternative. 61-4-515. Procedures are set forth in § 61-4-516 through 520.

Criminal Penalties--Violation of these statutes is an unfair or deceptive trade practice, authorizing misdemeanor prosecution and penalties. § 61-4-533 and 30-14-224.

Exception--Law not applicable when vehicle was subject to abuse, neglect, or unauthorized modification or alteration.

Montana

The following summary was reviewed and updated on 7 July 1993 by Captain Margaret A. McDevitt, 119th Judge Advocate General Detachment, 2101 Woolworth Avenue, Omaha, Nebraska 68108; Legal Services of Southeast Nebraska, Route 2 Box 406, Beatrice, Nebraska; Telephone Number: (402)-228-4286, FAX: (402) 228-2367.

Nebraska

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State -

Disclosure - Agency to Consumer: A consumer reporting agency doing business in Nebraska required to furnish information to a consumer under the Federal Credit Reporting Act must, at the request of a consumer and for a reasonable charge, provide the consumer with a typewritten or photostatic copy of any consumer report, investigative report, credit report, or other file information which it has concerning the consumer if the consumer makes a request in person or in writing. § 20-149.

Violations - Penalties: Consumer reporting agency violating agency to consumer disclosure requirements guilty of Class IV misdemeanor. § 20-149

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - If the collection agency is licensed by the Nebraska Department of Banking and Finance under Neb. Rev. Stat. sections 45-101 et seq, it may not:

(a) Use or threaten to use violence;

(b) Use obscene or profane language;

(c) Cause a telephone to ring or engage a person in telephone conversation at times known to be inconvenient to the borrower;

(d) Falsely represent the character, amount, or legal status of any debt;

(e) Falsely represent that an individual is an attorney when he or she is not;

(f) Falsely represent that nonpayment of any debt will result in the arrest or imprisonment of the borrower or any member of the borrower's household;

(g) Threaten to take any action that the licensee knows cannot legally be taken at the time the threat is made;

(h) Falsely represent that the borrower committed any crime when he or she did not;

(i) Communicate or threaten to communicate to any person credit information which is known to be false;

(j) Use or distribute any written communication which falsely represents that it is a document authorized, issued, or approved by any court, official, or agency of the United States or any state;

(k) Charge or collect any fees, charges, or expenses, incidental to the collection of any loan, unless such amount is expressly authorized by the loan agreement or permitted by law;

(l) Accept from any person a check or other payment instrument postdated by more than five days unless such person is notified in writing of the licensee's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit;

(m) Solicit any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution;

(n) Deposit or threaten to deposit any postdated check prior to the date on such check;

(o) Cause charges to be made to any person for communications by concealment of the true purpose of the communication, including, but not limited to, collect telephone calls and telegram fees;

(p) Communicate with a borrower regarding a debt by postcard; or

(q) Communicate with a borrower at the borrower's place of employment if the licensee has received actual notice that the borrower's employer prohibits the borrower from receiving such communication. § 45-177 (1988).

A licensee shall not contact any person, who is not living, residing, or present in the household of the borrower regarding the borrower's obligation to pay a debt, other than the borrower's spouse, the borrower's attorney, another creditor, or a credit reporting agency. § 45-173. The borrower may waive the benefits of § 45-173, by giving his/her consent at any time subsequent to

the date the debt arises. § 45-174. The licensee may contact any person without the borrower's consent:

(1) To ascertain information relating to a borrower's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the borrower's eligibility for credit or insurance if such contacts are not designed to collect a delinquent debt; or

(2) To locate the borrower when the licensee has reason to believe the borrower has changed his or her employment or has moved from his or her last-known address. § 45-175.

If the borrower has defaulted on his or her promise to pay and if he or she has given specific notice in writing, by registered or certified mail, instructing the licensee to cease further contacts with the borrower in regard to the indebtedness, the licensee shall, after such notice, except as provided in §§ 45-177 and 45-178, limit contacts to one notice per month by mail. No notice shall be designed to threaten action not otherwise permitted by law. § 45-176.

A licensee is not prohibited from:

(a) Contacting any person in order to discover property belonging to the borrower that may be seized to satisfy a debt that has been reduced to judgment;

(b) Making amicable demand and filing suit on the debt; or

(c) Contacting persons related to the debtor if permission is specifically given in writing at the time the debt arises or at any time after such debt arises. § 45-177.

Nothing shall limit a borrower's right to bring an action for damages. When the licensee has filed suit and obtained judgment, the licensee shall be permitted to resume contact with the borrower against whom judgment has been obtained. § 45-178.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following notification, by seller, of his/her cancellation rights. §§ 69-1603(1), 1604(5). Notice of cancellation is effective when

deposited in the mail properly addressed to the seller. § 69-1603(2). The sales agreement must contain a conspicuous notice of this cancellation right. § 69-1604(1) & (2).

The seller must, within 10 days of cancellation, return to the buyer any funds received including a down payment and within 20 days of cancellation, the seller must return any property received from the buyer. § 69-1605(1), (3). The buyer must take reasonable care of the goods and tender the goods, or, if inequitable, their reasonable value, at his or her residence or the location of the property, to the seller upon seller's required repayment and return as set forth above. However, the buyer takes title to the merchandise, without obligation to pay for it, if the seller fails to take possession of the property within 20 days after the buyer has tendered the property. § 69-1606.

The statute covers a sale, lease, or rental of consumer goods or services with a purchase price of $25.00 or more where the seller solicits, and buyer makes his/her agreement or offer, at a place other than seller's place of business. It includes transactions in response to, or upon an invitation of buyer, but not the following:

(1) A transaction made pursuant to prior negotiations in the course of visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis;

(2) Where the consumer has the right of rescission under the Consumer Credit Protection Act (15 U.S.C. § 1635 et seq.);

(3) A sale initiated by the buyer for goods and services to meet an emergency with a signed, handwritten statement by the buyer waiving his/her right to cancel the sale;

(4) A sale conducted and consummated entirely by mail or telephone without any other prior contact between the buyer and seller prior to delivery or performance;

(5) A sale in which the buyer initiated the contact and requested the seller to perform maintenance or repair work on the buyer's personal property; and

(6) A sale of securities or commodities by a registered broker-dealer.

(7) A consumer rental purchase agreement under the Consumer Purchase Agreement. Section 69-1601.

Nebraska

Violations of the statute entitle buyer to damages, recovery of payments, court costs and reasonable attorney fees.

MINOR'S CONTRACT

Age of majority to contract - 19; unless married. Marriage before age 19 terminates minority. § 43-2101.

A minor, 10 years or older, may contract for life, health and accident insurance and annuities. § 44-705.

Contractual liability - A minor does not have the capacity to bind herself or himself absolutely by contract. However, the minor is liable for the value of necessaries furnished on the basis of quasi-contract. Webster Street Partnership, Ltd v. Sheridan, 220 Neb. 9, 368 N.W.2d 439 (1985).

Disability of veteran on loans removed. § 80-701.

REPOSSESSION REQUIREMENTS

The plaintiff in an action to recover personal property (replevin action) may, at the commencement of suit or before answer, request delivery of such property and file an affidavit showing:

(1) A description of the property claimed;

(2) That the plaintiff is the owner of the property or that he/she is entitled to its immediate possession;

(3) That the property is wrongfully detained by the defendant; and

(4) That the property was not taken in execution of any order or judgment against the plaintiff, or for the payment of any fine, tax, or assessment, or by virtue of an order of delivery, or, in the alternative, that the property was taken in execution of a judgment or order, other than an order of delivery in replevin, and that the same is exempt from such execution or attachment under Nebraska law.

A specific request for the delivery of the property and the issuance of an order by the court to that effect may be attached to the affidavit. § 25-1093.01. The plaintiff also must execute a bond with one or more sufficient sureties, to the defendant in at least double the value of the property taken before the sheriff shall deliver the property to the plaintiff. § 25-1098.

Upon the filing of such affidavit and request for delivery, the defendant with full knowledge of the consequences of his/her actions may execute a voluntary, intelligent and knowing waiver of his/her rights to notice and a hearing and the court will order that the property be returned to the plaintiff. Absent such a waiver, the court will issue a temporary order to the defendant telling him/her to hold the property unimpaired and unencumbered. The temporary order also shall contain a notice that a hearing will be had and specifying the date, time and place of such hearing. The date of such hearing shall be seven days after service of the order upon the defendant, but in no event later than fourteen days after service. § 25-1093.02. The defendant can require the return of the property to his/her possession by executing a bond to the plaintiff, before the delivery of the property to the plaintiff, with one or more sufficient sureties, in at least double the value of the property taken. § 25-1098.

STATUTE OF LIMITATIONS

Written contract - 5 years. § 25-205.

Promissory notes - 5 years. § 25-205.

Contract for sale of goods - 4 years. UCC § 2-725.

Oral contracts - 4 years. § 25-206.

Open Accounts - 4 years. § 25-212.

Judgments - Courts of record - Kept alive by execution every 5 years. § 25-1515.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - No statutory provision.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Consumer Protection Act, Neb. Rev. Stat. sections 59-1601 to 59-1623 (1988).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

Special Requirements: None specified.

Nebraska

Scope: Trade or commerce defined as sale of assets or services that directly or indirectly affects the people of Nebraska. An asset includes real or personal property, intangibles and anything of value.

Exclusions: Agricultural organizations marketing products within the State of Nebraska; transactions permitted or regulated by Public Service Commission or Department of Insurance, federal power commission, or regulatory body acting under state or U.S. authority; public power and/or irrigation district, cooperatives, municipalities or associations furnishing electricity to consumers. Civil penalties do not apply to advertisements done by publishers, radio and television media, with no knowledge of falsity.

Private Remedies: Injunction; actual damages; attorney's fees and costs; court has discretion to increase damages to include immeasurable damages up to $1000.

Limitations: Must be injured in business or property for private remedy; 4 year statute of limitations after cause accrues; tolled during pendency of AG action except for civil penalty for injunction violation or actions predicated on party suffering actual injury to business or property.

State Remedies: AG enforces; injunction; attorney's fees and costs discretionary to prevailing party; court "may" make additional orders including restitution; if private party suffers injury in business or property, then that party may be awarded actual damages, attorney's fees and costs and court has discretion to increase award of actual damages up to $1000 to include immeasurable actual damages. In addition, there are civil penalties of $2000 per violation with maximum penalty of $25,000 for violation of injunction issued pursuant to the Act.

Neb. Rev. Stat. sections 87-301 to 87-306 (1987 & Supp. 1992). Uniform Deceptive Trade Practices Act.

Prohibited Practices: 15 enumerated deceptive trade practices

Scope: In course of a person's business, vocation or occupation.

Exclusions: Conduct complying with federal, state or local statutes or rules; publishers, broadcasters, printers or others who disseminate information without knowledge of deceptive character.

Private Remedies: Injunction; attorney's fees to prevailing party discretionary based on groundless suit brought or willful violation; if entered sale or lease, may rescind contract or retain merchandise or service without paying.

Nebraska

Limitations: One year statute of limitations from date of purchase of goods or services.

State Remedies: AG or county attorney with consent of AG enforces and investigates. Court may revoke license or grant other relief necessary including injunctions. Court may order necessary relief including restitution; criminal penalties, including maximum $5000 and/or 5 years imprisonment for willful injunction violation or violation of terms of voluntary compliance agreement.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. UCC § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. UCC § 2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. UCC § 2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308 (Magnuson Moss Warranty Act).

Nevada

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Collection agencies are licensed by the state through its Department of Commerce. §§ 649.075, 649.051. A collection agency, its manager, agents or employees shall not:

(1) Use any device, pretense or deceptive means to collect any debt, nor use any type of notice which simulates legal process or purports to be from a governmental authority or attorney;

(2) Collect or attempt to collect any interest, charge, fee or expense incidental to the principal obligation unless authorized by law, or judicially determined to be proper and legally due from the debtor;

(3) Assign or transfer any claim or account upon termination or abandonment of its collection business unless prior written consent by the customer is obtained;

(4) Operate its business or solicit claims for collection from any location, address or post office other than that listed on its license or as may be prescribed by the administrator;

(5) Harass a debtor's employer in collecting or attempting to collect a claim;

(6) Advertise for sale or threaten to advertise for sale any claim as a means to enforce payment of the claim, unless acting under court order;

(7) Publish or post, or cause to be published or posted any list of debtors except for benefit of stockholders or membership in relation to its internal affairs;

(8) Conduct or operate, in conjunction with its collection agency business, a debt counseling or prorater service whereby a debtor assigns or turns over to the counselor or prorater any of his/her earnings or other funds for apportionment and payment of his/her debts or obligations. § 649. 375. Any person who violates any provision of this chapter is guilty of a misdemeanor, § 649.435, and may suffer loss of their license. § 649.395.

Nevada

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a door-to-door (home solicitation) sale until midnight of the third business day following execution of an agreement or offer to purchase. Notice is effective when telegraphed, delivered, or deposited in the mail properly addressed to the seller, postage prepaid. § 598.230. The sales agreement must contain a conspicuous notice of this cancellation right and a copy of the agreement must be furnished to buyer. §§ 598.240, 598.250.

The buyer must tender the goods at his or her residence to the seller upon demand or if directed by seller, return them at seller's expense. However, the buyer takes title to the goods, without obligation to pay for them, if the seller does not pick the goods up or provide instructions to the buyer, within 20 days of the date of the notice of cancellation. The seller must return any funds received or property traded in to the buyer within 10 business days after cancellation of the sale. § 598.250. The seller is entitled to collect a cancellation fee which is equal to the lesser of 5 percent of the total purchase price, $15, or any down payment paid by the buyer at the time the contract is entered into or executed. § 598.260.

The following transactions are not included in the protections provided by this statute:

(1) A sale, lease, or purchase for less than $25;

(2) A sale made pursuant to a preexisting retail charge agreement or pursuant to prior negotiations between the parties at the seller's place of business;

(3) A sale in which the buyer has the right of rescission under the provisions of the Consumer Credit Protection Act, 15 U.S.C. § 1635;

(4) A sale initiated by the buyer for any emergency with a handwritten statement by the buyer waiving his/her right to cancel the sale;

(5) A sale conducted entirely by mail or telephone;

(6) A buyer initiated sale in which the buyer requests the seller to visit his/her home for repair or maintenance of the buyer's personal property;

(7) A sale or rental of real property, a sale of insurance; or the sale of securities or commodities by a registered broker-dealer;

(8) A sale or rental of vehicles;

(9) A sale or rental of mobile homes;

(10) A sale pertaining to the provision of facilities and services furnished by utilities under the jurisdiction of the public service commission of Nevada. § 598.180.

Any seller violating the statute may be sued civilly by the District Attorney or the Commissioner of Consumer Affairs, and incur a penalty of not more than $2,500.00 for each violation. § 598.270.

MINOR'S CONTRACT

Age of majority to contract - 18. § 129.010.

Contractual Liability - A minor is bound on contract for necessaries. § 104.1103.

Disability of veteran on loan removed. § 129.020.

REPOSSESSION REQUIREMENTS: In Nevada, replevin is known as "claim and delivery."

Plaintiff in an action to recover personal property may at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him/her. § 31.840. The following outlines procedures for "temporary repossession" prior to final adjudication of all claims:

Proceedings by Plaintiff. Where delivery is claimed, an affidavit shall be made by plaintiff, or by some one in his/her behalf and filed with court, showing: (1) that plaintiff is owner of property claimed (particularly describing it), or is lawfully entitled to possession thereof; (2) that property is wrongfully detained by defendant; (3) alleged cause of detention thereof according to his/her best knowledge, information and belief; (4) that same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against property of plaintiff, or if so seized that it is exempt by statute; and (5) actual value of property. § 31.850.

If affidavit meets requirements, court will issue an order to defendant to show cause why property should not be taken from

him/her and delivered to plaintiff. § 31.853. Hearing is held to determine who, with reasonable probability, is entitled to possession pending final adjudication. Following finding for plaintiff, writ of possession may be issued if plaintiff files written undertaking executed by two or more sufficient sureties, approved by court, to effect they are bound to defendant in double value of property for return of property to defendant if return thereof is ordered. If plaintiff is reasonably believed to be secured party, no undertaking will be required. § 31.863.

Writ of possession may issue prior to a hearing if plaintiff establishes that: (1) Defendant gained possession by criminal act; (2) property consists of negotiable instruments or credit cards; or (3) property is perishable or in immediate danger of destruction, concealment, removal from state, or sale. A written undertaking is also required. § 31.856.

Writ of possession describes property and its location, directs sheriff to seize and retain it, and advises defendant of his/her right to except to sureties or file a written undertaking for delivery of property. §§ 31.866/31.870.

Proceedings by Defendant: Defendant may within two days after service of such copy give notice to sheriff that he/she excepts to sufficiency of the sureties. If he/she fails to do so, he/she is deemed to have waived all objection to them. § 31.880.

If defendant does not except to sureties, he/she may at any time, before delivery of property to plaintiff, require return thereof, upon filing with court and serving plaintiff with a written undertaking, approved by court and executed by two or more sufficient sureties, to effect they are bound in double value of property, for delivery thereof to plaintiff, if such delivery be adjudged and for payment to him/her of such sum as may for any cause be recovered against defendant. § 31.890.

Claims of Third Parties: If such return of property is not so required within five days after serving writ of possession and undertaking upon defendant, it must be delivered to plaintiff unless property is claimed by some other person than defendant or his/her agent, and such person makes an affidavit of his/her title thereto, or right to possession thereof, stating grounds of such title or right, and files affidavit with court and serves a copy upon sheriff, in which instance sheriff is not bound to keep property or deliver it to plaintiff, unless plaintiff on demand of sheriff or his/her agent, indemnifies sheriff against such claim by an undertaking, by two sufficient sureties or surety company, accompanied by their affidavits that they are worth double value of property, as specified in affidavit, over and above their debts

and liabilities, exclusive of property exempt from execution, and are freeholders, or householders in county. No claim to such property by any other person than defendant or his/her agent shall be valid against sheriff unless so made. § 31.940.

STATUTE OF LIMITATIONS: A civil action is commenced by filing a complaint with the Clerk of the Court and any such action must be commenced within the following time periods:

Within six years: Action on judgment or decree of court within United States or on contract, obligation or liability evidenced by writing, sealed or unsealed, not limited by specific statute. § 11.190.

Within five years: Actions to recover real property or the possession or rents or profits thereof, except as hereinafter stated. § 11.030-§ 11.180.

Within four years: (1) Actions upon accounts; (2) actions upon contracts, obligations or liabilities not founded upon instruments in writing; (3) an action for any article charged on an account at a store. § 11.190. Statute commences to run from date of last transaction or last item charged, or last credit given; and whenever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made. (4) Actions for breach of contracts of sale under Uniform Commercial Code. § 104.2725; (5) Malpractice action, after date of injury, or two years after plaintiff discovers, or should have, injury, whichever occurs first, in action against professional health care provider for negligence, rendering professional services without consent, or for error or omission in such provider's practice. § 41A.097; (6) Malpractice actions against accountants, attorneys and veterinarians measured from time plaintiff discovered or should have discovered facts constituting cause of action. § 11.207.

Within three years: (1) Upon a liability created by a statute other than a penalty or forfeiture; (2) for waste or trespass on real property; (3) for taking, detaining or injuring goods and chattels; (4) an action for relief upon the ground of fraud, time running from discovery; (5) action against guardian by his/her ward § 11.190; (6) action to recover real estate sold by guardian, time running from termination of guardianship; (7) action to recover real estate sold by executor or administrator in probate proceedings, time running from sale §§ 11.260 and 11.270; (8) action against corporate directors on statutory liability, time running from discovery § 11.380.

Within two years: (1) Against sheriff, coroner or constable for official misconduct; (2) upon statute for penalty or forfeiture; (3) for libel, slander, assault, battery, false imprisonment or seduction; (4) action against sheriff, or other officer, for escape of prisoner arrested or imprisoned on civil process; (5) action to recover damages for injury to person or for death of person by wrongful act or neglect of another § 11.190; (6) after plaintiff discovers, or should have, injury due to negligence, rendering services without consent, or error or omission by professional health care provider § 41A.097; (7) upon action to recover mining claim or possession thereof § 11.060.

GENERAL LIMITATION PERIOD: The four-year limitation applies to actions for any relief not otherwise specified in NRS § 11.190 to § 11.220.

TIME LIMIT FOR SERVICE OF SUMMONS AND COMPLAINT. Service of the summons and complaint must be made upon a defendant within 120 days after the filing of the complaint or complaint is subject to dismissal without prejudice upon motion or upon the court's own initiative with notice to plaintiff unless plaintiff can show good cause why such service was not made within the foregoing period. N.R.C.P. 4(i).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - No statutory provision.

UNFAIR AND DECEPTIVE TRADE PRACTICES

NEV. REV. STAT. §§ 598.360, 41.600 (1983).

Prohibited Practices: Numerous enumerated deceptive trade practices defined in §§ 598.410, 598-411, 598-412 and 598.413.

Scope: In course of a person's business or occupation.

Exclusions: Conduct complying with federal, state or local rules or statutes; publisher, advertising agencies, broadcasters and printers who disseminate information without knowledge of deceptive character.

Private Remedies: Actual damages if plaintiff prevails as victim of consumer fraud. § 598.610.

Limitations: DA shall not institute actions until state agency or regulatory authority has reasonable time to investigate or within

30 days if immediate action not mandated by circumstances. § 598.640

State Remedies: Commissioner of Consumer Affairs, Director of Department of Commerce or DA enforces; injunction; court may make orders necessary including restitution; maximum $10,000 for violation of court order or injunction; $2500 maximum per willful violation; criminal penalties; rulemaking in commission and director.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 104.2314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 104.2315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 104.2316.

MISCELLANEOUS

1. Athletic Clubs. § 598.800 to 598.837.

The Act applies to contracts only if the buyer purchases or becomes obligated to purchase the use of the club for more than 3 months. The contract cannot provide for automatic renewal. If buyer becomes disabled and the disability will continue for more than 3 months, buyer may suspend contract. Buyer may cancel if permanently disabled. If club is closed more than 1 month, buyer may extend the contract or receive pro rata refund.

A buyer may cancel within 3 business days after he/she receives a copy of the contract. This right must be included in the contract. If the club does not exist when the contract is entered into, buyer may cancel if club is not open on date provided for in the contract. No private right of action is provided. Violation of the Act is a misdemeanor.

2. Organizations for Buying Goods or Services at Discount. § 598.840 to 598.930.

An organization under this section is defined as a person who, for consideration, provides or claims to provide a buyer with the abilit[illegible] to purchase goods or services at a price represented to be lowe[illegible]n the price generally charged in the area. The definition does [illegible]t cover contracts, the consideration of which is $50 or less, or an annual fee of $25 or less.

Before the buyer signs a contract, the organization shall give the buyer, in writing, the following: description of exact nature of services, a list (current within 60 days) of at least 100 items sold by or through the organization, a statement of policy with respect to warranties or guarantees, description of charges, and whether a stockholder, director, etc., has been convicted of a felony, misdemeanor, of pled nolo contendere if it involved fraud, embezzlement, or misappropriation. § 598.870.

The contract cannot be for longer than 2 years. The buyer may cancel within 3 business days after receiving a copy of the contract. Money must be returned within 15 days of such notice. Private right of action specified. The court may award restitution, treble damages, and reasonable attorney's fees and costs. § 598.880.

3. Credit Service Organizations. § 598.281 to 598.289.

An organization under this section means a person who, with respect to the extension of credit by others, sells, provides, or performs, or represents he/she will sell, provide, or perform, in return for payment, the following: improve buyer's credit record, history, or ratings; obtain extension of credit; or provide counseling or assist in the above. The definition does not include banks, credit unions, savings and loans, and the like.

The organization cannot charge money before full performance, charge for a simple referral, or counsel, advise, or make an untrue or misleading statement. Before signing the contract, the seller must inform the buyer that: buyer has right to receive all credit information, time and money considerations, description of services, and a statement that buyer may cancel within 5 days after execution.

The section provides for private recovery of actual damages plus reasonable attorneys fees, costs, and punitive damages.

New Hampshire

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - N.H. Rev Stat Ann § 359-B:1 et seq. 1971.

Disclosures - Agency to Consumer - Upon request, a consumer reporting agency must disclose to the consumer all information in its files (except medical), the sources of the information, and the recipients of any reports on the consumer it has furnished. § 359-B:9(I). Whenever an investigative consumer report is requested by any person, the consumer reporting agency shall furnish to the consumer investigated, upon his/her request, and upon payment by the consumer investigated of a reasonable copy fee: (a) A copy of the investigative consumer report; (b) Information normally required to be disclosed upon proper request by the consumer; (c) The names of all sources of information in its files on the consumer which were actually used in the preparation of the investigative consumer report; and, (d) The names of all persons to whom the investigative consumer report was sent. § 359-B:9(III).

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - A debt collector is prohibited from collecting or attempting to collect a debt in an unfair, deceptive, or unreasonable manner. § 358-C:2. Any debt collection or attempt to collect a debt shall be deemed unfair, deceptive or unreasonable if the debt collector:

(1) Communicates or attempts to communicate with the debtor, orally or in writing, by causing the telephone to ring excessively or at strange hours, or by using profane or vulgar language;

(2) Calls or writes the debtor at his/her place of employment, unless he/she has been unable to otherwise contact the debtor. The debt collector can call the debtor at his/her place of employment provided:

(a) The debtor has not told him/her otherwise;

(b) The debt collector does not reveal the nature of the call unless asked by the employer; and

(c) The debt collector makes no more than one phone call per month to the debtor at his/her place of employment;

(3) Fails to properly and accurately identify himself or herself in all communications with the debtor;

(4) Uses or threatens the use of force or violence;

(5) Threatens to take any unlawful action or action which the debt collector in the regular course of business does not take;

(6) Communicates or threatens to communicate, except by proper judicial process, the fact of the debt to a person other than the person who might reasonably be expected to be liable therefor;

(7) Communicates directly with the debtor, except through proper legal action, after notification from an attorney, financial counseling organization or other person representing the debtor that all further communications should be addressed to the attorney;

(8) Communicates with debtor through the use of forms which simulate the form and appearance of judicial process;

(9) Makes any material false representation or implication concerning the debt;

(10) Makes any representation that the principal obligation will definitely be increased by the addition of attorney's fees or service fees, when they are illegal or when the award of such fee is in the discretion of the court;

(11) Collects or attempts to collect any interest or other charge which is not expressly authorized by the agreement creating the obligation;

(12) Threatens that nonpayment of the debt will result in the arrest of a person or seizure of their property without also notifying them of the necessity of a court order and their opportunity to appear in court and contest the charge; or

(13) Threatens to assign or sell to another the account of or claim against the debtor while representing that the result of such sale will be that the debtor will lose any defense to the debt or would be subjected to harsh, vindictive or abusive collection attempts. § 358-C:3.

Any debt collector who engages in prohibited conduct while attempting to collect a debt shall be liable to the debtor for the larger amount of:

(a) $200 plus costs and reasonable attorney's fees for each violation, in an action brought by an individual debtor; or

(b) All damages proximately caused by the violation. § 358-C:4(I).

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Notice is effective when delivered, deposited in the mail properly addressed to the seller, postage prepaid, or the merchandise returned. The sales agreement must contain a conspicuous notice of this cancellation right. § 361-B:2(I).

The seller must return any funds received or property traded in to the buyer within 15 days after cancellation of the sale. § 361-B:2(I)(b,c). If seller does so the buyer must tender the goods at the point of delivery or pursuant to the seller's directions and at seller's cost. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to make an effort to recover the property within 90 days after the sale of the property. §§ 361-B:2(I)(c), 361-B:2(IV,V).

A sale of goods for less than $25, and a sale at the seller's permanent place of business are not included in the protections provided by this statute. §§ 361-B:1.

MINOR'S CONTRACT

Age of majority to contract - 18. §§ 21:44, 21-B:1.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 382-A:1-103.

Disability on veteran and spouse on loan removed. § 117:1.

REPOSSESSION REQUIREMENTS

In general, in prejudgment replevin actions, the defendant shall be given notice and an opportunity for a preliminary hearing. See N.H. Rev Stat Ann § 511-A:1 (1986). The plaintiff must serve a notice of intent advising of the right to a hearing that is annexed to the writ. § 511-A-2. On objection, the court will set a hearing within 14 days. § 511-A-3. In exceptional

circumstances, e.g., if there is substantial danger property will be damaged, concealed, or removed from the state; or if attachment is necessary to vest quasi in rem jurisdiction; or if there is imminent danger of a transfer to a bona fide third party, the attachments can be ordered in advance of notice to the defendant. § 511-A:8.

The creditor must file a complaint or application which states:

(1) That the creditor is the owner of the property claimed or is entitled to its possession, and shall attach a copy of any written instrument upon which such title or right is claimed;

(2) The name in which the property is wrongfully detained, the means by which the debtor came into possession of the property, and the cause of such detention;

(3) A particular description of the property, a statement of its actual value, the location of the property, and the name and address of the debtor; and

(4) Whether or not the property is exempt from execution, and the name and address of any known lienholder. § 536-A:2.

The creditor also must execute a bond with one or more sufficient sureties, approved by the court, double the value of the property as determined by the court. § 536-A:7.

The court shall then issue an order to the debtor requiring him/her to show cause why the property should not be taken from him/her and returned to the creditor. The order shall fix the date and time for the hearing which shall be no sooner than 10 days nor later than 20 days from the issuance of the order. § 536-A:3. The preliminary notice shall include a temporary order restraining the debtor from removing the property from the state or damaging, altering, or disposing of it. § 536-A:4. The writ of replevin may be issued prior to a hearing, if probable cause exists that:

(1) The debtor gained possession of the property by theft;

(2) The property consists of negotiable instruments or credit cards; or

(3) The property is perishable and will perish before any noticed hearing can be held, or the property is in danger of immediate destruction or concealment. § 536-A:12.
At any time prior to the hearing on the order to show cause or before delivery of the property to the creditor, the debtor can

require the return of the property to his/her possession, by executing a bond with one or more sufficient sureties, approved by the court, in double the value of the property, as stated in the verified complaint of the creditor, or as determined by the court. § 536-A:14. At the order to show cause hearing the court will make a preliminary determination which party, with reasonable probability, is entitled to possession pending final adjudication, of the parties' claims. § 536-A:5. Upon hearing, the burden is on the plaintiff to show reasonable likelihood that he/she will recover judgement including interest and costs on any amount equal to or greater than the amount of the attachment. §511-A:3.

STATUTE OF LIMITATIONS

Contract under seal - 20 years. § 508:5.

Simple written contract - 3 years. § 508:4.

Promissory note - 3 years. § 508:4.

Contract for sale of goods - 4 years. § 382-A:2-725.

Oral contracts - 3 years. § 508:4.

Open Accounts - 3 years. § 508:4.

Judgments - Courts of record - 20 years. § 508:5.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The New Hampshire Disclosure of Finance Charges Act requires that the creditor disclose to the buyer, concurrently with the consummation of the transaction to extend credit, finance charges in dollars, rate of interest, monthly rate of charge or a combination thereof. § 399-B:2. Disclosure is required for sales, loans and revolving credit transactions. § 399-B:1. The following transactions are excluded from coverage under the New Hampshire Disclosure of Finance Charges Act:

(1) A sale accompanied with an instrument creating or involving liens against real estate or any interest in real estate, § 399-B:7;

(2) A sale of goods bought for commercial, industrial, or business use; and § 399-B:8

(3) A sale of motor vehicles, accessories, equipment, parts or repairs. § 399-B:8.

New Hampshire

The violation of the statute is a crime. § 399-B:4.

UNFAIR AND DECEPTIVE TRADE PRACTICES

N.H. REV. STAT. ANN. § 358-A:1 (Supp. 1981 & Supp. 1983).

Prohibited Practices: Unfair method of competition or any unfair or deceptive acts or practices including 13 enumerated prohibitions. § 358-A:2 (1986).

Scope: Trade or commerce defined to include advertising, sale, offer for sale of any service, real or personal property, intangible and any other thing of value.

Exclusions: Trade or commerce permitted under state or U.S. laws; actions FTC has commenced until dismissed, complies or issue cease and desist order; publishers, broadcasters, printers or others engaged in dissemination of information without knowledge of its deceptive character. § 358-A:3.

Private Remedies: Actual damages; equitable relief including injunction as court deems necessary and proper; $200 if violation established; double or treble damages for willful or knowing violation; costs and attorney's fees to prevailing plaintiff; class action for actual damages or may allow injunctive or equitable relief and attorney's fees. § 358-A:10.

Limitations: Two year statute of limitations from date of transaction; no civil penalties if defendant in good faith misunderstanding of this statute; AG must send notice letters.

State Remedies: Rulemaking in AG; AG or consumer protection and antitrust division under AG supervision enforces; injunction; restitution; court may issue necessary orders, may award maximum $10,000 per violation; receiver; criminal penalties for violation of act or injunction; costs and expenses may be awarded state, maximum $500 for failure to comply with notice; court may dissolve corporate franchise for habitual injunction violations. § 358-A:4.

Precedential Value of FTC Interpretations: Guided by FTC.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 382-A:2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 382-A:2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 382-A:2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

1. Health Clubs. § 358-I:1 to I:10.

A fully completed copy of the contract must be delivered to buyer at time the buyer signs the contract. Each contract shall state in bold face type: NOTICE TO BUYER: DO NOT SIGN THIS CONTRACT UNTIL YOU HAVE READ ALL OF IT. ALSO, DO NOT SIGN THIS CONTRACT IF IT CONTAINS ANY BLANK SPACES. Every purchaser is entitled to cancel within 3 business days. This right must also appear in the contract. 358-I:3.

The contract is limited to 2 years with no automatic renewals. The club must refund the pro rata cost of unused services if the buyer becomes disabled or dies or if the club relocated more than 8 miles away. Also, the club must refund, pro rata, if the price of the contract exceeds $1,000. All remedies provided in RSA § 358-A may be used to enforce this chapter. § 358-I:A.

2. Buying Clubs. § 358-J:1 to J:8.

A buying club is an organization which, for consideration, provides or purports to provide its members with the ability to purchase goods or services at a discount.

A contract under this section may be cancelled by giving written notice before midnight of the third business day following date on which membership was attained. The buyer may cancel anytime thereafter by giving written notice. The contract terms must disclose the above cancellation rights. Also, the contract must contain a notice to the member to not sign the contract unless it has been read and unless there are no blank spaces.

The following summary was reviewed and updated in June 1993 by COL James B. Smith, 1182d RTU, Edison, New Jersey, 266 Lake Avenue, Metuchen, New Jersey 08840, Telephone Number: 908-494-8404, FAX: 908-494-0488.

New Jersey

CREDIT REPORTING/BILLING

Federal - Fair Credit Reporting Act.

State - If a creditor, having transmitted to a consumer a statement of the consumer's account, receives from the consumer at an address designated therefor by the creditor on the statement within 60 days of the mailing of said statement, a written notice, on a document other than a document provided by the creditor to accompany payment, by mail or other delivery setting forth sufficient information to enable the creditor to identify the consumer and the account, the amount and transaction shown in the statement which the consumer in good faith believes to be a billing error, and the facts providing the basis for the consumer's belief that the statement is in error; the creditor shall not communicate unfavorable credit information concerning the consumer to any person, including but not limited to credit bureaus or credit reporting agencies, based upon the consumer's failure to pay the amount believed by him/her to be a billing error, until the creditor has:

a. Not later than 30 days after receipt of the notice, mail a written acknowledgment to the consumer; and

b. Not later than 90 days after receipt of the notice and prior to taking any action to collect the amount believed by the consumer to be a billing error, (1) make appropriate corrections in the account of the consumer and mail to the consumer a written notice stating that the amount believed to be in error has been corrected and will be shown on the next statement mailed to the consumer or (2) send a written notice to the consumer setting forth the reasons why the creditor believes the account of the consumer was correctly shown in the statement. § 56:11-3.

Notwithstanding the receipt by a creditor of a notice from a consumer as described in this act, a creditor may, subject to the provisions of this act, transmit statements of account to the consumer which include an amount believed by the consumer to be a billing error, and the creditor, further, may undertake collection procedures not attributable to such consumer's failure to pay, nor directed at, such disputed amount. § 56:11-4.

Any creditor, having received a notice from a consumer as provided in this act, who fails to comply with the requirements of the act:

a. If such an amount is not in fact a billing error, forfeits any rights to collect from the consumer any finance charge or other charge imposed by the creditor in connection with the amount so specified, from the date of the mailing of such notice to the date the creditor complies with section 3 of this act; and

b. If such amount is in fact a billing error, is liable to the consumer in an amount equal to the sum of:

(1) the actual damages sustained by the consumer as a result of the failure of the creditor to comply with such section;

(2) twice the amount of the billing error shown in the statement of the consumer's account except that liability under this paragraph shall not be greater than $100.00; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

c. If such amount is in fact a billing error but the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from bona fide error made despite the maintenance of procedures reasonably adopted to avoid any such error, the creditor shall be liable to the consumer only to the extent of the actual damages sustained by the consumer as a result of the failure of the creditor to comply with such section and the costs of any action brought to enforce collection of such erroneous bill together with a reasonable attorney's fee as determined by the court. § 56:11-7.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - New Jersey law provides that a person is guilty of a disorderly persons offense when, with purpose to enforce a claim or judgment for money or property, he/she sends, mails or delivers to another person a notice, document or other instruments which has no judicial or official sanction and which in its format or appearance simulates a summons, complaint, court order or process or an insignia, seal or printed form of a Federal, State or local government or an instrumentality thereof, or is otherwise calculated to induce a belief that such notice, document or instrument has a judicial or official sanction. § 2C:21-19(d).

A person convicted of a disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall not exceed 6 months, § 2C:43-8, and/or a fine of up to $1,000.00. § 2C:43-3.

See also Collection Agencies. §§ 45:18-1 to 45:18-61.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until 5 p.m. of the third business day following execution of an agreement or offer to purchase. § 17:16C-61.6. Cancellation of the agreement occurs when the buyer gives notice of his/her intent to rescind the sale by certified mail, return receipt requested, to the seller at the address stated in the agreement. § 17:16C-61.5(a)(1). The sales receipt must contain a conspicuous notice of the cancellation right. § 17:16C-61.6.

The buyer must tender the goods at his or her residence and pursuant to the retail installment contract. § 17:16C-61.5(a)(2). The seller must pick up the goods at his/her own expense, and return any funds received or goods traded in to the buyer within 10 business days after receipt of the notice of cancellation. § 17:16C-61.5(b). The seller must keep a record of the receipt of the notice of cancellation for at least 18 months. § 17:16C-61.5(d).

The following transactions are not included in the protections provided by this statute:

(1) A sale for $25 or less;

(2) A sale of motor vehicles or boats, and motor vehicle or boat accessories;

(3) Mail order, telephone, or catalogue sales;

(4) A sale in which the buyer has requested the retail seller to enter into the sale at a place other than the retail seller's place of business; and

(5) A sale in which the buyer has requested the seller to conduct a demonstration or exhibition at a place other than the seller's place of business and also requested to enter into a sale at that place at the same time he/she has requested such demonstration or exhibition. § 17:16C-61.5.

New Jersey

MINOR'S CONTRACT

Age of majority to contract - 18. § 9:17B-1. Minors, 15 or over, may contract for life or health insurance and annuity contracts. § 17B:24-2.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 12A:1-103. However, consent to medical or surgical care executed by a married person who is a minor, or by a pregnant minor, in his or her behalf or in behalf of any of his or her children, is valid and binding. Also, contracts, promissory notes, or other written obligations entered into by a minor for purposes of higher education are valid and binding. Any written obligation by one over 18 of a federal loan is valid. § 38:23B-23.

REPOSSESSION REQUIREMENTS

Notice and an opportunity for the debtor to be heard prior to repossession of the property are not required by statute. However, the New Jersey Supreme Court declared that: "insofar as our statute deviates from the standard of notice and hearing set forth in Fuentes v. Shevin, 407 U.S. 67 (1972)] it . . . is unconstitutional." Singer v. Gardiner, 65 N.J. 403, 415 (1974).

The New Jersey Supreme Court also adopted Court Rule 4:61 to establish the procedure for replevin. This rule applies only to repossession undertaken under a writ executed by a court officer or sheriff's officer. It does not apply to self help repossession undertaken by a secured creditor under Article 9-503 of the Uniform Commercial Code (N.J.S.A. 12A:9-503).

The rule requires a hearing by the court on at least 3 days notice to debtor. The debtor must file his/her response at least 1 day before the hearing. The court will grant the motion for possession if he/she finds a probability that final judgment will be in favor of movant. Court Rule 4:61-1(a). The repossession may be allowed without hearing if the court finds the party in possession is about to abscond, or destroy, hide or dispose of the property. Court Rule 4:61-1(b).

The debtor can prevent delivery of the goods to the creditor by posting bond in double the amount of goods and by delivering a written claim to the property to the sheriff, specifying the goods so claimed, within 48 hours after service of the writ upon him/her. § 2A:59-6. In lieu of the bond, the sheriff may accept a deposit in cash, amounting to double the appraised value of the goods. § 2A:59-8.

New Jersey

STATUTE OF LIMITATIONS

Contract under seal - 16 years. § 2A:14-4. (Except when plaintiff is a merchant or financial institution - then 6 years).

Simple written contract - 6 years. § 2A:14-1.

Promissory notes - 6 years. § 2A:14-1.

Contract for sale of goods - 4 years. § 12A:2-725.

Oral contracts - 6 years. § 2A:14-1.

Open Accounts - 6 years. § 2A:14-1.

Judgments - Courts of record - 20 years. § 2A:14-5.

Personal injuries - 2 years. § 2A:14-2.

Wrongful death - 2 years. § 2A:31-3.

Property damage - 6 years. § 2A:14-1.

Defamation - 1 year. § 2A:14-3.

TRUTH-IN-LENDING REQUIREMENTS

Federal- Truth-in-Lending Act.

State - To the extent that the provisions of New Jersey law are inconsistent with respect to disclosure, advertising, terminology, type size, method of computation of finance charges, form content or time of delivery provisions and requirements of the federal Truth-in-Lending Act and Regulation Z, compliance with the federal rules is deemed compliance with the New Jersey laws. § 17:3B-1. Retail charge accounts are subject to the requirements of the federal Truth-in-Lending Act and Regulation Z applicable to open end credit.

UNFAIR AND DECEPTIVE TRADE PRACTICES

N.J. STAT. ANN. § 56:8-1 (West 1964 & Supp. 1983-1984).

Prohibited Practices: Unconscionable commercial practice, deception, fraud or knowing concealment, suppression or omission of material fact with intent to cause reliance including numerous enumerated prohibitions.

New Jersey

Scope: In connection with sale or advertisement of any merchandise or real estate; sales by definition include rentals, offers for sale and merchandise includes services or anything offered to the public for sale.

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge of falsity; refund policy does not apply to perishables, custom ordered merchandise, motor vehicle or merchandise by law not returnable.

Private Remedies: Actual and treble damages; attorney's fees and costs; refund of money; other appropriate legal or equitable relief.

Limitations: Must suffer ascertainable loss.

State Remedies: AG or director of county or municipal office of consumer affairs enforces; rulemaking in AG; restitution; injunction; receiver; annul corporate charter; revoke license; enjoin from managing or owning business or serving as officer or director; costs to AG; maximum $2000 for first offense; maximum $5000 each subsequent offense; cease and desist orders; maximum $25,000 per violation of such order.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 12A:2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 12A:2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 12A:2-316. Notwithstanding in automobile cases, The Magnuson-Moss Warranty Act, 15 U.S.C. § 2303 (Lemon Law), creates obligations in addition to those imposed by the Uniform Commercial Code; and if the actions of the dealer or manufacturer are inconsistent with the disclaimer, the latter will not be given effect. See Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 433 D.2d 801 (App. Div. 1981).

New Mexico

All cites are to New Mexico statutes annotated unless indicated to the contrary.

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - A credit bureau may supply a non-credit-granting government agency only identifying information, such as names, addresses, former addresses, places of employment and former employment, except in response to legal process or for investigation for security purposes § 56-3-3. Reports to businesses, professionals and individuals shall be made only for the purposes of granting credit or other bona fide business transactions such as evaluation of present or prospective credit risks or evaluation of the qualifications of present or prospective employees. § 56-3-4.

Disclosures - Agency to Consumer - A credit bureau upon request and after adequate identification, must disclose the contents of all information about that consumer which is included in his/her credit report or rating. § 56-3-2(B).

Prohibited Information - Obsolete Information - A credit bureau may report the following matters for no longer than the specified periods:

(1) Bankruptcies of all types for not longer than fourteen years from the date of adjudication of the most recent bankruptcy;

(2) Accounts placed for collection and accounts charged to profit and loss for not longer than seven years, or until the governing statute of limitations has expired, whichever is the longer period;

(3) Suits and judgments for not longer than seven years from date of entry, or until the governing statute of limitations has expired, whichever is the longer period;

(4) Paid tax liens for not longer than seven years and unpaid tax liens for any length of time;

(5) Arrests and indictments pending trial, or convictions of crimes, for not longer than seven years from date of release or parole. Such items shall no longer be reported if at any time it is learned that after a conviction a full pardon has been granted, or after an arrest or indictment a conviction did not result; and

(6) Any other data not otherwise specified in this section, for not longer than seven years.

A credit bureau shall delete as soon as practical any items of derogatory information that can no longer be verified. § 56-3-6.

Procedures

Compliance - In dealing with businesses, professionals, and individuals, the credit bureau must require service contracts to be executed in which the subscriber certifies that inquiries will only be made for bona fide business purposes. Service will be denied to a subscriber who fails to make the certification. § 56-3-4.

Personnel Reporting - A credit bureau which furnishes a personnel-reporting service shall adopt rigid safeguards in order that the specialized information developed in the course of such investigations other than credit information is maintained separately and not reported except in connection with subsequent personnel investigations. § 56-3-5.

Disputed Accuracy - A credit bureau must give the consumer forms upon which to correct errors. The credit bureau also must make any necessary reinvestigation for the purposes of updating and correcting a credit report, if a consumer has been denied credit as a result of the report. If the consumer has not been denied credit, the credit bureau may charge $5 for the reinvestigation. § 56-3-2(C).

Violations and Penalties - After a credit bureau has been given written notice of error in its credit report, the credit bureau is liable for any subsequent report which fails to correct the error. § 56-3-2(D). A credit bureau that willfully fails to comply with the provisions relating to collection agencies is liable to the consumer in an amount equal to:

(A) Actual damages;

(B) Punitive damages as the court may allow; and

(C) In a successful action under this section, costs of the action, and reasonable attorney's fees. § 56-3-7.

A credit bureau that negligently fails to comply with the provision relating to collection agencies is liable to the consumer in an amount equal to (1) actual damages sustained; and (2) in a successful action under this section, costs of the action and

reasonable attorney's fees. § 56-3-7. A person who knowingly and willfully obtains information from a credit bureau under false pretenses, or an officer or employee who knowingly and willfully provides information concerning a consumer to a person or firm not authorized to receive that information is guilty of a fourth degree felony. § 56-3-8.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - New Mexico licenses collection agencies and prohibits any collection agency from using any of the following methods in an attempt to collect a debt: print, publish, or otherwise prepare for distribution any system of collection letters, demand forms, or other printed matter upon the agency's stationary, upon which the agency's name appears in such manner as to indicate that a demand is being made by such agency for money due, where such forms are to be sold or furnished to anyone by such agency at any address different from that agency's address. § 61-18A-25. The Unfair Trade Practice Act also applies to collection agencies. § 57-12-1.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - In connection with any door-to-door sale, it is an unfair or deceptive trade practice for any seller to:

(1) fail to furnish buyer with a copy of the contract and in immediate proximity of the signature line or on the front page of the receipt if a contract is not used and in bold face type a statement that the buyer may cancel the transaction at any time prior to midnight of the third business day after the date of this transaction;

(2) fail to furnish buyer a completed form, in duplicate, captioned "NOTICE OF CANCELLATION;"

(3) fail to complete both copies of the "NOTICE OF CANCELLATION;"

(4) include a confession of judgment or waiver of rights;

(5) fail to inform orally of right to cancel;

(6) misrepresent the right to cancel;

(7) fail or refuse to honor a valid cancellation notice and within 10 days of receipt of such notice fail to refund payment, return property or goods traded in, and cancel any negotiable instruments;

(8) transfer or assign any notice to a finance company before midnight of the 5th business day;

(9) fail to notify within 10 days of receipt of cancellation notice. § 57-12-21.

Remedies are the same as under the Unfair Trade Practices Act generally.

MINOR'S CONTRACT

Age of majority to contract - 18. § 28-6-1. 16 and over if married, member of the armed forces or emancipated.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 55-1-103.

Disability of veteran and spouse on loan removed. § 58-6-2.

For educational loans, legal disability of minors reproved § 58-6-3.

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit stating:

(1) That the creditor is lawfully entitled to possession of the property;

(2) That the property was wrongfully taken or wrongfully detained by the debtor;

(3) That the creditor has reason to believe that the debtor may conceal, dispose of, or waste the property, during the pendency of the trial;

(4) That the right of action accrued within one year; and

(5) Specific facts from which it clearly appears that the other allegations are true. § 42-8-5.

The creditor also must execute a bond with sufficient sureties to the officer to whom the writ is directed, in double the value of the property. § 42-8-6.

Upon the debtor's motion before trial, the court shall determine the truth of the facts stated in the creditor's affidavit. If the creditor fails to prove the truth of the facts stated, the writ is dissolved, debtor receives damages, and the action proceeds as if no writ has been issued. § 42-8-19. Any time within five days after service of the writ of replevin on him/her, the debtor can regain possession of the property by giving to the sheriff a bond with two or more sufficient sureties in double the value of the property as stated in the creditor's affidavit. § 42-8-21.

STATUTE OF LIMITATIONS

Contract under seal - 6 years. § 37-1-3.

Simple written contract - 6 years. § 37-1-3.

Promissory notes - 6 years. § 37-1-3.

Contract for sale of goods - 4 years. § 55-2-725.

Oral contracts - 4 years. § 37-1-4.

Open Accounts - 4 years. § 37-1-4.

Judgments - Courts of record - 14 years. § 37-1-2.

Conversion, injury to property - 4 years. § 37-1-4.

Personal injury and defamation - 3 years. § 37-1-8.

Wrongful death - 3 years. § 41-2-2.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Compliance with the federal Truth-in-Lending Act and Regulation Z needed to comply with the Retail Installment Sales Act § 56-1-1. This statute requires that (1) the contract be designated "Retail Installment Contract" in large type, (2) contain advice that buyer not sign before reading or if it contains blank spaces; and (3) a notice that buyer is entitled to a copy of the contract. § 56-1-2,3. No contract may provide (1) for acceleration

of installment without default, (2) authorization to confess judgment or collect the debt, (3) waiver of defenses. § 56-1-5.

UNFAIR AND DECEPTIVE TRADE PRACTICES

N.M. STAT. ANN. § 57-12-1 (1987 Repl. volume).

Prohibited Practices: Unfair or deceptive trade practices, including 17 enumerated prohibitions, and 2 enumerated unconscionable trade practices.

Special Requirements: False or misleading statements must be knowingly made; unconscionable trade practice must act to plaintiff's detriment.

Scope: Trade or commerce includes advertising, sale, or offers for sale of any services, property, commodity or thing of value. Unfair or deceptive practice and unconscionable trade practice must be in connection with sale, lease, rental or loan of goods or services, extension of credit or debt collection in regular course of trade.

Exclusions: Actions permitted by state or U.S. laws; publishers, broadcasters, printers or others who reproduce material without knowledge of deceptive or unconscionable character.

Private Remedies: Injunction; $100 minimum actual damages; if violation is willful, court may award up to 3 times actual damage or $300, whichever is greater. Court shall award attorney's fees to a prevailing plaintiff, also costs. § 57-12-10.

Limitations: AG must act in public interest; acceptance of restitution pursuant to assurance bars any damage recovery on same practice; actual or minimum damages only if private party suffered loss.

State Remedies: AG or DA if delegated; AG enforces; injunction; restitution; maximum $5000 per willful violation; rulemaking in AG; writ of ne exeat may be granted. §§ 57-12-8 and 57-12-11.

Precedential Value of FTC Interpretations: Guided by FTC.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 55-2-314.

New Mexico

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 55-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 55-2-316.

New York

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State -

Issuance of Consumer Reports: Substantially the same as federal law, except that state law prohibits the request for a consumer report for credit, employment, insurance, or rental or lease of a residence unless the applicant is first informed in writing that a consumer report may be requested in connection with the application, that the applicant will be informed upon request when a report was requested and the name of the consumer reporting agency that furnished the report. No additional notice to the consumer is required if a subsequent report in connection with an update, renewal or extension of credit, employment, insurance, or rental or lease of a residence is made. N.Y. Gen. Bus. Law § 380-b.

Investigative Consumer Reports: Before an investigative consumer report can be made the same notice required for a consumer report must be given to the consumer plus authorization from the consumer. Notice must be in writing if a written application is made by the consumer. N.Y. Gen. Bus. Law § 380-c.

Disclosures:

Agency to Consumer: Essentially the same as federal law, except, that under state law, disclosures of medical information may be made by mailing a copy or transcription of the information in the consumer's file after a properly identified written request. An agency must inform a consumer, during any contact by the consumer, by mail, phone or in person, of the agency's obligation to provide disclosures of the consumer's file, including a decoded written version of the file or a written copy with an explanation of any code used, if the consumer so requests. The disclosure shall be in the manner selected by the consumer. All consumers must be specifically advised that if they have been denied credit in the past 30 days they are entitled to receive a written copy of their complete file, at no charge whatsoever. N.Y. Gen. Bus. Law § 380-e.

User to Consumer: Substantially the same as federal law, except that under state law, the user of any such report for the purpose of evaluating an application for credit must also furnish the consumer with reasons for any adverse action in relation to the application in conformity with the requirements of the Federal Equal Credit Opportunity Act and dissemination of such information is prohibited to any other person unless that person

has a legitimate business need for the information. N.Y. Gen. Bus. Law § 308-i.

Prohibited Disclosure: Obsolete Information -In addition to federal law, state law prohibits reports of information regarding drug or alcohol addiction or past confinement in a mental institution unless the last reported incident is dated within the last 7 years. Reporting information about accounts placed for collection or charged to profit and loss which antedate the report by more than 7 years, or more than 5 years if accounts have been paid, is prohibited. Effective January 1, 1991, judgments which have been satisfied within 5 years after the entry date must be removed from the report 5 years after such entry date. Reporting of certain tax liens is prohibited. Effective September 1, 1986, reporting agencies are prohibited from collecting or maintaining any information concerning polygraphs of individuals. N.Y. GEN BUS § 380-J.

State law also prohibits the reporting or maintaining in a consumer's file the following information:

(1) Information relative to arrest or criminal charges unless the charges are pending or the information has led to a conviction.

(2) Information relative to race, religion or ethnicity.

(3) Information it has reason to know is incorrect.

Consumer reporting agencies may not issue consumer reports which list a person as having been denied credit if the reason for the denial is lack of sufficient information to grant credit, unless the report states that the denial was for that reason.

Investigative Reports: Must be in writing and retained by the consumer reporting agency for at least one year after it is issued.

Report Procedures: Disputed Accuracy - Substantially the same as federal law; however, under state law, if any item disputed and reinvestigated is found to be in error or can no longer be verified upon completion of the reinvestigation of all items disputed, the agency must promptly mail the consumer a corrected written copy of the file, reflecting any written changes, with an explanation of any code used, at no charge to the consumer.

Violations and Penalties:

New York

Civil Liability - Same as under federal law for both willful and negligent noncompliance. N.Y. GEN BUS § 380-L.

Criminal Liability - Provisions relating to criminal liability for obtaining information under false pretenses, the unauthorized disclosure of information to an officer of a consumer reporting agency and introducing or causing to be introduced false information in a consumer reporting agency's files for the purpose of wrongfully damaging or wrongfully enhancing the credit information of any individual.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - All debt collectors are prohibited from using any of the following methods in attempting to collect a consumer debt:

(1) Simulate in any manner a law enforcement or government official or legal or judicial process;

(2) Knowingly collect an unjust or illegal debt;

(3) Disclosing false information affecting the debtor's credit worthiness;

(4) Communicating with debtor's employer without consent from the debtor, or prior to obtaining final judgment;

(5) Disclosing information about a disputed debt without also disclosing that the debt is disputed;

(6) Abusing or harassing the debtor or his/her family;

(7) Threatening any action which the principal creditor normally does not take. N.Y. Gen. Bus. Law § 601.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - New York's Door-To-Door Sales Protection Act is found in N.Y. Personal Prop. L., § 425-431.

Excludes transactions:

(1) made pursuant to prior negotiation in course of buyer's visit to seller's place of business;

(2) in which buyer initiated the contact and the goods or services are needed for immediate personal emergency;

(3) conducted entirely by mail or phone or catalogue sales;

(4) buyer initiates and requests seller to visit buyer's home;

(5) pertaining to real proper[illegible]rance, and securities;

(6) of $25 or less.

(7) requested demonstrations or exhibits that do not include request to close sale.

The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective, if given by mail, when deposited in the mail properly addressed to the seller, postage prepaid. § 427. Notice of cancellation is sufficient if it indicates intention of buyer not to be bound § 427 (4).

The sales agreement must contain a conspicuous notice of this cancellation right. Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. The written agreement must be in same language used in the oral presentation.

This notice requires certain wording to be in 10 point type. This will apparently be strictly construed. See, e.g., Cohn v. Royal Globe Ins. Co., 49 N.Y.2d 942, 428 N.Y.S.2d 881, 406 N.E.2d 739 (1979).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the merchandise if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. § 430.

The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 429. The seller is not entitled to compensation for any services due prior to cancellation of the agreement. § 430. Failure to return the down payment may result in an award of $100, attorney fees and actual damages. § 429.

No obligation may be assigned until midnight of the fifth business day. All defenses applicable to the assignor may be asserted against the assignee. § 431.

MAIL ORDER SALES

Federal - FTC Trade Regulation Rule.

See N.Y. Gen. Bus. L. § 396M.

MINOR'S CONTRACT

Age of majority to contract - 18. N.Y. Gen. Oblig. Law, § 3-101. If married, may contract, mortgage, deed, and convey residence (N.Y. Gen. Oblig. Law, Ch 24-a, Art 3, § 101). Minors, 14 years and 6 months, may contract for life insurance (N.Y. Ins. Law, § 3207).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. UCC § 1-103. See Fisher v. Cattani, 53 Misc.2d 221, 278 N.Y.S.2d 420 (Dist. Ct., Nassau City 1966). Married minor may contract for banking loan with regard to purchase of actual residence. N.Y. Gen. Oblig. Law § 3-101-3. 16-year-old minor may not disaffirm certain college level education loans. See N.Y. Educ. L. § 281.

Disability of veteran and spouse removed (N.Y. Gen. Oblig. Law, § 3-103).

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit which clearly identifies the property; states the creditor's rights to possession; alleges that the debtor wrongfully holds the property; tells what actions creditor has commenced; gives the value of property; and if seizure without notice is desired, justifies this with facts. The creditor must also enter into sufficient surety, acceptable to the court, of twice the value of the property. The creditor, in a seizure without notice, must move for an order giving the debtor notice within 5 days of seizure. Upon motion with sufficient grounds and surety, the debtor can have court order return the property to the debtor. CPLR 7102 and 7103.

STATUTE OF LIMITATIONS

Contract under seal - 6 years. CPLR § 213.

Simple written contract - 6 years. CPLR § 213.

New York

Promissory notes - 6 years. CPLR § 213.

Contract for sale of goods - 4 years. UCC § 2-725.

Oral contracts - 6 years. CPLR § 213.

Open accounts - 6 years. CPLR § 213.

Judgments - Courts of record - 20 years. CPLR § 211(b).

Personal injury and property damage - 3 years. CPLR 214(3).

Exposure to Agent Orange for Vietnam veterans - 1 year from date of discovery or 2 years when discovery could have been made with reasonable diligence, whichever is later, CPLR 214(b) other toxic torts - see CPLR 214c.

Wrongful death - 2 years. N.Y. Est. Powers & Trust Law 5-4.1.

Medical podiatric and Dental malpractice - 2 1/2 years. CPLR 214-a.

Intentional torts - 1 year. CPLR 215.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - All New York credit transactions are subject to the Federal Truth-in-Lending Act.

UNFAIR AND DECEPTIVE TRADE PRACTICES

N.Y. EXEC. LAW § 63(12) (Consol. Supp. 1983-1984).

Prohibited Practices: Repeated fraudulent or illegal acts, including deception, suppression or unconscionable contractual provisions. Public nuisances. See State v. Schnectady Chem. Inc., 103 App. Div.2d 33, 479 N.Y.S.2d 1010 (3rd Dept. 1984).

Scope: Conduct or transaction of business.

Private Remedies: None specified.

Limitations: Injunction had upon 5 days notice.

State Remedies: AG enforces; injunction; restitution; damages; cancel filed certificate; court may award other relief proper.

New York

Precedential Value of FTC Interpretations: None specified. N.Y. GEN. BUS. LAW § 349 and § 350 (Consol. 1968 & Supp. 1983-1984).

Prohibited Practices: Deceptive acts or practices and false advertising.

Scope: In conduct of business, trade, commerce or furnishing of service in state.

Exclusions: Action subject to and in compliance with FTC, U.S. agency or federal court rules; any broadcaster, publisher or printer of advertising.

Private Remedies: Injunction for deceptive act; actual damages; minimum $50; treble damages discretionary up to $1,000 if willful or knowing violation; court "may" award attorney's fees to prevailing plaintiff. N.Y. GEN BUS § 349.

Limitations: AG must give notice and provide opportunity for hearing before injunction, unless not in public interest; private action predicated on injury.

State Remedies: AG enforces; injunction, restitution available for deceptive act; $500 per violation of false advertising.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. UCC § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. UCC § 2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. UCC § 2-316. This may be affected by 15 U.S.C. § 2308 in auto warranties.

Purchasers of new motor vehicles during the first 18,000 miles of operation or during the period of two years following the date of original delivery, whichever is the earlier date, have several

statutory rights to enforce all applicable express warranties for defects or conditions in motor vehicles that substantially impair its value. Upon promptly reporting the "non-conformity" to the manufacturer, its agents, or its authorized dealer, the "non-conformity" or defect shall be corrected at no charge to the consumer and if the manufacturer is unable to repair or correct any "non-conformity" the consumer has the option of having the manufacturer replace the motor vehicle with a comparable motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price including sales taxes, etc., less a reasonable allowance for the consumer's use of the vehicle in excess of the first 12,000 miles of operation. The refund or replacement option is available for a "non-conformity' that has been subject to repair four or more times within the first 18,000 miles of operation or two years, or if the vehicle is out of service by reason of repair of "non-conformity" for a cumulative total of 30 days or more.

An informal dispute settlement procedure may also be applicable. See Gen. Bus. Law § 198-a.

Notwithstanding UCC-2-316, all used cars sold by dealers for more than $1500 are warranted for 30 days if the car has more than 36,000 miles or 60 days if less. The warranty can be excluded if a vehicle has in excess of 100,000 miles. N.Y. Gen. Bus. Law § 198-b.

MISCELLANEOUS

1. Rental Purchase Agreements. Pers. Prop. Law §§ 500-507.

A rental-purchase agreement means an agreement for use of merchandise by a consumer for personal, family, or household purposes for an initial period of 4 months or less. The agreement may not contain provisions for: confession of judgment, authorization to commit breach of peace, purchase of insurance from the seller, requiring payment of late charge unless delinquent by more than 3 days, and requiring additional payments to obtain ownership or a total payment of more than it costs to acquire ownership.

The agreement must disclose in a conspicuous fashion: a description of the merchandise, whether it is new or used, amount and timing of payments, total payments, who is liable for loss or damage, cash price, and conditions of exercising early options.

Private remedy: a consumer who has suffered loss is entitled to recover actual damages, reasonable attorneys fees, and court

costs. If court finds bad faith, seller is subject to a penalty of not less than $100 nor more than $1,000.

2. Health Club Services. Gen. Bus. Law §§ 620-630.

The contract may not provide for payments over $1,200 except in the case of contracts for tennis, platform tennis, or racquet ball facilities. No contract shall provide for a term longer than 36 months, nor can it be assigned without written consent of the buyer.

Every contract is voidable if the services are not available within one year. Furthermore, every contract must provide that it may be cancelled within 3 business days after receipt by buyer. Also, after the 3-day period, a buyer may cancel if he or she becomes significantly disabled, dies, moves his/her residence more than 25 miles from a health club operated by seller, or after services are no longer available because of seller's permanent discontinuance of operation.

The Section lists 8 prohibited acts. See § 626.

Private remedy: Judgment may be entered in an amount not to exceed 3 times the actual damages plus reasonable attorneys fees.

A seller who violates the article shall be liable for a civil fine not exceeding $2,500 for each violation.

The following summary was reviewed and updated by LTC Mark E. Sullivan, Army Legal Assistance Program (IMA) OTJAG, HQDA, Washington, D.C., 1306 Hillsborough Street, Raleigh, North Carolina 27605, Telephone Number: 919-832-8501, FAX: 919-833-2852.

North Carolina

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - § 58-70-1 et seq: Collection Agencies. A collection agency that has properly obtained a permit and posted at least a $5,000 bond must at all times identify itself (including permit number) in all correspondence with debtors. The collection agency also must furnish a debtor who pays in cash with a receipt. The collection agency is strictly prohibited from using any of the following methods to collect any debts:

(1) Threats and coercion;

(2) Any conduct the natural consequence of which is to oppress, harass or abuse;

(3) Any unreasonable publication of a consumer's debt;

(4) Deceptive representation;

(5) Any unconscionable means.

(6) Unauthorized practice of law.

For any violation of the prohibited acts, a collection agency may be liable for the debtor's actual damages and for an additional sum of not less than $100 nor greater than $2000. The same prohibitions are applicable to persons or businesses whose primary business is not the collection of bad debts, i.e., an attorney. §§ 75-50 to 75-56.

See also § 75-50 entitled "Prohibited Acts by Debt Collectors." Debt collectors are defined as persons engaging, directly or indirectly, in debt collection from a consumer except those subject to § 58-70-1 et seq. The debt collector is prohibited from using the following methods:

(1) threats or coercion, § 75-51;

(2) harassment, § 75-52;

(3) unreasonable publication, § 75-53;

(4) deceptive representations, § 75-54; and

(5) unconscionable means, § 75-55.

Creditors seeking to collect debts would be subject to § 75-50 et seq. North Carolina considers landlords who seek to collect overdue rent are debt collectors. Spinks v. Taylor, 278 S.E.2d 501 (1981).

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 25A-39(a). Cancellation occurs when the buyer gives written notice of cancellation to the seller. Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 25A-39(c). Additionally, if the goods or services have not been received by the buyer within 30 days after execution of the contract (and the delay is the fault of the seller), the buyer can rescind the contract and recover a refund of all payments previously made. § 25A-39(f).

The buyer may not cancel a home solicitation sale in which the buyer requested the seller to deliver the goods due to an emergency if (1) the seller has begun substantial performance of the contract before receiving notification; (2) the goods cannot be returned to the seller in as good condition as when received by the buyer; and (3) unless the buyer returns the goods to sellers at buyer's expense. § 25A-39(e).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand after revocation or cancellation. The seller must make complete refund and notify the buyer of his/her intentions to repossess or to abandon the goods within 10 days after receipt of the notice of cancellation. If the goods are then made available to the seller and the seller fails to pick them up within 20 days, the buyer may retain or dispose of the goods without further obligation. § 25A-42(a).

A sale made pursuant to a preexisting revolving charge account, a sale after a similar business transaction between the parties, a sale on the premises where the goods are offered for sale, a sale subject to rescission under the federal Truth-in-Lending Act, and sales of wearing apparel, motor vehicles, farm equipment, and goods and services to be used within 10 days in connection with funeral services are not included in the protections provided by this statute. § 25A-38.

MINOR'S CONTRACT

Age of majority to contract - 18. § 48A-2. Marriage removes disability (§ 39-13.2). Minors, 15 or over, may contract for life insurance and other annuity contracts (§ 58-58-100)

Contractual liability - Minor is liable for necessaries received as a result of a contractual relationship and for obligations imposed by statute (such as motor vehicle insurance). Nationwide v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

Veteran and spouse relieved of disability under Act (§ 165-18).

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit before the clerk of court stating:

(1) That the creditor is the owner of the property or entitled to its possession;

(2) That the property is wrongfully detained by the debtor and the alleged causes of the detention;

(3) That the property has not been taken for tax, assessment or fine pursuant to a statute, or seized under an execution or attachment against the property of the creditor; and

(4) The actual value of the property. § 1-473.

The creditor also must execute a bond in an amount double the value of the property and which must be approved by the sheriff. § 1-475. Notice to the debtor is required and a hearing before the clerk, appealable to a judge, must be held not less than 10 days after service of the notice. Waiver of these rights is available. §1-474.1.

North Carolina

STATUTE OF LIMITATIONS

Contract under seal - 10 years. § 1-47(2).

Simple written contract - 3 years. § 1-52(1).

Promissory notes - 3 years. § 1-52(1).

Contract for sale of goods - 4 years. § 25-2-725.

Oral contracts - 3 years. § 1-52(1).

Open accounts - 3 years. § 1-52(1).

Judgments - Courts of record - 10 years. §§ 1-47(1) & 1-306.

Personal injury, property damage, wrongful death - 3 years. § 1-52.

Defamation, assault, battery, false imprisonment - 1 year. §1-54.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - No state truth-in-lending statute.

UNFAIR AND DECEPTIVE TRADE PRACTICES

N.C. GEN. STAT. § 75-1 (1981 & Supp. 1983).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices including 7 enumerated prohibitions.

Scope: In or affecting commerce, which includes all business activities.

Exclusions: Professional services by member of learned profession; advertisements done by a disinterested publisher, radio or television media, with no knowledge of falsity.

Private Remedies: Actual damages; treble damages (§ 75-16) Attorney's fees to prevailing party are discretionary, based on finding of willful violation and unwarranted refusal to resolve suit or on frivolous lawsuit. (§ 75-16.1).

Limitations: Private action based on injury to person or business; statute of limitations is 4 years after cause accrues; limitations

tolled in private action while state action pending and 1 year afterwards (§ 75-16.2). AG brings action if in his opinion it is in public interest (§ 75-15).

State Remedies: AG enforces; criminal penalties discretionary with court; injunction; court may order restitution or cancel contracts; court has discretion to impose maximum $5000 civil penalty per knowing violation or violation of court order with court considering all relevant circumstances including extent of harm, persistence and length of violation, assets of party and corrective action by defendant.

WARRANTIES

Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 25-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 25-2-315.

The ability to exclude auto warranties may be affected by 15 U.S.C. § 2308.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing, if the writing is conspicuous. The remedies for breach of warranty also can be limited. § 25-2-316.

MISCELLANEOUS

1. Discount Buying Club. § 66-131 to 66-136.

A discount buying club is any person, firm, or corporation which, in exchange for any valuable consideration, offers to sell or arrange the sale of goods or services at prices lower than are generally available.

A contract must provide: the duration of such contract, that the club will maintain a trust account and bond in compliance with law, immediately above the signature line in bold face type a statement that the buyer may cancel at any time prior to midnight

of the third business day after date of contract; such notice must be in writing, list categories of goods and services available, procedures for selecting, ordering, and paying, method of pricing, a list of charges, discount buying club's obligations as to warranties and obligations as to cancelled or returned goods.

The statute lists 5 prohibited acts. § 66-134. Any person injured by a violation of this Article may bring an action for damages, including reasonable attorneys fees. § 66-136.

2. Rental Referral Agencies. § 66-142 to 66-146.

A rental referral agency is a person or business which offers to assist any person in locating residential rental property in return for consideration from a prospective tenant.

The agency may not charge any fees from a prospective tenant except where rental housing is in fact obtained. The agency contract must contain: 1) specifications of housing sought, and 2) any deposit will be refunded within 10 days of request should housing not be obtained within 30 days. § 66-143.

The agency cannot make any representations of availability unless verified within 48 hours. § 66-144. Any person injured by a violation of this Article may bring action for damages including reasonable attorneys fees. § 66-146.

3. Unsolicited Merchandise: § 75-27. Deemed a gift to the recipient.

North Dakota

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision. But see Collection Agencies §§ 13-05-01 to 13-05-10.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice of cancellation is effective when delivered to the seller, sent by ordinary mail, postage prepaid, or by telegram. § 51-18-02. The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (a) the seller in good faith makes a substantial beginning of performance before the buyer gives notice of cancellation, and (b) the goods cannot be returned to the seller in substantially as good condition as when the buyer received them. § 51-18-07(4). The sales agreement must contain a conspicuous notice of cancellation right. § 51-18-04.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to take possession of such goods within 20 days after cancellation of the sale. § 51-18-07(1,2). The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 51-18-06.

The following transactions are not included in the protections provided by this statute:

(1) A previously negotiated sale at the seller's place of business;

(2) A sale of insurance;

(3) A sale of goods or services for less than $25. §§ 51-18-01(3), 51-18-08.

(4) Emergency sale and work has begun or goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18. § 14-10-02.

Contractual liability - A minor may make any contract other than those relating to real property and personal property not in his/her immediate control in any manner as an adult, subject only to the minor's power of disaffirmance. § 14-10-10. A minor may disaffirm all contracts, except those for necessities and statutory contracts, either before his/her majority or within one year afterwards.

Disability or minor and spouse removed for loans (§ 37-01-37).

REPOSSESSION REQUIREMENTS

The creditor must make an affidavit stating:

(1) That the creditor is the owner of the property, with a particular description of it, or that he/she is lawfully entitled to the possession of the property;

(2) That the property is wrongfully detained by the debtor;

(3) The alleged cause of the detention;

(4) That the property has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the creditor;

(5) The actual value of the property;

(6) That a court order has been issued authorizing delivery hereunder, and is attached:

(a) Pursuant to notice to the debtor and hearing on an order to show cause; or

(b) Without notice to the debtor if, in addition to satisfying the requirements for an order to show cause, probable cause appears to the court that:

1. The debtor gained possession of the property by theft or fraud;

2. The property consists of negotiable instruments or credit cards;

3. The property is perishable and will be irreparably damaged before a hearing can be held; or

4. The property is in immediate danger of destruction, serious harm, concealment, or removal from the state, or of sale to an innocent purchaser. § 32-07-02.

The creditor also must execute a bond with one or more sufficient sureties approved by the sheriff, in double the value of the property, as stated in the affidavit. § 32-07-04. At any time before delivery of the property to the creditor, the debtor, if he/she does not except to the creditor's sureties or the amount of his/her bond, may require the return of the property to him/her, by giving to the sheriff an executed bond with two or more sufficient sureties, in double the value of the property as stated in the creditor's affidavit. § 32-07-06.

In a secured transaction, unless otherwise agreed, the secured party, upon default, may proceed to take possession of the collateral if this can be done without breach of the peace, or may proceed by action. § 41-09-49.

STATUTE OF LIMITATIONS

Contract under seal - 6 years. §§ 28-01-16, 9-06-11.

Simple written contract - 6 years. § 28-01-16.

Promissory notes - 6 years. § 28-01-16.

Contract for sale of goods - 4 years. § 41-02-104.

Oral contracts - 6 years. § 28-01-16.

Open Accounts - 6 years. § 28-01-16.

Judgments - Courts of record - 10 years. § 28-01-15.

Malpractice - 2 years. § 28-01-18.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

North Dakota

State - The North Dakota Revolving Charge Accounts law requires a creditor to disclose to a retail buyer his/her credit service charges. The credit service charges must be stated in terms of a monthly percentage rate. § 51-14-02. These disclosures are required only for revolving charge accounts.

Any person who violates any of the disclosure requirements shall be guilty of a Class A misdemeanor. Any revolving charge account or any act in the making or collection of any revolving charge account which violates the disclosure requirements of the Revolving Charge Accounts law shall result in the forfeiture of all credit service charges that have been paid or that may become due or payable thereunder, and in the event that such violation is willful, the retail seller shall have no right to collect, receive or retain any principal, credit service charge, interest, or other charge whatsoever. § 51-14-05.

The North Dakota Retail Installment Sales Act requires certain disclosures (e.g., amount financed, amount of fiance charge, total number of payments), but provides that if the retail installment sale is also subject to the Federal Truth-In-Lending Act the seller may comply with that Act rather than the disclosure provisions of the North Dakota law. § 51-13-02.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Prohibited Practices: The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact ben misled, deceived, or damaged thereby, is declared to be an unlawful practice. § 51-15-02.

Special Requirements: Act done with intent that others rely. § 51-15-02.

Scope: Sale or advertisement of any merchandise; sale includes offers for sale and merchandise includes goods, commodities, intangibles, realty or services. § 51-15-02.

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge of falsity. § 51-15-03.

Private Remedies: The provisions of the chapter do not bar any claim for relief by any person against any person who has acquired any moneys or property by means of any practice declared to be unlawful in the chapter. If the court finds the defendant knowingly committed the conduct, the court may order that the person

commencing the action recover up to three times the actual damages proven and the court must order that the person commencing the action recover costs, disbursements, and actual reasonable attorney's fees incurred in the action. § 51-15-9.

Limitations: Injunction given pursuant to notice by AG. § 51-15-07.

State Remedies: AG enforces and has rulemaking power; injunction; other orders as may be necessary, including restitution and receiver; costs, expenses and attorney's fees to AG; maximum $5000 per violation "may" be assessed. §§ 51-15-07, 51-15-10, 51-15-11.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 41-02-31.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 41-02-32.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 41-02-33.

The ability to exclude auto warranties may be affected by 15 U.S.C. § 2308.

North Dakota

The following summary was reviewed and updated in March 1994 by MAJ Michael J. Barren, MDW, Ft. McNair, Washington, D.C., Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, OH 43215, Telephone Number: 614-227-2237, FAX: 614-227-2100.

Ohio

CREDIT REPORTING

Federal - Fair Credit Reporting Act. See Chapter 2 supra.

State - No statutory provision. But see Consumer Sales Practices Act, §§ 1345.01 - 1345.99

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act. See Chapter 2 supra.

State - No statutory provision. But see Consumer Sales Practices Act, §§ 1345.01-.99.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule. See Chapter 2 supra.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day after the buyer signs an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice by mail is effective upon the date of postmarking; notice by telegram is effective when the telegram is ordered; notice by personal delivery is effective when delivered to the seller or the seller's address. § 1345.22. The sales agreement must contain a conspicuous notice of this cancellation right. § 1345.23(B). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller by mailing, delivering, or telegraphing written notice of his/her intention to cancel. § 1345.23(C).

The buyer must take reasonable care of the goods before cancellation and within 20 days thereafter, and tender the goods at his or her residence to the seller upon demand. § 1345.27. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to pick them up within 20 days after the date of the notice of cancellation. § 1345.27. The seller must return any funds received, goods traded in and any negotiable instruments to the buyer within 10 business days after cancellation of the sale. § 1345.23(D)(4).

The following transactions are not included in the protections provided by this statute:

(1) A sale in which the total purchase price is less than $25;

(2) A sale conducted entirely by mail or telephone if initiated by the buyer, and without any other contact between the seller or his/her representative prior to delivery of the goods or performance of the service;

(3) A previously negotiated sale at the seller's permanent place of business;

(4) A sale in which the buyer initiates the contact for the purpose of negotiating a purchase and the seller has a business establishment at a fixed location in Ohio where the goods or services are regularly offered or exhibited for sale;

(5) A sale in which the buyer initiates the contact to meet a personal emergency, and the seller is given a handwritten (by the buyer), dated and signed statement from the buyer describing the situation and waiving his/her right to cancel the sale;

(6) A sale in which the buyer initiated the contact and requested the seller to visit his/her home for the purpose of repairing or performing maintenance upon the buyer's personal property;

(7) A sale in which the buyer is accorded the right of rescission by the Consumer Credit Protection Act, 15 U.S.C. § 1635; and

(8) Sales made by licensed insurance agents, real estate brokers, broker-dealers and securities dealers, auctioneers, and automobile dealers and salesmen. § 1345.21.

MINOR'S CONTRACT

Age of majority to contract - 18. § 3109.01. Minors, 15 or over, may contract for life insurance. (§ 3911.08).

Generally, a minor is liable only for necessaries received as a result of a contractual relationship. A minor 15 or over may purchase insurance on his/her life, § 3911.08 and may consent to treatment for drug abuse. The latter may not be disaffirmed. § 3719.012. Also, a minor may contract for higher education loans. § 3351.09.

Veteran and minor spouse relieved of disability (§3109.02).

PREJUDGMENT REPOSSESSION REQUIREMENTS - REPLEVIN R.C. 2737.01 et seq.

The creditor must make an affidavit stating:

(1) Description and value of the property claimed;

(2) If the interest in the property is based upon a written instrument, a copy of the instrument;

(3) That the property is wrongfully detained, and list any reason that respondent may claim the detention is not wrongful;

(4) The use to which the respondent has put the property;

(5) The extent to which the movant will be damaged by the respondent's continued detention of the property;

(6) Location of the property;

(7) That the property was not taken for a tax, assessment, or fine pursuant to statute, or seized under execution of judgment against the property of the movant or, if so seized, that it is statutorily exempt from seizure. §§ 2737.02 and 2737.03 (Supp. 1994).

The creditor must execute a bond with sufficient sureties in double the value of the property, as stated in the order. § 2737.10.

The court may issue an order of possession without prior notice to the respondent and without conducting a hearing if the court finds that there is probable cause that the creditor will suffer irreparable injury if the order is delayed until the respondent has been given an opportunity for a hearing. § 2737.19. Otherwise, the respondent must be given notice and the opportunity to request a hearing. § 2737.04. The respondent may recover the property taken pursuant to an order of possession by filing a bond equal to the creditor's bond, or if no bond has been filed by the creditor then the bond shall be twice the value of the property. If the respondent is indigent, the court may waive the bond requirement or set a lower amount, as fairness requires. § 2737.11.

Ohio

STATUTE OF LIMITATIONS

*Contract under seal - 15 years. § 2305.06.

*Simple written contract - 15 years. § 2305.06.

*Promissory notes - 15 years. § 2305.06.

Contract for sale of goods - 4 years. § 1302.98.

Oral contracts - 6 years. § 2305.07.

Open accounts - 6 years. § 2305.07.

Judgments - Courts of record - 21 years. § 2325.18.

See also special statute of limitation for buyers in consumer transactions under Ohio Retail Installament Sales Act, §1317.032 (c) (3) - earlier of 2 years after execution of note/contract, or date fixed for last payment under note/contract.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act. See Chapter 2 supra.

State - No statutory provision.

UNFAIR AND DECEPTIVE TRADE PRACTICES

OHIO REV. CODE ANN. § 1345.01 (Baldwin 1988).

Prohibited Practices: Unfair and deceptive act or practice including 10 enumerated prohibitions; or any unconscionable act or practice including 7 enumerated situations for consideration.

Scope: Applies to acts by "suppliers", includes sellers, lessor or other business person dealing directly or indirectly with a consumer. Must also be "consumer transaction" which includes a sale, lease, assignment, award by chance or transfer of goods, service, franchise or intangible for personal, family, household purposes.

Exclusions: Transactions governed by § 4905.03 which governs public utilities commission and § 5725.01 which governs financial institutions; acts between attorney or physician and clients; actions not involving consumers or suppliers; acts permitted by federal or state law except AG may receive injunction; personal

injury or death claims; publisher, broadcaster, printer or other person who disseminates information or reproduces printed matter if done for another and without knowledge.

Private Remedies: Rescind transaction; actual damages; treble damages; minimum $200; class action for actual damages or "other appropriate relief," declaratory judgment, injunction; court may award attorney's fees to prevailing party if consumer action is groundless and in bad faith or supplier commits a knowing violation. §1345.09

Limitations: AG brings actions against suppliers on consumer transactions and in public interest; AG actions have 2 year statute of limitations after occurrence; private actions 2 years after occurrence or 1 year after AG action terminates, private action for rescission must be within reasonable time after should have discovered violation and before subject matter substantially changes; private action by consumer precludes his/her inclusion in subsequent class action by AG on same transaction; no statute of limitations on counterclaims in suppliers suit. No civil penalties, attorney's fees or amounts over actual damages if supplier proves bona fide error after reasonable procedures caused violation; acts permitted by FTC rule, trade regulation or federal courts and not prohibited by state statute before occurrence limits AG remedy to injunctive relief, no remedy in consumer action against supplier; in private action, consumer must choose between rescission and damages. §§1345.07, 1345.09, 1345.10.

State Remedies: Director of Commerce has substantive and procedural rulemaking powers and acts upon petition of any person; AG enforces; may obtain assurance of compliance conditioned on consumer reimbursement; declaratory judgment; injunction; $5000 per each day injunction is violated if supplier has notice; class actions for consumers damaged by violation; court may make appropriate orders including receiver; reimbursement; specific performance; strike unconscionable clauses; court "may" impose maximum $25,000 civil penalty; revoke suppliers license or permit; class actions authorized. § 1345.07.

Precedential Value of FTC Interpretations: Due consideration and great weight given in interpretation and rulemaking.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 1302.27.

Ohio

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 1302.28.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. R.C. §1302.29. Remedies for breach of warranty also can be limited. § 1302.29. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

Ohio

The following summary was reviewed and updated by LTC Robert L. Hert, Jr., 33d JAG Det., Oklahoma City, Hert & Baker, P. O. Box 668, Stillwater, Oklahoma 74076, Telephone Number: 405-377-8644, FAX: 405-377-6363.

Oklahoma

CREDIT REPORTING

Federal - FTC Trade Regulation Rule.

State - Oklahoma law regulates the credit rating business.

24 O.S., § 132.

See 24 § 131-147, The Credit Services Organization Act; § 24, § 81 - 85.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day after the buyer signs an agreement or offer to purchase. 14A § 2-502(1).

Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. 14A § 2-502(2).

Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. 14A § 2-502(3).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller in good faith, makes a substantial beginning of performance before the buyer gives notice of cancellation and (B) in the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer. 14A § 2-502(5). The sales agreement must contain a conspicuous notice of this cancellation right. 14A § 2-503. Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify

the seller in any manner of his/her intention to cancel. 14A § 2-503(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to demand such possession within a reasonable time after receipt of the notice of cancellation, with forty (40) days being presumed to be a reasonable time. 14A § 2-505(1,2). The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. 14A § 2-504(1,2). The seller may retain as a cancellation fee 5 percent (5%) of the cash price, but not exceeding the amount of the cash down payment. If the seller fails to comply with all of his/her obligations, or if the buyer avoids the sale on any ground independent of his/her right to cancel the sale, or revokes his/her offer to purchase, the seller is not entitled to retain a cancellation fee. 14A § 2-504(3).

A cash sale, a sale of farm equipment, a sale made pursuant to a preexisting revolving charge account, and a sale previously negotiated at a business establishment at a fixed location where goods or services are offered or exhibited for sale, and emergency orders where work has not begun or where goods not returnable in good condition are not included in the protections provided by this statute. 14A § 2-501.

MINOR'S CONTRACT

Age of majority to contract - 18. 15 § 13.

Contractual liability - A minor may make any contract other than those involving real property and personal property not in the minor's possession or control, in the same manner as an adult subject to the minor's powers of disaffirmance. 15 § 18. The contract of a minor may be disaffirmed by the minor either before majority or within one year afterwards. Provided any minor between 16 and 18 who paid for any repair, supply, or equipment in a motor vehicle may disaffirm only by restoring consideration. 15 § 19.

A minor cannot disaffirm contracts for necessaries. 15 § 20.

Disability of veteran and spouse removed under act. (72 § 49.1).

REPOSSESSION REQUIREMENTS

The creditor must file a verified petition that alleges facts which show:

(1) A description of the property claimed;

(2) That the creditor is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he/she is entitled to the immediate possession of the property;

(3) That the property is wrongfully detained by the debtor;

(4) The actual value of the property;

(5) That the property was not taken in execution on any order or judgment against the creditor, or for the payment of any tax, fine or amercement assessed against him, or any other mesne or final process issued against the creditor; or, if taken in execution, that it is exempt by law from being taken; and

(6) The prayer for relief may request the court issue an order for the immediate delivery of the property. 12 § 1571.

If prejudgment possession is requested, the creditor must execute a bond with one or more sufficient sureties, to be approved by the clerk, in double the value of the property as stated in the petition. The bond must be filed with the clerk. 12 § 1573.

The clerk must issue a summons which is served on the debtor which notifies the debtor that an order for delivery of the property is sought and that he/she can file a written objection to the order within 5 days of the service of the summons. If no objection is filed, the order of delivery is granted without a hearing. If a written objection is filed, the court will promptly set the matter for hearing. 12 § 1571(A)(3). Prejudgment delivery of the property can be ordered if the debtor cannot be served and the judge finds that a reasonable effort to serve him/her was made and the creditor shows the probable truth of the allegations in his/her petition. The debtor also may move to have the prejudgment order dissolved within 5 days. 12 § 1571(B).

The debtor may require the return of the property to his/her possession by executing a bond to the creditor, with one or more sufficient sureties, to be approved by the sheriff, in double the value of the property as stated in the creditor's affidavit. 12 § 1577.

STATUTE OF LIMITATIONS

Written contract - 5 years. 12 § 95.

Oklahoma

Promissory notes - 5 years. 12 § 95.

Contract for sale of goods - 5 years. 12A § 2-725.

Oral contracts - 3 years. 12 § 95.

Open accounts - 3 years. 12 § 95.

Judgments - Courts of record - Judgment kept alive by execution every 5 years. 12 § 735.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - The Oklahoma Uniform Consumer Credit Code requires the creditor to disclose to the buyer, usually before credit is extended, his/her credit charges in dollars and cents and as an annual percentage rate or as a nominal annual percentage rate. 14A § 2-304 and 2-306. Disclosure is required for sales, loans and revolving credit transactions. 14A § 2-306, 2-310, 3-301. The Oklahoma Uniform Consumer Credit Code does not apply to the following:

(1) Extensions of credit to the government, or for business, commercial or agricultural purposes;

(2) The sale of insurance by an insurer, except as provided in UCCC, Article 4;

(3) Transactions under public utility or common carrier tariffs if a subdivision or agency of Oklahoma or the United States regulates the charges for the services;

(4) Licensed pawnbrokers;

(5) Loans made to enable the debtor to build or purchase a residence or to refinance such loan when made by a lender whose loans are supervised by an agency of the United States or made by a Federal Housing Administration approved mortgagee, unless the loan is made subject to the Act by agreement or other sections of the Act.

(6) Margin accounts; and

(7) Sales of goods or services where the amount financed exceeds forty-five thousand dollars ($45,000.00). 14A § 1-202, 2-104. (Indexed for various purposes, 14A O.S., § 1-106 (1).

(8) Home fuel budget plans.

A creditor who fails to disclose information to a person entitled to the information is civilly liable to that person in an amount equal to the sum of (a) any actual damage sustained; twice the amount of the credit service charge (but not less than $100 nor more than $1,000); (b) the costs of the action together with attorney's fees in a successful action to enforce liability under 14A § 5-203(1). A creditor is not liable in an action brought against him/her if within 60 days after discovering an error and prior to written notice of the error or to the institution of an action, the creditor makes the proper adjustments and notifies the debtor. 14A § 5-203(2). A creditor that willfully and knowingly fails to provide information which he/she is required to disclose is guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $5,000, or imprisonment not to exceed one year, or both. 14A § 5-302.

UNFAIR AND DECEPTIVE TRADE PRACTICES:

Okla. Stat. Ann. tit. 78 § 51 (1987).

Prohibited Practices: 11 enumerated deceptive trade practices. 78 § 53.

Scope: In course of a person's business, vocation, or occupation.

Exclusions: Conduct complying with federal, state or local statute, or agency rules and orders; advertisements done by publisher, radio and television media, with no knowledge of falsity; dealers covered by Motor Vehicle Commission. 78 § 55.

Private Remedies: Injunction; actual damages; court has discretion to award attorney's fees to prevailing party, with fees mandatory to prevailing party if suit based on willful violation or plaintiff acting in bad faith; class actions brought by trade associations for its members. 78 § 54.

Okla. Stat. Ann. tit. 15 § 751 (West Supp. 1991).

Prohibited Practices: 17 enumerated unlawful practices. 15 § 753.

Special Requirements: None specified.

Scope: In course of his/her business.

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge of falsity; transactions regulated by Corporate Commission, or state or U.S. regulatory body; acts by

retailers or others in good faith and without knowledge, if based on information supplied by others. 15 § 754.
Private Remedies: Actual damages; costs and attorney's fees; maximum $2000 per unconscionable violation with court considering 4 enumerated circumstances.

Limitations: None specified.

State Remedies: AG or DA enforces, and there are private enforcement rights; declaratory judgment; injunction; actual damages; civil penalties with maximum of $2000 per violation for unconscionable conduct brought for consumer, court considers 4 circumstances; expenses and investigation fees; consent judgments including restitution or specific performance stipulation; court may make orders necessary including specific performance, restitution, receiver or revoke license; $10,000 civil penalty per willful violation of injunction or court order plus other penalties as court deems necessary and proper; costs and attorney's fees. 15 § 756-1, 761-1.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. 12A § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. 12A § 2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. 12A § 2-316.

MISCELLANEOUS

Health Spa Act. 15 § 2000 - 15 § 2009.

Every health spa contract for sale of future health spa services which are paid for in advance or paid for in installments must be in writing and contain the following:

Oklahoma

(1) A provision for the penalty-free cancellation of the contract within 3 business days of its making and refund of money paid;

(2) A provision for cancellation if buyer dies or becomes physically disabled for 30 or more consecutive days;

(3) A provision for cancellation if the health spa relocates or goes out of business and fails to provide alternate facilities within 8 miles of the health spa's former location;

(4) A provision that:

(a) to cancel, buyer must notify in writing, certified mail, or personally deliver the notice;

(b) all moneys to be refunded are to be paid within 30 days of cancellation;

(c) any credit or lien agreement executed by buyer must be returned within 60 days of cancellation.

Oklahoma

Oregon

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - It shall be an unlawful collection practice for a debt collector, while collecting or attempting to collect a debt, to do any of the following ($ 646.639):

(a) Use or threaten the use of force or violence to cause physical harm to a debtor, his/her family or his/her property;

(b) Threaten arrest or criminal prosecution;

(c) Threaten the seizure, attachment or sale of a debtor's property where such action can only be taken pursuant to court order without disclosing that prior court proceedings are required;

(d) Use profane, obscene or abusive language in communicating with a debtor or his/her family;

(e) Communicate with the debtor or any member of his/her family repeatedly or continuously or at times known to be inconvenient to that person with intent to harass or annoy the debtor or any member of his/her family;

(f) Communicate or threaten to communicate with a debtor's employer concerning the nature or existence of the debt;

(g) Communicate without the debtor's permission or threaten to communicate with the debtor at his/her place of employment if such place is other than the debtor's residence, except that the debt collector may:

(1) Write to the debtor at his/her place of employment if no home address is reasonably available and if the envelope does not reveal that the communication is from a debt collector other than a provider of the goods or services from which the debt arose.

(2) Telephone a debtor's place of employment without informing any other person of the nature of the call or

identifying the caller as a debt collector, but only if the debt collector is unable to contact a debtor at his/her residence. The debt collector may not contact the debtor at his/her place of employment more frequently than once each business week.

(h) Communicate with the debtor in writing without clearly identifying the name of the debt collector, the name of the person, if any, for whom the debt collector is attempting to collect the debt and the debt collector's business address;

(i) Communicate with the debtor verbally without disclosing to the debtor within 30 seconds the name of the individual making the contact and the true purpose thereof;

(j) Cause any expense to the debtor in the form of long distance telephone calls, telegram fees or other charges incurred by a medium of communication, by concealing the true purpose of the debt collector's communication;

(k) Attempt to or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten to take any action which the debt collector in the regular course of business does not take;

(l) Use any form of communication which simulates legal or judicial process or which gives the appearance of being authorized, issued or approved by a governmental agency, governmental official or attorney-at-law when it is not in fact so approved or authorized;

(m) Represent that an existing debt may be increased by the addition of attorney fees, investigation fees or any other fees or charges when such fees or charges may not legally be added to the existing debt;

(n) Collect or attempt to collect any interest or any other charges or fees in excess of the actual debt unless such are expressly authorized by the agreement creating the debt or expressly allowed by law;

(o) Threaten to assign or sell the debtor's account with an attending misrepresentation or implication that the debtor would lose any defense to the debt or would be subjected to harsh, vindictive or abusive collection tactics. § 646.639.

Any person injured as a result of willful use or employment by another person of an unlawful collection practice may bring an action in an appropriate court to enjoin the practice or to recover actual damages or $200, whichever is greater. The court or the

jury may award punitive damages, and the court may provide such equitable relief as it deems necessary or proper. In any action brought by a person under this section, the court may award, in addition to the relief provided, reasonable attorney fees and costs. If the defendant prevails, the court may award reasonable attorney fees and costs if it finds the action to be frivolous. § 646.641.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 83.720(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. § 83.720(2). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 83.720(3).

The buyer may not cancel a home solicitation sale if the buyer in a separate signed writing not furnished by the seller requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice of cancellation, (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer. § 83.720(5). The sales agreement must contain a conspicuous notice of this cancellation right. § 83.730(2). Until the seller has notified the buyer of his rights of cancellation, the buyer may notify the seller in any manner of his intention to cancel. § 83.730(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. §§ 83.740, 83.750.

The following transactions are not included in the protections provided by this statute:

(1) A sale made pursuant to a preexisting revolving charge account;

(2) A contract in writing for the sale or lease of a house or business property or the construction of a new house or business property;

(3) A previously negotiated sale at the seller's place of business;

(4) A cash sale for less than $25; and

(5) A sale of insurance, farm equipment or motor vehicles. § 83.710(2).

(6) Emergency order and work has begun or good not returnable in good condition.

Note: Door-to-door sellers and telephone solicitors are required to identify themselves, state the purpose of the call, and inquire whether the person being solicited is interested in listening to a sales presentation within the first 30 seconds after beginning conversation. § 646.611

MINOR'S CONTRACT

Age of majority to contract - 18. § 109.510. Marriage removes minor's disability to contract (§ 109.520).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 71. 1030. Except for purposes of the Minimum Wage Act, all persons are deemed to have arrived at the age of majority upon their being married. Also, negotiation of commercial paper by minor is valid, subject to rescission rights § 73.2070.

Veterans may receive state loans (Art. XI, § 3 Ore. Const.).

REPOSSESSION REQUIREMENTS

The creditor must obtain an order for provisional process (claim and delivery) by filing with the clerk of court an affidavit or sworn petition requesting specific provisional process and showing:

(1) The name and residence or place of business of the defendant;

(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

(3) Description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

(5) A copy or verbatim recital of any writing or portion of a writing which evidences the origin or source of the plaintiff's claim to provisional process;

(6) Whether the claimed property is wrongfully detained by the defendant or another person;

(7) Whether the claimed property has been taken by public authority for a tax, assessment or fine;

(8) If the plaintiff claims that the defendant has waived his/her right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

(9) If provisional process is based on notice of a bulk transfer under ORS Chapter 76 or a similar statute or provision of law, a copy of the notice;

(10) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state or transfer to an innocent purchaser;

(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

(12) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

(13) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim. Rule of Civil Procedure 83A.

The creditor does not have to file a bond with the court, but sheriff may require a bond. R.C.P. 84D. Based on the affidavit, petition, and the evidence if presented, the court will decide whether there is probable cause to sustain the validity of the underlying claim, and consider whether to order issuance of provisional process, a restraining order or a show cause order. R.C.P. 83E.

The court will then notify the debtor to appear for a hearing at a place fixed by the court and at a fixed time after the third day after service of the order to show cause why provisional process should not issue. The order will notify the debtor that he can file affidavits on his behalf and that if he/she fails to show up, the court will order issuance of the provisional process. R.C.P. 83G. The debtor can waive his/her rights to notice and a hearing at any time. R.C.P. 83H. The court, in its discretion, can order issuance of a provisional remedy without conducting a show cause hearing, if the claimed property is in danger of destruction, serious harm, concealment, or removal from the state. R.C.P. 83I.

STATUTE OF LIMITATIONS

Contract under seal entered into before Aug. 13, 1965 - 10 years §§ 12.070, 42.115.

Simple written contract - 6 years. § 12.080.

Promissory notes - 6 years. § 12.080.

Contract for sale of goods - 4 years. § 72.7250.

Oral contracts - 6 years. § 12.080.

Open accounts - 6 years. § 12.080.

Judgments - Courts of record - 10 years. § 12.070.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Any retail installment sales contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer and a description or identification of the goods sold or to be sold, or services furnished or rendered or to be furnished or rendered. The contract also shall contain the following items:

(1) The cash sale price of each item of goods or services;

(2) The amount of the buyer's down payment, identifying the amounts paid in money and allowed for goods traded in;

(3) The difference between subsections (1) and (2) of this section;

(4) The aggregate amount, if any, included for insurance, specifying the type or types of insurance an the terms of coverage;

(5) The aggregate amount of official fees;

(6) The principal balance, which is the sum of subsections (3), (4) and (5) of this section;

(7) The dollar amount or rate of the service charge;

(8) The amount of the time balance owed by the buyer to the seller, which is the sum of subsections (6) and (7) of this section, if subsection (7) is stated in a dollar amount; and

(9) The maximum number of installment payments required, the amount of each installment and the due date of each payment necessary to pay such balance. § 83.030.

UNFAIR AND DECEPTIVE TRADE PRACTICES

OR. REV. STAT. § 646.605 (1983).

Prohibited Practices: 2 enumerated unconscionable tactics in business and 22 enumerated unfair or deceptive acts or practices, including a catchall for "any other" unfair or deceptive conduct.

Special Requirements: Must be only goods and services obtained primarily for personal, family, or household purposes. Also, solicitor must state total cost of the goods or services, and the number, timing, and amount of any installment payments. § 646.611(2).

Scope: Trade or commerce defined as advertising or distributing by sale or rental any real estate, goods or services, and includes any trade or commerce directly or indirectly affecting the people of Oregon.

Exclusions: Definition section excludes insurance; conduct complying with federal, state or local statute; advertisements done by publisher, radio and television media, with no knowledge of falsity. § 646.612.

Private Remedies: Actual damages or $200 minimum damages, whichever is greater; punitive damages; equitable relief deemed proper; court may award costs and attorney's fees, if judgment for defendant, based on finding of frivolous action. § 646.638

Limitations: AG or DA acts upon probable cause; private action based on ascertainable loss as result of willful violation; no

judgment rendered for plaintiff until plaintiff sends copy of complaint to AG; private action statute of limitations is one year from discovery, tolled during state prosecution of violation, limitations waived for counterclaims under this Act.

State Remedies: AG has rulemaking power; AG or DA enforces; injunction upon notice letter except it would cause immediate public harm or defendant violated terms of assurance to comply within 2 years of its making; attorney's fees to prevailing party may be awarded, and shall be if prosecution prevails or defendant prevails after good faith compliance entered into, or if AG or DA did not have reasonable grounds to waive the notice before injunction; court may make additional orders including restitution; maximum $25,000 per willful violation of act, injunction or assurance of compliance; court has discretion to order dissolution of license or franchise for injunction violation. § 646.642.

WARRANTIES

Unless disclaimed, a warranty on every sale by manufacturer carries with it that manufacturer's implied warranty of merchantability. § 72.8020.

Where the manufacturer has reason to know at the time of the retail sale that the good is required for a particular purpose and that the buyer relies on the manufacturer's skill or judgment to select or furnish a suitable good, the manufacturer gives an implied warranty of fitness. Likewise if the retail dealer or distributor has reason to know the above, such dealer or distributor gives an implied warranty of fitness. §§ 72.8030 and 72.8040.

Except with respect to the sale of a consumer good by means of mail order catalog, a sale of a consumer good on an "as is" or "with all faults" basis effective disclaimer of the above warranties can be effected.

MISCELLANEOUS

Telephone Solicitation Sales. § 83.715.

The provisions of this Article relate only to telephone solicitation sales of periodicals, magazines, or any other reading material that the buyer receives at fixed intervals and does not apply to newspapers or advertising and sales in which buyer is offered reasonable opportunity to preview and return without obligation.

Oregon

No enforceable agreement may be formed by a telephone solicitation sale unless the seller receives from the buyer a signed, written contract containing all terms. The contract must contain a notice of the above fact to the buyer.

Pennsylvania

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State Procedures - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - It is unlawful for a collection agency to:

(1) Appear for or represent a creditor or other person in any proceeding or action in any court, or before any justice of the peace or magistrate;

(2) Furnish or offer to furnish legal services, directly or indirectly, or to offer to render or furnish such services within or without this Commonwealth; however, a collection agency may bring legal action on claims assigned to it if the agency appears by an attorney.

(3) Collection agencies may take assignments from creditors if all the following conditions exist:

(a) Assignment between creditors and collection agency is in writing;

(b) Original agreement between creditor and debtor does not prohibit assignments; and

(c) Collection agency complies with Unfair Trade Practices and Consumer Protection Law. Tit. 73 § 201-1 et seq.

(4) Act for, represent or undertake to render services for any debtor with regard to the proposed settlement or adjustment of the affairs of the debtor, or to demand, ask for, or receive any compensation for services in connection with the settlement or collection of any claim except from the creditor for whom it has rendered lawful services;

(5) To solicit employment for any attorney-at-law, or to receive from or divide with any such attorney-at-law any portion of any fee received by such attorney-at-law; and

(6) Coerce or intimidate any debtor by delivering or mailing any paper or document simulating or intending to simulate a summons, warrant, writ or court process as a means for the collection of a claim.

(7) Collect any amount, including interest, fee, charge, or expense incidental to the principal obligation, unless such amount is expressly provided in the agreement creating the debt or is permitted by law.

Whoever violates any of the prohibited practices is guilty of a misdemeanor punishable by a fine not exceeding $500 or imprisonment not exceeding 1 year. 18 Pa. Con. Stat. § 7311.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale within three full business days following execution of an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. 73 Pa. Con. Stat. § 201-7(a).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and the buyer has hand-written and signed a waiver of his/her right to cancel. 73 Pa. Con. Stat. 201-7(J). The sales agreement must contain a conspicuous notice of this cancellation right. 73 Pa. Con. Stat. § 201-7(b)(1).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. The seller must return any funds received or goods traded in to the buyer within 10 business days after cancellation of the sale. 73 P.S. § 201-7(2).

A sale or contract for the sale of goods or services having a sale price of less than $25; a sale of realty and an emergency order with signed waiver are not included in the protections provided by this statute. 73 P.S. § 201-7(a), 201-7(K), and 201-7(L).

MINOR'S CONTRACT

Age of majority to contract - 18. 23 Pa. S § 5101.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. 73 Pa. Con. Stat. § 2021. Where minor disaffirms contract other than one for

necessaries, other party cannot recover value of any item obtained pursuant to contract, and only remedy is action in replevin to recover item itself. See Central Bucks Aero, Inc. v. Smith, 226 Pa. Super. 441, 310 A.2d 283 (1973).

Any [veteran] minor at least 17 and spouse relieved of disability for loans (51 P.S. § 7310).

REPOSSESSION REQUIREMENTS

The creditor must file a verified complaint with the prothonotary stating:

(1) A description of the property;

(2) The value of the property;

(3) The location of the property, if known; and

(4) The material facts upon which the creditor's claim is based. Pa. R.C.P. No. 1073.1.

The creditor also must execute a bond in double the value of the property, with security approved by the prothonotary, and naming the Commonwealth as obligee. Pa. R.C.P. No. 1075.3.

After the complaint has been filed, the creditor may move for the issuance of a writ of seizure. The court will then fix the date and time of the hearing which shall not be less than 48 hours after filing the motion for the writ of seizure. Notice must be given to the debtor, informing him/her of the hearing place, date, and time, at least 24 hours before the hearing. Pa. R.C.P. No. 1075.1. A writ of seizure can be issued without a hearing being held, if the creditor satisfies the court of the probable validity of his/her claim to possession and that there is probable cause to believe that before notice can be given or hearing held, (1) the value of the property and the creditor's interest therein will be adversely affected by the continued possession and use by the debtor; or (2) the debtor or other person in possession will conceal, dispose, encumber, waste the property or remove it from the county. A hearing shall be held within 72 hours after seizure of the property. Pa. R.C.P. No. 1075.2. The debtor can regain possession of the property by filing a counterbond within 72 hours after seizure of the property, in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee. Pa. R.C.P. No. 1076.

Pennsylvania

STATUTE OF LIMITATIONS

Contract under seal - 20 years. 42 Pa. Con. Stat. § 5529.

Simple written contract - 6 years. 42 Pa. Con. Stat. § 5527.

Promissory notes - 6 years. 42 Pa. Con. Stat. § 5527.

Action for Breach of Contract for sale of goods - 4 years. 13 Pa. Con. Stat. § 2725.

Oral contracts - 6 years. 42 Pa. Con. Stat. § 5525(3).

Open accounts - 6 years. 42 Pa. Con. Stat. § 5525(3).

Judgments - Courts of record - 6 years. 42 Pa. Con. Stat. § 5527.

Defamation - 1 year. 42 Pa. Con. Stat. § 5523.

Personal injury, wrongful death, property damage, assault, battery, malicious prosecution, false imprisonment - 2 years. 42 Pa. Con. Stat. 5524.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Goods and Services Installment Sales Act. Any retail installment contract, contract, retail installment account, installment account, or revolving account made in Pennsylvania subject to the provisions of this act. 69 § 1103.

With only a few exceptions, a contract shall contain the following:

(1) The names of the seller and the buyer, the place of business of the seller, the residence or place of business of the buyer as specified by the buyer and a description of the goods or services sufficient to identify them. Services or multiple items of goods may be described in general terms and may be described in detail sufficient to identify them in a separate writing.

(2) The cash sale price of the goods, services and accessories which are the subject matter of the retail installment sale.

(3) The amount of the buyer's down payment, itemizing the amounts paid in money and in goods and containing a brief description of the goods, if any, traded in.

(4) The difference between item (2) and item (3).

(5) The amount, if any, included for insurance, specifying the coverages and the cost of each type of coverage.

(6) The amount, if any, of official fees.

(7) The unpaid balance, which is the sum of items (4), (5) and (6).

(8) The amount of the service charge, if any.

(9) The time balance, which is the sum of items (7), and (8), payable by the buyer to the seller, the number of installments required, the amount of each installment expressed in dollars and the due date or period thereof and

(10) The time sale price.

69 § 1303.

UNFAIR AND DECEPTIVE TRADE PRACTICES AND CONSUMER PROJECTION LAW

PA. CON. STAT. ANN. tit. 73 § 201-1 (Purdon 1971 & Supp. 1987).

Prohibited Practices: 16 enumerated unfair methods of competition and unfair or deceptive acts or practices and a catchall prohibiting any other fraudulent conduct likely to create confusion. 73 § 201-2.

Special Requirements: None specified.

Scope: Trade and commerce means advertising, sale, offers for sale of any service, real or personal property, intangibles and any other thing of value.

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge of falsity. § 201-3.

Private Remedies: Actual damages; $100 minimum damages; treble damages discretionary; may provide additional relief if proper. 73 § 201-9.2.

Pennsylvania

Limitations: State action for injunction must be in public interest; private action for consumers and predicated upon ascertainable loss.

State Remedies: AG has rulemaking power, after public hearing; AG or DA enforces; injunction; court has discretion to award restitution; maximum $5000 per violation of injunction or assurance of compliance; equitable relief deemed proper; maximum $1000 per willful violation, court has discretion to dissolve business for violation of injunction; may appoint a receiver. 73 PS & 201-8.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. 13 P.S. § 2314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. 13 P.S. § 2315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. 13 P.S. § 2316. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

Cash Consumer Protection Act. 73 §§ 204-1 to 204-9.

It is unlawful for any person to refuse to rent or sell property or services for the reason that an individual does not possess a credit card. A person may, however, demand and receive reasonable security from an individual who does not possess a credit card. Reasonable security may be in the form of cash on account reasonably related to the value of the property or services.

The Attorney General or district attorney may bring an action to restrain the person from violation of this section. An injunction may be accompanied by payment of costs, restitution, and assurances of voluntary compliance. Any person who violates an injunction is subject to a civil penalty not exceeding $1,000. In

addition, a penalty of up to $200 may be assessed for willful violations. §§ 204-5, 204-8.

Any person who suffers actual loss may bring a private action to recover actual damages or $100, whichever is greater. The court may also award treble damages, reasonable attorneys fees, and costs. § 204-9.

Pennsylvania

Puerto Rico

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

Commonwealth - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

Commonwealth - Collecting Agencies Act: P.R. Laws Ann. tit. 10, § 981p. No collecting agency may:

(1) Carry out actions for collection in relation to accounts, bills or debts without having been previously authorized in writing by the client;

(2) Institute judicial proceedings against a debtor in the name of the client without having been previously authorized in writing therefor;

(3) Refuse to, or fail to remit the portion of the money collected corresponding to the client at request of the latter within 30 days from the day on which the same has been collected.

(4) Refuse to, or fail to return to the client as the latter's request, all documents or papers kept with an account, when such account is returned to the client, when the collection has been performed or when the client desists to continue action for collection;

(5) Operate under the name or in such a manner as to imply that such agency is a branch of or is associated with any department of the federal, commonwealth or municipal government, or to use any seal, insignia, envelope or other format which simulates that of any government department or agency;

(6) Withhold an amount of money in excess of the quota previously agreed upon between the parties as fees for the service rendered;

(7) Use or threaten to use physical violence to collect an account;

(8) Publish or threaten to publish a list of debtors or diffuse information with respect to the debt, as well as the use of the telegraph for collection purposes;

(9) Require from the debtor the signing of a promissory note for an amount in excess of the debt;

(10) Collect or require from the debtor the payment of additional charges on the indebted amount as well as the expenses incurred by the collection agency in its normal action of collection or any other expenses including counsel fees not agreed upon, except when it may be so authorized by a final judgment;

(11) Intimidate the debtor by using documents which simulate in their form and appearance judicial documents;

(12) Mix the money belonging to clients with the operation funds of the agency or use part of same to defray expenses of the agency unless so authorized by the client;

(13) File judicial action for collection of money without previously having required from the debtor in writing the payment of the debt by certified mail with acknowledgment of receipt. No court may assume jurisdiction in an action for recovery of money instituted by a collection agency without compliance with this requirement having been alleged and proven. P.R. Laws Ann. tit. 10, § 981p.

STATE REMEDIES

§ 981r. Administrative fines not less than $50 nor more than $500. Upon conviction, fines not more than $1,000 and/or jail not to exceed 2 years. No private remedy indicated.

REPOSSESSION REQUIREMENTS - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

Commonwealth - Retail Installment Sales and Finance Companies (Tit 10 LPRA § 751): The buyer has the right to cancel a domicile retail installment contract (home solicitation sale) until 3 working days after the date of delivery of the goods if the price of the goods exceeds $75. No particular method of cancellation is prescribed. There shall be no surcharge if the cancellation is made within the time limit. The seller is not bound to accept the goods if the latter has suffered damages or deterioration in the hands of the buyer. The return and subsequent acceptance of damaged goods does not relieve the buyer from the payment of compensation for damage to the goods.

Upon cancellation, buyer is liable for compensation for damages to goods returned and for surcharges. Buyer must tender the goods out his/her own residence within 20 days. Buyer may keep goods if seller makes no demand within 20 days. Seller's obligations upon cancellation are to tender payments, negotiable instruments and trade-ins to buyer within 10 days and cancel security interest.

Excluded from these protections are:

(1) Cash sales

(2) Installment sales of $75 or less

MINOR'S CONTRACT

Non-emancipated minor is incapable to consent. P.R. Laws Ann. tit. 31, § 3402.

A minor may be emancipated at age 18. P.R. Laws Ann. tit. 31, § 911.

Contractual liability - The contract obligation of an emancipated minor is limited to the amount of his/her income for one year. P.R. Laws Ann. tit. 31, § 915.

Age of majority to contract - 21. P.R. Laws Ann. tit. 31, § 971. Minors, 15 or over, may contract for life or disability insurance on self, spouse or children, and if married or emancipated, property or liability insurance (tit 26, § 1103).

STATUTE OF LIMITATIONS

Personal property actions - 6 years. 31 § 5292.

Real property actions - 30 years. 31 § 5293.

Mortgage actions - 20 years. 31 § 5294.

Payment of services of named professionals - 3 years. 31 § 5297.

Payment of income for support and rent - 5 years. 31 § 5296.

All actions to which no limit is specified - 15 years. 31 § 5294.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

Commonwealth - Puerto Rico's Retail Installment Sales and Finance Companies Act requires a creditor to disclose to the buyer his/her credit charges including cost of insurance in dollars and cents and as an annual percentage rate. P.R. Laws Ann. tit. 10, § 742. These disclosures are not required for loans and revolving credit transactions. There are no statutory provisions relating to exempted and excluded transactions.

A creditor who fails to disclose information to a person entitled to the information is civilly liable to that person for a sum of money equal to not less than $100 nor more than $1,000, as determined by the Administrator. A creditor that fails to disclose required information may alternatively be found guilty of a misdemeanor and punished by a fine of not more than $500, or by imprisonment for not more than 6 months, or both. P.R. Laws Ann. tit. 10, § 792.

WARRANTIES

Consumer Goods and Domestic Appliances - P.R. Laws Ann. tit. 10, § 112-13.

The sale in Puerto Rico of any goods and domestic appliances which contain warranty certificates in which Puerto Rico is not included in the cover of said warranty is hereby prohibited. P.R. Laws Ann. tit. 10, § 112. The Director of the Consumer Service Administration is empowered to impose fines, upon service of notice and holding of an administrative hearing for any violation of the warranty provisions, as well as to the orders that may be issued and to the regulations that may be adopted pursuant thereto. The fines imposed shall not be less than $25 nor more than $1,000. P.R. Laws Ann. tit. 10, § 112b.

In every sale of goods and domestic appliances made in Puerto Rico, there shall be executed separated documents for the sale contract of the appliance and for the contract or service insurance, if any. In case both contracts are executed jointly, the contract or service insurance shall only take effect immediately upon the expiration of the warranty term of the appliance sold. P.R. Laws Ann. tit. 10, § 113.

Contracts or service insurances shall be optional and the vender shall so state clearly and expressly to the vendee. P.R. Laws Ann. tit. 10, § 113a. Every vendor of goods or domestic appliances shall abstain from pressing or coercing or otherwise

influencing a vendee to execute a contract or acquire a service insurance with the sale of goods or domestic appliances. P.R. Laws Ann. tit. 10, § 113b.

Any person who violates the provisions of this title shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $500 or by imprisonment in jail not to exceed six (6) months, or both penalties in the discretion of the court. P.R. Laws Ann. tit. 10, § 113c.

NOTE: The Consumer Service Administration of Puerto Rico is a government agency which deals with the protection of consumers' rights. The Administrator of this agency is empowered to effect necessary remedies to insure that consumers' rights are protected and to watch over violations of statutes designed to ensure the protection of consumers' rights.

Automobiles - see 15 U.S.C. § 2308.

Puerto Rico

Rhode Island

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third day following execution of an agreement or offer to purchase, excluding Sunday and any holiday on which regular mail deliveries are not made. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. The notice of cancellation shall be sent by registered or certified mail. Notice of cancellation is effective when delivered or when deposited in the mail properly addressed to the seller. The notice of cancellation must indicate the intention on the part of the buyer not to be bound by the sale. § 6-28-3. The sales agreement must contain a conspicuous notice of this cancellation right to be valid. § 6-28-4.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller fails to take possession of the goods within 20 days after cancellation of the sale. § 6-28-7. The seller must return any funds received and goods traded in to the buyer within 20 days after cancellation of the sale. § 6-28-5(a,b). The seller may retain as a cancellation fee 5 percent of the cash price, $5, or the amount of the cash down payment, whichever is least. § 6-28-5(c). If the sales agreement fails to conform to the requirements for it and the buyer has notified the seller of his/her intention to cancel, the seller has 30 days to return any deposit made by the buyer. § 6-28-4.

Rhode Island

A sale of insurance and a sale of real estate are not included in the protections provided by this statute. § 6-28-2.

A violation of the statute is a misdemeanor, § 6-28-8, and provides debtor with double damages, § 6-28-4(c).

MINOR'S CONTRACT

Age of majority to contract - 18. § 15-12-1.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 6A-1-103.

Disability of veteran removed. (§30-19-1).

REPOSSESSION REQUIREMENTS

The creditor is not required to make an affidavit before seeking a writ of replevin. If the unlawfully detained goods or chattel exceed $5,000 in value, the creditor must apply to the superior court for the writ, and if the goods or chattel are less than $5,000 in value, the creditor must apply to the district court for the writ. §§ 34-21-1, 34-21-2. The creditor must execute a bond to the debtor, with sufficient sureties or a surety company authorized to do business in Rhode Island, in double the value of the goods to be replevied. § 34-21-4. Notice to the debtor is not required. If the creditor's bond or sureties are not approved by the court, and the creditor fails to comply with a court order concerning them within 3 days after the sheriff has taken possession of the property, the property must be returned to the debtor. Failure of the creditor to comply with the order operates as an adjudication of the title to the goods and chattels replevied in favor of the debtor. § 34-21-5.

STATUTE OF LIMITATIONS

Slander - 1 year. § 9-1-14(a).

Libel - 3 years. § 9-1-14(a). See Mikaelian v. Drug Abuse Unit, 501 A.2d 721 (R.I. 1985).

Contract under seal - 20 years. § 9-1-17.

Rhode Island

Simple written contract - 10 years. § 9-1-13.

Promissory notes - 10 years. § 9-1-13.

Contract for sale of goods - 4 years. § 6A-2-725.

Oral contracts - 10 years. § 9-1-13.

Open Accounts - 10 years. § 9-1-13.

Judgments - Courts of record - 20 years. § 9-1-17.

Personal injury - 3 years. § 9-1-14(b).

Agent Orange Claims for Vietnam Veterans - 3 years from: discovery date or date when should have been discovered through due diligence whichever is later. 39-1-14.2.

Wrongful death - 3 years. § 10-7-2.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - Truth-In-Lending and Retail Selling. §§ 6-27-3 through 6-27-11.

The Rhode Island Truth-In-Lending and Retail Selling Act requires clear and conspicuous disclosure on loans and revolving credit transactions, but not sales. § 6-27-10.

Exemptions include oral solicitations and solicitations or applications through print media distributed in more than one state. § 6-27-10.

Any person who knowingly and willfully violates any provisions of § 6-27-10 shall be subject to a civil penalty of not less than $500 nor more than $5,000 per violation. Any application or solicitation violating the section is treated as a single violation regardless of the number of such applications or solicitations distributed. § 6-27-10.

Additional protections/disclosures are required in the case of any open end consumer credit plan secured by consumers principal residence. § 6-27-11.

Rhode Island

UNFAIR AND DECEPTIVE TRADE PRACTICES

R.I. GEN LAWS § 6-13.1-1 (1969 & Supp. 1983).

Prohibited Practices: 18 enumerated unfair methods of competition and unfair or deceptive practices. 6-13.1.1.(5).

Scope: Trade or commerce includes advertising, sale, offers for sale of any service, real or personal property, intangible and any other thing of value.

Exclusions: Actions permitted under state or U.S. laws administered by department of business regulation or other regulatory body. § 6-13.1-4.

Private Remedies: Actual damages; minimum $200; punitive damages; proper equitable relief "may" be provided; class action for actual and punitive damages and court has discretion to award injunction or other equitable remedy; court may award attorney's fees and costs. § 6-13.1-5.2.

Limitations: AG action if in public interest and notice given for injunction; private actions for consumers who suffer ascertainable loss. § 6-13.1-5.

State Remedies: AG enforces; injunction; court may make additional orders necessary including restitution, receiver, revocation of license; maximum $10,000 or dissolution of corporation per injunction violation. §§ 6-13.1-5, 6-13.1-8.

Precedential Value of FTC Interpretations: Due consideration and great weight. § 6-13.1-3.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 6A-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable

goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 6A-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 6A-2-316. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

Unsolicited Goods. § 6-13-10.

The receipt of unsolicited goods, wares, or merchandise through the mail or otherwise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the same in any manner without obligation to the sender.

Rhode Island

American Samoa

STATUTES

Consumer Protection - A.S.C. Ann. §§ 27.0401 to 27.0405.

Loans & Interest - A.S.C. Ann. §§ 28-1501 to 28.1510.

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

Territory - None.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

Territory - None.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

Territory - None.

MINOR'S CONTRACT - No statutory provision found.

REPOSSESSION REQUIREMENTS

(1) American Samoa has no apparent separate provision for repossession of goods by a creditor. The territory has not adopted the Uniform Commercial Code, but has adopted the Uniform Negotiable Instruments Law as promulgated by the U.S. National Conference of Commissioners on Uniform State Laws. Any provisions contained within it for repossession by a merchant of goods securing a negotiable instrument would be applicable. § 27.2503 (1962).

(2) The territory has special proceedings for attachment and garnishment. Requirements for attachment are:

(a) Before or after judgment, a plaintiff may seek a writ of attachment on any express or implied contract to have seized any nonexempt property as security for the satisfaction of any judgment recovered. § 43.0901.

(b) Before any writ of attachment may issue, the plaintiff must submit an affidavit to the clerk of court showing that the defendant is indebted to the plaintiff, the amount of the indebtedness, and that the attachment is not sought for purposes of fraud, hinderance, or delay. § 43.0902. The writ is issued by the clerk with approval of the court.

(c) A bond in double the amount for which plaintiff seeks judgment must be approved by the clerk of court. § 43.903(a). No bond is required if the plaintiff is the government of Samoa or the Attorney General of Samoa on behalf of a Samoan suing a non-Samoan. Although there are no provisions for pre seizure notice to the debtor or immediate hearing requirements, there are reported cases challenging the validity of the statute.

STATUTE OF LIMITATIONS

A.S. Code Ann § 43.0120 (1962).

Oral contracts - 3 years.

Property damage - 3 years.

Written contracts - 10 years.

Judgments of records - 10 years.

Personal injuries - 2 years.

Defamation - 2 years.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

Territory - No federal equivalent, but § 29.1501 to § 27-1532 specifies the following:

(1) No merchant, trader, or storekeeper may sell goods to a Samoan on credit for more than the current selling price of like goods at the place where the credit transaction took place. But it is permissible for a Samoan to agree to pay up to 8% per year interest on overdue accounts arising out of credit transactions. § 27.1501.

(2) No conditional rules contract is valid unless all the following conditions are met. § 27.1510.

(a) It is in writing signed by the person to be bound and attested to by at least one witness;

(b) It is filed with the territorial registrar within 10 days after its execution;

(c) It truly states the consideration upon which it is based or the debt or liability which it was intended to secure and contains a description of the specific articles or land to be sold or mortgaged.

WARRANTIES - No express statutory provision, but general authority exists for the Director of the Bureau of Consumer Protection, Department of Legal Affairs, to initiate enforcement actions for "unlawful acts or practices" against the consuming public. §§ 27.0401 to 27.0403.

American Samoa

South Carolina

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - See § 37-5-108(5).

Under the South Carolina Consumer Protection Code, if a court determines, as a matter of law, that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from a consumer credit transaction, an injunction may be granted and the consumer may be awarded treble damages for any injury sustained. The following factors, among others, shall be used to determine unconscionability in debt collection:

(a) Using or threatening to use force or violence, or criminal prosecution against the debtor or his/her family,

(b) Communicating with the debtor or family member at frequent intervals or in usual hours or under circumstances designed primarily to harass the debtor;

(c) Using fraudulent, misleading or deceptive representations;

(d) Engaging in conduct with knowledge that similar conduct has been restrained or enjoined.

The code also provides that, if it is understood at the time credit is extended that late payment or nonpayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person, the extension of credit is unenforceable. A showing that the creditor had a reputation for using or threatening violence or punishment for nonpayment establishes a prime facie case that the extension of credit is unenforceable. Furthermore, the administrator may bring a civil action to enjoin a creditor or any person acting for him/her from enforcing unconscionable terms or from engaging in fraudulent or unconscionable conduct in the collection

of debts arising from consumer credit transactions. He/she may also obtain temporary relief pending final determination.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - S.C. Code Ann § 37-2-501 et seq. (1976).

The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 37-2-502(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. § 37-2-502(2). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 37-2-502(3).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice of cancellation, (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer. § 37-2-502(5). The sales agreement must contain a conspicuous notice of this cancellation right. § 37-2-503(2). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. § 37-2-503(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. § 37-2-505(2). However, the buyer takes title to the goods if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. § 37-2-505(1). The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 37-2-504.

The following transactions are not included in the protections provided by this statute:

(1) A sale made pursuant to a preexisting revolving charge account;

(2) A previously negotiated sale at the seller's place of business;

(3) A sale conducted entirely by mail or telephone;

(4) A sale which is subject to the provisions of the federal Truth-In-Lending Act on the consumer's right to rescind certain transactions. § 37-2-501.

(5) Emergency order with signed waiver and work has begun or goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18. S.C. Const. art. XVII, § 14.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 36-1-103 AND 20-7-250.

Minor may contract to borrow money for higher education. § 20-7-260.

Minor veteran and spouse may contract for loans. § 25-15-10.

REPOSSESSION REQUIREMENTS

§ 15-69-10 et seq.

The creditor must make an affidavit which shows:

(1) That the creditor is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof by virtue of a special property interest therein, and the facts in respect to which shall be set forth;

(2) That the property is wrongfully detained by the debtor;

(3) The alleged cause of the detention;

(4) That the property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the creditor; and

(5) The actual value of the property. § 15-69-30.

The creditor also must execute a bond with one or more sufficient sureties, approved by the court, in double the value of the property as stated in the affidavit. § 15-69-50.

The creditor must attach to the affidavit a notice of a right to a preseizure hearing which notifies the debtor that he/she may demand a hearing within 5 days from the date of service by notifying the clerk of court in writing of such evidence touching upon the probable validity of the creditor's claim. § 15-69-40. If the debtor (A) fails to demand a preseizure hearing within 5 days of service, or (B) after such hearing, the judge shall find that the creditor's claim for immediate possession should be allowed, or (C) the clerk of court or judge finds that a preseizure hearing has been waived in writing, or (D) the clerk of court or judge finds that there is a probability that the claimed property is in immediate danger of being destroyed or concealed by the debtor, then the clerk of court or the judge shall endorse the affidavit requiring the sheriff to take possession of the property. § 15-69-50. Any time before the property has been delivered to the creditor, the debtor can require the return of the property to him/her by giving the sheriff a bond executed by two or more sufficient sureties in double the value of the property as stated in the creditor's affidavit. § 15-69-140. Under extremely limited circumstances i.e. immediate danger of destruction of property or concealment, the court may order immediate seizure. See 15-69-100.

STATUTE OF LIMITATIONS

Property damage - 6 years. § 15-3-530.

Contract under seal - 20 years.* § 15-3-520.

Simple written contract - 3 years. § 15-3-530.

Promissory notes - 3 years. § 15-3-530.

Contract for sale of goods - 4 years. § 36-2-725.

Oral contracts - 3 years. § 15-3-530.

Open accounts - 3 years. § 15-3-530.

Judgments - Courts of record - 10 years. § 15-39-20.

Wrongful death - 6 years. § 15-3-530.

Personal injuries - 6 years from time plaintiff knew or should have known of cause of action. § 15-3-530(5); § 15-3-535 (1977).

Medical malpractice - 3 years from date of incident, 3 years from date of discovery but not later than 6 years from occurrence.

Defamation, assault, battery, false imprisonment - 2 years. § 15-3-550.

*An action on a sealed note and a personal bond for the payment of money are both subject to a 6 year statute of limitation. § 15-3-520.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - The South Carolina Consumer Protection Code requires a creditor to disclose to the consumer the information required by the federal Truth-In-Lending Act and in all respects to comply with the provisions of the Act. §§ 37-2-301, 37-3-301. Also, see Chapter 2 supra.

The following transactions are exempted or excluded from coverage under the South Carolina Consumer Protection Code:

(1) Extensions of credit to the government or governmental agencies;

(2) A sale of insurance by an insurer (except CPC Art. 4);

(3) Transactions under public utility, municipal utility or common carrier tariffs if South Carolina or the United States regulates the charges for services;

(4) A licensed pawnbroker-loans of $300 or less;

(5) Licensing or examining restricted lenders [§ 37-3-501(4)];

(6) Rates and charges for advancing insurance premiums by insurance agents;

(7) Rates and charges on loans, and rates and charges on restricted loans [§ 37-3-501(3)];

(8) Loans and sales or leases made primarily for agricultural purposes;

(9) Loans to or on behalf of students pursuant to a government supported educational loan program;

(10) Federally chartered credit unions;

(11) First mortgage loans made to enable the debtor to build or purchase a residence, when made by a lender whose loans are subject to supervision by South Carolina or the United States or made by a Federal Housing Administration approved mortgagee. § 37-1-202 (1981).

A creditor who fails to disclose information to a person entitled to the information is civilly liable to that person for actual damages and a penalty in an amount determined by the court, but not less than $100 nor more than $1,000. § 37-5-202(1). A creditor is not liable for a penalty for failure to disclose information, if he/she notifies the debtor of a violation before the creditor receives from the debtor written notice of the violation or the debtor has brought an action, and the creditor corrects the violation within 60 days after notifying the debtor. § 37-5-202(6). A creditor who willfully fails to provide information which he/she is required to disclose is guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $5,000, or imprisonment not to exceed one year, or both. § 37-5-302.

UNFAIR AND DECEPTIVE TRADE PRACTICES

S.C. Code Ann. § 39-5-10 (Law. Co-op. 1976 & Supp. 1986).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices. § 39-5-20 (1971).

Scope: Trade or commerce defined to include advertising, sale, and offers for sale of any service, real or personal property, intangible and any other thing of value.

South Carolina

Exclusions: Actions permitted by state or U.S. law; advertisements done by disinterested publisher, radio and television media, with no knowledge of falsity; actions governed by Title 38, Ch. 55 §§ 38-55-10 through 38-55-410 relating to regulation of insurance; actions that comply with FTC statutes, § 39-5-40 (1971).

Private Remedies: Actual damages; treble damages for willful or knowing violation and court "may" provide other relief deemed proper; attorney's fees and costs to successful plaintiff. § 39-5-14. Conditioned upon "ascertainable loss".

State Remedies: AG, County or City Atty. upon AG approval enforces; injunction with costs to state; court may make additional orders necessary including restitution, revocation of license; assurance of compliance may stipulate costs, restitution; rulemaking; maximum $5000 per willful violation; maximum $15,000 or corporate dissolution per injunction violation and costs to AG. § 39-5-50. § 39-5-110.

Precedential Value of FTC Interpretations: Guided by FTC interpretations. § 39-5-20 (1971).

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 36-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 36-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 36-2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

Consumer Rental Purchase Agreements. §§ 37-2-701 to 37-2-714.

A consumer rental-purchase agreement means an agreement for the use of personal property by an individual primarily for personal, family, or household purposes, for an initial period of 4 months or less that is automatically renewable and permits the consumer to become the owner of the property.

There are 8 enumerated required disclosures under this section. See § 37-2-702. Advertisements of the agreements are also regulated. § 37-2-704.

A lessee may not authorize any person to confess judgment on a claim arising out of such an agreement. Furthermore, at any time after the lesser has made the first periodic payment, the lessee may return the rented property or purchase the property by tendering 55% of the difference between total payments and total paid. § 37-2-713.

South Dakota

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - S.D. Codified Laws Ann § 37-24-5.1 et seq.

The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 37-24-5.3. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective when delivered, when telegramed or when deposited in the mail properly addressed to the seller, postage prepaid. § 37-24-5.4. The sales agreement must contain a conspicuous notice of this cancellation right. § 37-24-5.3. Seller's failure to disclose right to cancel is a deceptive act or practice. § 37-24-5.3.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to pick up the goods within 20 days after the date of the notice of cancellation. The seller must return any funds received or goods traded in to the buyer within 10 business days after cancellation of the sale. § 37-24-5.4.

The following transactions are not included in the protections provided by this statute:

(1) A sale made pursuant to prior negotiations at the seller's place of business;

(2) A sale in which the consumer is accorded the right of rescission by the provisions of the Consumer Credit Protection Act (15 U.S.C. § 1635);

(3) An emergency sale in which the buyer initiated the contact and the buyer furnishes the seller with a handwritten, dated statement describing the situation and acknowledging and waiving his/her rights to cancel the sale in 3 days;

(4) A sale conducted entirely by mail or telephone;

(5) A sale in which the buyer initiated the contact and requested the seller to visit his/her home for repairing or performing maintenance upon the buyer's personal property;

(6) A sale or rental of real property, a sale of insurance or a sale of securities or commodities by a registered broker-dealer; and

(7) The sale, lease or repair of motor vehicles, metal buildings, farm machinery, or implements or mobile homes, by a dealer having a fixed permanent location and place of business in South Dakota where such goods and services are offered on a continuing basis. § 37-24-5.2.

(8) Sale or rental of goods or services with purchase price less than $25.00. § 37-24-5.1.

MINOR'S CONTRACT

Age of majority to contract - 18. § 26-1-1.

Contractual liability - A minor may make any contract subject only to his/her power of disaffirmance except contracts relating to delegation of power, real property, and personal property not in the minor's immediate possession or control. § 26-2-3. A minor may not disaffirm a contract for necessaries nor may a minor disaffirm a contract in which statutory authorization has been given such as educational loan contracts. §§ 26-2-4 to 26-2-5.

Veteran and spouse free of disability (§ 26-2-2).

REPOSSESSION REQUIREMENTS - S.D. Codified Laws Ann § 21-15-1 et seq.

In essence, the creditor proceeds by order to show cause with summons and complaint annexed. In support of one's moving papers, one must make an affidavit stating:

(1) That the creditor is the owner of the property claimed, particularly describing it, or is lawfully entitled to possession thereof, by virtue of a special property therein, and the facts in respect to which shall be set forth;

(2) That the property is wrongfully detained by the debtor;

(3) The alleged cause of the detention;

(4) That the property has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the creditor; and

(5) The actual value of the property. § 21-15-2. The creditor also must execute a bond with one or more sufficient sureties approved by the sheriff, or a cash deposit, in double the value of the property as stated in the affidavit. § 21-15-4. If cash is deposited, it must be left with the clerk or the judge having jurisdiction. § 21-15-5.

After the filing of the complaint, summons, and the affidavit, the judge shall order the debtor to show cause at a specified time and place, after reasonable notice to the debtor, why the creditor should not have delivery of the property. § 21-15-3. At any time before delivery of the property to the creditor, the debtor can require the return of the property to his/her possession, by giving the sheriff a bond, or receipt for cash deposit, in amount and sufficiency as required on the creditor's bond, and securing the creditor for delivery of the property. § 21-15-12.

STATUTE OF LIMITATIONS

Contract under seal - 20 years. § 15-2-6.

Simple written contract - 6 years. § 15-2-13.

Promissory notes - 6 years. § 15-2-13.

Contract for sale of goods - 4 years. § 57A-2-725.

South Dakota

Oral contracts - 6 years. § 15-2-13.

Open accounts - 6 years. § 15-2-13.

Judgments - Courts of record - 20 years. § 15-2-6.

Personal injuries - 3 years. § 15-2-14.

Defamation, assault, battery, false imprisonment - 2 years. § 15-2-15.

Wrongful death - 3 years. § 21-5.3.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - See § 54-6-1.

UNFAIR AND DECEPTIVE TRADE PRACTICES

S.D. CODIFIED LAWS ANN. § 37-24-1 (1977 & Supp. 1987)

Prohibited Practices: Deceptive acts or practices, including 6 enumerated prohibitions. § 37-24-6.

Scope: Includes the advertising, offering for sale, attempting to sell, selling, or distributing services or any property, tangible or intangible, personal or mixed, for cash, exchange of goods and services, or on credit.

Exclusions: Advertisements done by disinterested publisher, radio and television media, with no knowledge of falsity; acts permitted by state or U.S. laws or regulations.

Private Remedies: Actual damages.

Limitations: Statute of limitations is 2 years after discovery.

State Remedies: Director of Consumer Protection has rulemaking power; AG or state's attorney with AG approval has enforcement power; director may accept assurance of compliance that stipulates costs and restitution; AG may get injunction if provides notice; maximum $5000 per injunction violation; maximum $2000 per intentional violation; court may make necessary additional orders including restitution and receiver.

South Dakota

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 57A-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purposes. § 57A-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 57A-2-316. Nevertheless, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

1. Unsolicited Merchandise. § 37-24-2.

When unsolicited merchandise is delivered in person or by mail or common carrier to a person, that person has the right to refuse such merchandise and is not obligated to return it. The unsolicited merchandise shall be deemed an unconditional gift and the recipient is under no obligation to the sender.

2. Buying Clubs. §§ 37-26-4 to 37-26-11.

A buying club is a corporation, partnership, unincorporated association, or other business enterprise organized with the primary purpose of providing benefits to members from the cooperative purchase of services or merchandise.

A fraudulent offer or sale of a membership is a class 5 felony. Likewise, any person who intentionally violates any provision of the Chapter is guilty of a class 5 felony.

South Dakota

Any person damaged by a violation of any of the provisions may bring a civil action and recover damages, together with costs, reasonable attorney's fees, and other equitable relief.

Attorney general can investigate/seek injunctive relief for violations. Civil penalties, not to exceed $25,000, can be levied for violations of this chapter.

CREDIT REPORTING

Federal - FTC Trade Regulation Rule.

State - § 47-18-1001 through 47-18-1011.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision. But see Collection Agencies, §§ 62-20-101 to 62-20-123.

Also, regarding harassment, the Tennessee Supreme Court ruled that a creditor's attempts to collect a debt through harassment, abusive language and threat of legal process when, in fact, the alleged debt was the result of a billing error on the part of the creditor constituted intentional or reckless infliction of severe emotional distress by means of outrageous conduct. Moorhead v. J.C. Penney Company, Inc. (Tenn Sup. Ct. 1977).

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - § 47-18-701 through § 47-18-707, the buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 47-18-703(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. § 47-18-703(2). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 47-18-703(3).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice of cancellation, (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer, and (C) the buyer has signed a waiver of his/her right to cancel. § 47-18-703(5). The sales agreement must contain a conspicuous notice of this cancellation right. § 47-18-704(b). Until the seller has notified the buyer of his/her rights of

cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. § 47-18-704(d).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. § 47-18-706. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 47-18-705. The seller is entitled to compensation only to the extent of the fair market value for any services performed prior to cancellation of the sale. § 47-18-706(c).

The following transactions are not included in the protections provided by this statute:

(1) A sale or lease of farm equipment, motor vehicles, insurance, or securities;

(2) A cash sale of less than $25;

(3) A sale or lease made pursuant to a preexisting revolving charge account;

(4) A sale or lease made pursuant to prior negotiations between the parties;

(5) A sale of real estate or listing agreements; and

(6) A sale of farm animals or produce or similar perishable items. § 47-16-102(4).

(7) Emergency order with signed waiver and work has begun or goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18. § 1-3-113(a).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 47-1-103.

Disability removed for minors and their spouses (§ 58-3-103).

Tennessee

REPOSSESSION REQUIREMENTS

The creditor must file a complaint in the circuit or chancery court or cause a warrant to issue in the general sessions court in order to institute an action to recover personal property. If the creditor's right of possession is founded on a writing, a copy of the writing must be attached as an exhibit to the affidavit. The complaint or warrant shall be sworn to or have attached a sworn affidavit stating:

(1) That the creditor is entitled to possession of the described property and the reason he/she is so entitled;

(2) A description of the property;

(3) The value of the property. § 29-30-103.

The creditor can expedite the proceeding for obtaining a writ of possession by filing an application and a verified complaint simultaneously during the first session of court. The court shall hear the parties and order the issuance of the writ of possession where the court finds that:

(A) That at least five (5) days prior to such application plaintiff mailed by certified mail or delivered to defendant a notice of the time and place of such application and that:

(i) Such notice had either been received by the defendant, or was directed to the defendant at the address stated in any writing, signed by the defendant, and on which the plaintiff's claim to possession is founded;

(ii) Such notice was accompanied by a copy of plaintiff's complaint, including a copy of any writing on which the plaintiff's claim to possession was founded; and

(iii) The plaintiff is entitled to possession of the property, or that there is no substantial controversy as to the plaintiff's right to such possession; or

(B) (i) That the property was obtained by fraud, misrepresentation or theft, or

(ii) That the defendant is:

(a) Concealing the property;

(b) Likely to remove it from the jurisdiction of the court;

(c) Likely to dispose of the property;

(d) Endangering the property by unusually hazardous use; or

(e) Seriously impairing the plaintiff's security interest in the property, such as use in some manner other than that contemplated by the parties or by failing to maintain hazard insurance on the property where the written instrument or agreement on which the plaintiff's claim is founded requires such insurance. § 29-30-106.

A writ of possession issued pursuant to (B) shall be conditioned on the plaintiff's posting a bond in an amount fixed by the court which shall not be less than the value of the property. § 29-30-106. After the action to recover personal property has been properly filed with the clerk, process shall issue to the debtor stating that a possessory hearing will be held on a date and at a time specified before the judge or chancellor of the court where the action is filed. The possessory hearing shall be held not less than 5 or more than 20 days after the process is served on the debtor. The process must notify the debtor that his/her failure to appear and offer evidence will result in issuance of the writ of possession. If the action is filed in the court of general session, the process shall notify the debtor that his/her failure to appear and offer evidence will result in the entering of a default judgment against him/her for the relief sought in the warrant. § 29-30-104.

There are no statutory provisions relating to a redelivery bond.

STATUTE OF LIMITATIONS

Contract under seal - 6 years. § 28-3-109.
Simple written contract - 6 years. § 28-3-109.

Promissory notes - 6 years. § 28-3-109.

Tennessee

Contract for sale of goods - 4 years. § 47-2-725.

Oral contracts - 6 years. § 28-3-109.

Open accounts - 6 years. § 28-3-109.

Judgments - Courts of record - 10 years. § 28-3-110.

Personal property damage - 3 years. § 23-3-105.

Personal injuries - 1 year. § 28-3-104.

Wrongful death - 1 year. See Collier v. Memphis Light Gas and Water Div., 657 S.W.2d 771 (Tenn. Ct. App. 1983).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - Compliance with the requirements of the Consumer Credit Protection Act, commonly referred to as the federal "Truth-In-Lending Act," shall be deemed compliance with any requirement of the statutes of Tennessee relating to the disclosure of information in connection with credit transactions. § 47-14-125.

UNFAIR AND DECEPTIVE TRADE PRACTICES

TENN. CODE ANN. § 47-18-101 (1979 & Supp. 1990).

Prohibited Practices: Unfair or deceptive acts or practices, including 26 enumerated prohibitions and a catchall provision prohibiting any other deceptive consumer act. § 47-18-104. Effective July 1, 1988, provisions dealing with utility companies and discrimination against the handicapped are omitted as beyond the scope of the Act.

Scope: Trade or commerce defined as advertising, offering for sale, lease, or rental any goods, services, real or personal property, intangible and any other thing of value.

Exclusions: Acts authorized by state or U.S. laws; advertisements done by publisher, radio and television media, with no knowledge of falsity; credit terms; except in so far as the Tennessee Consumer Credit Act of 1974

is applicable; retailer in good faith and without actual knowledge of violation.

Private Remedies: Actual damages; court may award treble damages and other relief necessary and proper for willful or knowing violation; declaratory judgment; injunction provided no state action filed; attorney's fees and costs to prevailing plaintiff. § 47-18-109.

Limitations: Injunction if in public interest and upon notice; private action if suffered ascertainable loss; court may set aside unreasonable settlement 1 year from making; court may limit private party to terms of reasonable offer of settlement; statute of limitations is 1 year from discovery and 4 years from transaction.

State Remedies: AG at request of consumer affairs division enforces; knowing violation of assurance of compliance results in maximum $1,000 per violation; injunction; costs; court may make orders necessary including restitution, revoke license for knowing and persistent violation. §§ 47-18-107, 47-18-108.

Precedential Value of FTC Interpretations: Interpreted and construed consistent with FTC.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 47-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. With respect to the sale of cattle, hogs, sheep, and horses, there shall be no implied warranty that these animals are free from disease. § 47-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited.

§ 47-2-316. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

1. Health Clubs. §§ 47-18-301 to 47-18-320.

All club agreements must:

(a) Be in writing;

(b) Be signed by the buyer;

(c) Designate the date on which the buyer actually signed the agreement; and

(d) Contain in bold face type, in immediate proximity to the space reserved for buyer's signature, a notice that the buyer has until midnight of the 3rd business day following the signing of the contract to cancel such contract. § 47-18-305.

The duration of an agreement cannot exceed 36 months and may not contain an automatic renewal or extension clause. § 47-18-306.

Private Remedies - only remedy provided for is unenforceability of the contract and pro-rata refund of purchase price (§ 47-18-303) for false, deceptive, or misleading information, representation, notice, or advertisement or if the operator fails to maintain a bond or fails to conform to this section.

2. Buyers' Club. §§ 47-18-501 to 47-18-509.

A buying club means any person, corporation, partnership, unincorporated association or other operating for profit, the primary purpose of which is to provide benefits to members from cooperative purchase of services or merchandise.

Any member may cancel such membership by giving written notice any time before midnight of the 3rd business day following date when membership is attained. Such right must be contained within the contract.

It is unlawful under the section to fail to disclose the following:

(a) Goods or services can be bought only through catalogs;

(b) Policies regarding warranties and guarantees;

(c) Charges incidental to purchase;

(d) List of categories of merchandise;

(e) Advice that the contracts may be transferred, sold, or assigned; and

(f) Percentage required as a down payment.

A violation constitutes a violation of the Tennessee Consumer Protection Act.

3. Rental-Purchase Agreements. §§ 47-18-601 to 47-18-614.

Rental-purchase agreements are contracts for the use of personal property primarily for personal, family, or household purposes, for an initial period of 4 months or less, that is automatically renewable and permits the consumer to become the owner.

The section lists 12 disclosures that must be made. A person who fails to comply with the requirements imposed is liable to a consumer in an amount equal to the greater of (a) actual damages; (b) if an individual action, 25% of total payments necessary to acquire ownership, but not less than $100 nor greater than $1,000; or (c) if a class action, no minimum recovery as to each member but, total recovery arising out of some violation cannot exceed the lesser of $500,000 or 1% of lessor's net worth; and (d) cost of action and reasonable attorneys fees.

An action may be brought within 1 year of date of occurrence or 6 months of time rental-purchase agreement ceases to be effective, whichever is greater.

4. Unsolicited Merchandise. § 47-18-901. Treated an unconditional gift.

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - Any person or credit reporting bureau who knowingly furnishes false information regarding another person's credit worthiness, credit standing, or credit capacity is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $200. Tex. Rev. Civ. Stat. Ann. art. 9016 (Vernon 1971).

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - Texas law prohibits a debt collector from collecting or attempting to collect any debt alleged to be due and owing by a consumer by employing any of the following practices:

(1) The use of threats, coercion, or attempts to coerce, Tex. Civ. Stat. Ann. art. 5069-11.02 (Vernon 1973) (8 enumerated prohibitions);

(2) The use of oppressive methods, harassment, or abuse of any person, Tex. Rev. Civ. Stat. Ann. Art. 5069-11.03 (4 enumerated provisions);

(3) The use of any unfair or unconscionable means, Tex. Rev. Civ. Stat. Ann. art. 5069-11.04 (Vernon 1973) (2 enumerated prohibitions);

(4) The use of any fraudulent, deceptive or misleading representations, Art. 5069-11.05 (16 enumerated prohibitions).

Any person who engages in acts or practices which are prohibited by law is guilty of a misdemeanor, and upon conviction is punishable by a fine of not less than $100 nor more than $500 for each violation. Tex. Rev. Civ. Stat. Ann. art. 5069-11.09.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - Tax Rev. Civ. Stat. Ann., § 5069-13.01 through 13.07. The buyer has the right to cancel a home solicitation sale until midnight of the third business

day following execution of an agreement or offer to purchase. Tex. Rev. Civ. Stat. Ann. art. 5069-13.02(a). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. Tex. Rev. Civ. Stat. Ann. art. 5069-13.02(c). The sales agreement must contain a conspicuous notice of this cancellation right. Tex. Rev. Civ. Stat. Ann. art. 5069-13.02(b).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. Tex. Rev. Civ. Stat. Ann. art. 5069-13.06. The seller must return any funds received or goods traded in to the buyer within 10 business days after cancellation of the sale. Tex. Rev. Civ. Stat. Ann. art. 5069-13.03(5).

The statute also applies to certain real property sales. Art 5069-13.01(5)(B).

The following transactions are not included in the protections provided by this statute:

(1) A sale of farm equipment;

(2) A sale of goods for less than $25;

(3) A sale made pursuant to a preexisting revolving charge account or retail charge agreement;

(4) A sale made pursuant to prior negotiations between the parties at a fixed business location;

(5) A sale of realty for less than $100; and

(6) A sale of realty in which the purchaser is represented by a licensed attorney, or in which the transaction is negotiated by a licensed real estate broker, or in which the transaction is being negotiated by the person who owns the realty not at the residence of the customer. Tex. Rev. Civ. Stat. Ann. art. 5069-13.01(5).

MINOR'S CONTRACT

Age of majority to contract - 18. V.T.C.A., Civil Practice and Remedies Code § 129.001 (Vernon 1985). Minors, 14 or older, may contract for life, term or endowment insurance with written approval of family adult or guardian (VTCA Ins. Code Art. 3.49-2).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. See Cummings v. Powell, 8 Tex. 80 (1852).

REPOSSESSION REQUIREMENTS

The creditor must file an affidavit stating:

(1) That the creditor is the owner of the property, or some interest therein specifying such interest, and is entitled to the possession thereof;

(2) If the suit be to foreclose a mortgage or enforce a lien upon the property, the fact of the existence of such mortgage or lien, that the same is just and unsatisfied, and the amount of the same still unsatisfied, and the date when due;

(3) A description of the property to be sequestered, and the value of each article of property and the county in which it is situated;

(4) It shall set forth one or more of the causes named in V.T.C.A., Civil Practice and Remedies Code § 62.001, entitling him/her to the writ which includes:

(A) When a person sues for the title or possession of any personal property of any description, and makes oath that he/she fears the debtor or person in possession thereof will injure, ill-treat, waste or destroy such property, or remove the same out of the limits of the county during the pendency of the suit; or

(B) When a person sues for the foreclosure of a mortgage or the enforcement of a lien upon personal property of any description, and makes oath that he/she fears the debtor or person in possession thereof will injure, ill-treat, waste or destroy, or remove the same out of the county during the pendency of the suit, section 62.001; Tex. R. Civ. P. Ann. r. 696 (Vernon 1978).

The creditor also must file with the officer authorized to issue the writ of sequestration a bond payable to the debtor in the amount fixed by the court's order with sufficient surety or sureties as provided by statute to be approved by such officer. Tex. R. Civ. P. Ann. r. 698 (Vernon 1978).

The debtor shall be served in any manner provided for service of citation, with a copy of the writ of sequestration, the application, accompanying affidavits, and orders of the court as soon as practicable following the levy of the writ. Service of the writ on the debtor notifies him/her that he/she can regain possession of the property by filing a replevy bond. Tex. R. Civ. P. Ann. r. 700a (Vernon 1978). At any time before judgment, the debtor may replevy the property by executing a bond, with sufficient surety or sureties as provided by statute, to be approved by the officer who levied the writ, payable to the creditor in the amount fixed by the courts order. Tex Civ. Rules 701 (Vernon 1978); Tex. Rev. Civ. Stat. Ann. § 62.023.

STATUTE OF LIMITATIONS

Contract under seal - 4 years. Vernon's Annotated Civil Statutes, Art. 5527.

Simple written contract - 1 year. Art. 5527.

Action for recovery of charges by carriers of property for compensations - 3 years. Art. 5526.

Action on retail installment transaction where the date of final entry thereon refers to the date of execution rather than final payment on a mobile home purchase - 2 years - Quantanilla v. Warlingan National Bank (Tex. Ct. Civ. App. 1981).

Promissory notes and open accounts - 4 years. Vernon's Annotated Civil Statutes. Art 5527.

Contract for sale of goods - 4 years. Tex. Bus. & Com. Code Ann. Tex. Rev. Civ. Stat. Ann. § 2.725.

Oral contracts - 4 years. Vernon's Annotated Civil Statute. Art. 5526.

Judgments - Courts of record - 10 years. Vernon's Ammotated Civil Statutes. Art. 5526. (May be revived

if execution delivered to clerk prior to expiration of 10 year period.

Personal injuries, property damage and wrongful death -2 years. V.T.C.A., Civil Practice and Remedies Code § 16.003.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - Compliance with the federal Truth-in-Lending Act and Regulation Z is deemed compliance with the Texas Insurance Premium Finance Law. Tex. Rev. Civ. Stat. Ann. art. 24.12. Applies to insurance premiums only. See generally Tex. Rev. Civ. Stat. Ann. § 5069-1.01 et seq.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Tex. Bus. & Com. Code Ann. § 17.41 (Vernon 1986).

Prohibited Practices: Deceptive acts or practices, including 24 enumerated prohibitions with consumers having additional actions for breach of warranty, insurance violation, or an unconscionable act that takes grossly unfair advantage of consumer's lack of knowledge or results in gross disparity between what was paid and received. § 17.46.

Special Requirements: None specified.

Scope: Trade or commerce defined as advertising, offers for sale, sales or lease of any service, goods, real or personal property, intangible and any other thing of value. § 17.45(6).

Exclusions: State acts against insurance agency only on request of State Board or Commissioner of Insurance; owners or employees of newspaper, magazine, telephone directory, billboard, broadcast station who advertises without knowledge or benefit from violation; acts authorized by FTC rules or regulations. § 17.49.

Private Remedies: Actual damages; double damages maximum of $1000; for knowing violations, no more than three times the amount of actual damages in excess of $1000; injunction; restitution; any other relief deemed proper including receiver, revocation license; attorney's fees

and costs to prevailing plaintiff, and to defendant if action in bad faith, groundless or brought to harass. § 17.50. Effective 9 January 1989, each consumer who prevails shall be awarded court costs and reasonable and necessary attorney's fees.

Limitations: No double recovery of actual damages and penalties for same act; state acts in public interest and upon notice for injunction; private actions for consumers that suffer actual damages; no receiver or license suspension for consumer if also regulated by state agency with those powers; consumer civil penalties only if notice letters sent, unless statute of limitations would run. It is a defense if a consumer rejects a written settlement providing for actual damages and attorney's fees. In consumer claims, defense exists if defendant proves gave plaintiff written notice of defendant's reliance, without knowledge, on false information, provided in government records, tests, or another source. Consumer may get actual damages for false information provided by third party, to the defendant, who should have foreseen it was for consumer; statute of limitations is 2 years from discovery or in the exercise of reasonable diligence should have discovered the violation; additional 180 days given if consumer proves defendant knowingly induced postponement of action. §§ 17.43, 17.50, 17.506, and 17.565.

State Remedies: Consumer protection division and DA or county attorney upon notice to division enforces; maximum $2000 per violation, not to exceed total of $10,000; injunction; court may make additional orders, including restitution, receiver; $10,000 per injunction violation, not to exceed $50,000; criminal penalties of $5000 and/or 1 year imprisonment for intentional concealment of evidence. § 17.47.

Precedential Value of FTC Interpretations: Guided but not bound by FTC and federal court decisions interpreting FTCA. 15 U.S.C. § 45(a)(1). § 17.46(c)(1).

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the

premises or elsewhere is a sale. UCC § 2.314. Tex. Bus. & Com. Code Ann. § 2.314 (Vernon 1968).

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 2.315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 2.316. Nevertheless, the ability to limit implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

1. Health Spas. Vernon's Ann. Civ. Stat. Art. 5221L.

A health spa may offer for sale or sell memberships before it opens. However, if the spa fails to open before the 181st day in which a membership is prepaid, it must return all amounts prepaid.

The spa must deliver a complete copy of the contract to the member. A contract may not require the member to make payments or finance for a period longer than 2 years. The term of such contract may not be measured by the life of the member.

Each contract must state in bold fact type that the buyer should read the contract and not sign it if it contains blank spaces. The contract should also state that the member has until midnight of the 3rd business day after signing the contract to cancel. Also, if the spa goes out of business and does not provide facilities within 10 miles, the buyer may cancel. Finally, if the member dies or becomes totally and permanently disabled, the contract may be cancelled and a partial refund obtained.

Private remedy includes actual damages, equitable relief, punitive damages, and reasonable attorneys fees and costs to the prevailing party.

2. Rental-Purchase Agreements. V.T.C.A., Bus. & C. §§ 35.71 to 35.74.

Rental-purchase agreement means an agreement for the use of merchandise by a consumer for personal, family, or household purposes for an initial period of 4 months or less, that is automatically renewable with each payment after the initial period, and that permits the consumer to become the owner.

The section provides for disclosures that must be printed in bold face type in the contract, which include: additional charges, reinstatement procedures, whether the merchandise is new or used, amount, timing and total of payment, who is liable for loss or damage, and cash price.

Private remedies include: actual damages, 25% of amount equal to total amount of payments not less than $250 nor more than $1,000, and reasonable attorney's fees and costs.

3. Credit Service Organizations. VTCA, Bus. & C. §§ 18.01 to 18.15.

A credit service organization is a person who, with respect to the extension of credit by others and in return for consideration, provides or represents the person can provide the following: improvement of buyer's credit record, history, or rating; obtain extensions of credit for buyer; or provide advice or assistance with regard to the above.

The contract may be cancelled within 3 days after the contract is signed, which right must be contained in the contract. The contract must also contain the terms of payment, description of services, and address of organization's principal place of business.

Private remedy includes actual damages, not less than amount paid, plus reasonable attorneys fees and costs.

4. Contests and Gift Giveaways. Texas Civ. Stat. Ann. (Supp 1991), § 5069 - 17.01 et seq. Provides disclosure requirements, explains consumer rights and remedies.

Utah

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision. But see Collection Agencies, §§ 12-1-1 to 12-1-9.

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - § 70C-7-107.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - Utah Code Ann § 70C-5-101 et seq. (1985).

The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 70C-5-102(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. § 70C-5-102(2). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 70C-5-102(3).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice of cancellation and (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer. § 70C-5-102(5). The sales agreement must contain a conspicuous notice of cancellation rights. § 70C-5-103(2). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. § 70C-5-103(4).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to demand such possession within 40 days after receipt of the notice of cancellation. § 70C-5-105. The seller must return any funds received or goods traded in

to the buyer within 10 days after cancellation of the sale. § 70C-5-104.

The following transactions are not included in the protections provided by this statute:

(1) A cash sale;

(2) A sale made pursuant to a preexisting open-end charge account;

(3) A sale made pursuant to prior negotiations between the parties at the seller's place of business. § 70C-5-101.

(4) Sale of farm equipment.

(5) Emergency order and work has not begun or goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18, but all minors obtain their majority by marriage. § 15-2-1. Minors, 15 or over, may contract for life, disability, property, casualty, or surety insurance and annuity contracts (§ 31-19-2).

Contractual liability - Minor is liable not only for necessaries but also by his contracts, unless he/she disaffirms them within a reasonable time upon reaching majority and returns all money or property received by virtue of the contract and remaining within his/her control at any time after reaching majority. § 15-2-2.

Minor and spouse relieved of disability. § 71-1-24.

REPOSSESSION REQUIREMENTS - Replevin Utah Court R. Civ. P. 64A et seq. (1976).

In general, the replevin rules require commencement of an action prior to recovering possession unless the creditor can establish immediate and irreparable harm if the writ is not granted prior to notice and hearing. This writ cannot be issued orally and must be issued by the court as opposed to the clerk. If a writ is issued without notice, the respondent may move, on short notice (two days or less if directly by the court), to dissolve

or modify the writ. The court will then set an expedited hearing date. Utah Rules Ann R. Civ. P. 64A(6).

The creditor must make an affidavit showing:

(1) A description of the property claimed;

(2) That the creditor is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he/she is entitled to the possession thereof;

(3) That the property is wrongfully detained by the debtor and the alleged cause of the detention;

(4) That the property has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or an attachment against the property of the creditor; and

(5) The actual value of the property. UTAH R. CIV. P. 64B(b).

The creditor must execute a bond with sufficient sureties in double the value of the property, as stated in the creditor's affidavit. UTAH R. CIV. P. 64B(c).

The sheriff will then serve the debtor with a copy of the affidavit, undertaking and writ. UTAH R. CIV. P. 64B(c). At any time before delivery of the property to the creditor, the debtor may require the return of the property to his/her possession, by serving upon the sheriff and the creditor and filing with the court, a bond with sufficient sureties in double the value of the property as stated in the creditor's affidavit. UTAH R. CIV. P. 64B(e). Either party can object to the sufficiency of the others surety. Rule 64B(d), and (f).

After repossession of goods subject to consumer credit sale, of value of $3000 or less, debtor has no further liability unless the goods have been damaged to a significant degree. Utah Code Ann § 70C-7-101 (1985).

STATUTE OF LIMITATIONS

Contract under seal - 6 years § 78-12-23.

Simple written contract - 6 years. § 78-12-23.

Promissory notes - 6 years. § 78-12-23.

Contract for sale of goods - 4 years. § 70A-2-725.

Oral contracts - 4 years. § 78-12-25.

Open accounts - 4 years. § 78-12-25.

Judgments - Courts of record - 8 years. § 78-12-22.

Property damage - 3 years. § 78-12-26.

Wrongful death - 2 years. § 78-12-28.

Defamation, assault, battery, false imprisonment. § 78-12-29.

Personal injuries - 4 years. § 78-12-25(2).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - See "Utah Consumer Credit Code", § 70C-1-101 et seq.

UNFAIR AND DECEPTIVE TRADE PRACTICES

UTAH CODE ANN. §§ 13-2-1 and 13-5-1 (1953 & Supp. 1983).

Prohibited Practices: Unfair methods of competition, including many enumerated unlawful practices.

Scope: In trade or commerce defined as intrastate commerce.

Exclusions: Banks, common carriers and other public utilities subject to regulation; sales made to close out stock upon notice to public; sales of damaged goods upon notice to public; sales made in price competition; sales at prices set by interstate competition.

Private Remedies: Injunction, actual damages; treble damages or $2000, whichever is greater; court costs; maximum $5000 per day of injunction violation, upon notice of injunction given. § 13-5-14.

Utah

Limitations: Actual damages given only if injury occurred.

State Remedies: Division of Consumer Protection and AG or county attorney upon request of division may enforce; injunction; actual damages; treble damages; minimum $2000 damages, costs, maximum $5000 and/or 12 months imprisonment for knowing violation; division has rulemaking power; $2000 per day of injunction violation upon notice of injunction.

UTAH CODE ANN. § 13-11-1 (Supp. 1983).

Prohibited Practices: Deceptive acts or practices by a supplier in consumer transaction; including 15 enumerated prohibitions and unconscionable practice by supplier in consumer transaction. § 13-11-4 (1987).

Scope: Consumer transaction includes offers or solicitations and sale, lease, assignment, of services, tangible or intangible property for primarily personal, family or household purposes or business opportunity requiring expenditure of money or property and services on continuing basis.

Exclusions: Securities and insurance excepted from definition of consumer transaction; violation not done by supplier in connection with a consumer transaction; act permitted by state or federal law; personal injury or death claims; property claims other than subject to consumer transaction; credit terms; public utilities regulated by state Public Services Commission; publisher, broadcaster, printer or other person that disseminates information for others if done without actual knowledge of violation.

Private Remedies: Declaratory judgment, injunction, actual damages, minimum $2000 plus court costs, class actions for declaratory judgment, injunction and appropriate ancillary relief or actual damages; attorney's fees to prevailing party if consumer action is groundless or supplier violation proven or settled.

Limitations: Only unjust enrichment of supplier as damages if he/she proves violation by bona fide error despite reasonable procedures; statute of limitations for state is 2 years from violation; consumer action predicated upon loss suffered; statute of limitations for consumer is 2 years from occurrence or within 1 year

after state action terminated; no statute of limitations on consumer counterclaims.

State Remedies: Division of Consumer Protection or state official or agency with supervisory authority over supplier enforces; maximum $5000 per day of injunction violation; substantive and procedural rulemaking; declaratory judgment; injunction; actual damages; class action for actual damages; attorneys fees, court costs, and costs of investigation; court may make appropriate orders, including: receiver, reimbursement, specific performance, strike unconscionable clauses; assurance of compliance may be conditioned on reimbursement or corrective action.

Precedential Value of FTC Interpretations: Make state regulation consistent with FTC policies on consumer protection, make uniform with states that enact similar law.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 70A-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 70A-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 70A-2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

New Motor Vehicles Warranties Act, Utah Code Ann § 13-20-1 et seq. (1985).

Excludes motorcycles, motor homes, truck, tractors, and vehicles with gross weight in excess of 12,000 lbs.

Applies only to express warranties. If the vehicle fails to conform to the warranty and such problem is communicated to the manufacturer, or within the warranty period or one year from date of delivery, whichever is earlier, then the manufacturer/dealer must make necessary repairs notwithstanding that the warranty term or one year period has expired.

Under limited circumstances, refunds may be available. See § 13-20-4 (1985).

MISCELLANEOUS

1. Credit Service Organizations. §§ 13-21-1 to 13-21-9.

A credit service organization is any person who, with respect to the extension of credit by others, sells, provides or performs, or represents he/she will do the same in return for money, any of the following: improve buyer's credit history, record, or rating; obtain extension of credit for buyer; or advise or assist in doing the above.

The organization cannot charge money prior to completion of performance, charge solely for a referral, make or advise to make misleading statements.

Before entrance in to the contract, a buyer must receive a written information statement including: buyer's right to review all of buyer's credit files, buyer's right to dispute contents of those files, description of services, and details of the bond the organization is required to obtain.

The contract must contain a notice of cancellation statement in bold face type which states the buyer may cancel within 5 days from the date of signing the contract.

Private remedies include: actual damages, attorney's fees and costs, and the court may award punitive damages.

2. Health Spas. §§ 13-23-1 to 13-23-7.

No contract for health spa services can have a term of over 36 months. Such contract must be in writing and constitute the entire agreement.

Utah

A consumer may rescind if he/she enters into the contract before the spa is open and it is not fully operational within 60 days of entering into the contract. A consumer's right to rescind continues for 3 business days after the spa becomes fully operational.

No private remedy is provided for under the section.

Vermont

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - No statutory provision.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Vt. Stat. Ann. tit. 9, § 2454(a)(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Vt. Stat. Ann. tit. 9, § 2454(a)(2). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. Vt. Stat. Ann. tit. 9, § 2454(a)(3).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice of cancellation, and (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer, and (C) the consumer's request is both handwritten and signed by the consumer. Vt. Stat. Ann. tit. 9, § 2454(a)(5). The sales agreement must contain a conspicuous notice of this cancellation right. Vt. Stat. Ann. tit. 9, § 2454(b)(1). Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. Vt. Stat. Ann. tit. 9, § 2454(b)(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. Vt. Stat. Ann. tit. 9, § 2454(d)(4). However, the buyer takes title to the goods, without obligation to pay for them if the seller fails to demand such possession within 20 days after receipt of the

notice of cancellation. Vt. Stat. Ann. tit. 9, § 2454(d). The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. Vt. Stat. Ann. tit. 9, § 2454(c).

The following transactions are not included in the protections provided by this statute:

(1) A sale made pursuant to prior negotiations at the seller's place of business;

(2) A sale in which the consumer initiated the contact and specifically requested the seller to visit his/her home for the purpose of repairing or performing maintenance upon the consumer's personal property;

(3) A sale conducted entirely by mail or telephone;

(4) A sale with a purchase price of less than $25, with no written contract; and

(5) Sale of real property, insurance, or securities by a registered SEC broker.

(6) Purchase of goods when buyer may cancel at any time prior to delivery and receive a full refund; may refuse delivery and receive full refund; return goods and receive a full refund provide notice is clearly set forth on the agreement. Vt. Stat. Ann. tit. 9, § 2451a(d)(6).

(7) Emergency order with signed waiver and work has begun or goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18. Vt. Stat. Ann. tit. 1, § 173.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. Vt. Stat. Ann. tit. 9, § 1-103.

Veteran or spouse may contract for loans (Tit. 8 § 1849).

Vermont

REPOSSESSION REQUIREMENTS

The creditor is required to make an affidavit, and he/she may replevy the goods on writ of replevin filled out and issued to the creditor's attorney by the clerk of the court in the county where the goods are located upon the order of a Superior or District Court Judge. V.R.C.P. 64(b)(1). The creditor also must execute a bond based upon the reasonable valuation for the property of which replevin is sought. An order of approval may be issued only upon motion after five days' notice to the debtor and hearing and upon findings by the court that there is a reasonable likelihood that the creditor will prevail in the replevin action, and that the bond required by law has been given by the creditor. V.R.C.P. 64(b)(2).

An order of approval may be issued ex parte upon motion and findings by the court (A) that there is a reasonable likelihood that the creditor will prevail in the replevin action, that the bond required by law has been given by the creditor, that the amount of the bond is based upon a reasonable valuation for the property of which replevin is sought; and (B) that either (i) the person of the debtor is not subject to the jurisdiction of the action; or (ii) there is a clear danger that the debtor will remove the property from the state, if notified in advance; or (iii) there is immediate danger that the debtor will damage, destroy, or sell to a bona fide purchaser. V.R.C.P. 64(b)(3).

On two days notice to the creditor, the debtor from whom the property has been taken pursuant to an ex parte order may appear and move the judge or the Presiding Judge of the court in which the action is pending for an order for the return of the property to him/her. The judge will then as expeditiously as possible hear and determine the motion. V.R.C.P. 64(i).

STATUTE OF LIMITATIONS

Contract under seal - 8 years. Tit. 12, § 507.

Simple written contract - 6 years. Tit. 12, § 511.

Contract for sale of goods - 4 years. Tit. 9A, § 2-725.

Vermont

Promissory notes - 6 years. Tit. 12, § 511. If promissory note is witnessed - 21 years. Tit. 12, § 508.

Oral contracts - 6 years. Tit. 12, § 511.

Judgments - Courts of record - 8 years. Tit. 12, § 506.

Ski accidents - 1 year. Tit. 12, § 513.

Personal injury, property damage, defamation, assault, false imprisonment - 3 years. Tit. 12, § 512.

Wrongful death - 2 years. Tit. 14, § 1491.

Agent Orange/Toxic Torts - 3 years from discovery but no later than 20 years from last exposure. Tit. 12, § 518.

Medical malpractice - 3 years or 2 years from discovery but no later than 7 years from injury. Tit. 12, § 521.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State -

See generally Tit. 9, §§ 101, 102.

See Tit. 9, § 2405. Retail Installment Contract Disclosures.

See Tit. 9, §§ 2351, 2355. Motor Vehicle Retail Installment Sales Disclosures.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Vt. Stat. Ann. tit. 9, § 2451 (1984 & Supp. 1987).

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices in commerce. Tit. 9, § 2453.

Special Requirements: None specified.

Scope: In commerce.

Vermont

Exclusions: Advertisements done by publisher, radio and television media, with no knowledge of falsity.

Private Remedies: Equitable relief; actual damages; restitution; attorney's fees; exemplary damages not exceeding treble consideration given.

Limitations: State acts in public interest; private action by consumer who sustains injury.

State Remedies: AG rulemaking consistent with FTC Act; AG or state's attorney if authorized by AG enforces; injunction; maximum $10,000 per violation; restitution to consumer; costs and expenses; maximum $10,000 per injunction violation.

Precedential Value of FTC Interpretations: Guided by FTC construction.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. Tit. 9A, § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. Tit. 9A, § 2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. Tit. 9A, § 2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

The following summary was reviewed and updated by MAJ Douglas R. Wright, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, DC 20044, Telephone Number: 202-662-6000, FAX: 202-662-6291.

Virginia

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - See Privacy Protection Act of 1976. § 34-29(b1) (1978). Va. Code § 2.1-377 et seq. (1976). Remedies for violations include injunctions, mandamus. Successful parties can recover costs and attorney's fees. § 2.1-386.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - It is a Class 4 misdemeanor to use any document simulating legal process to collect money. § 18.2-213 (1975). For article on model abusive debt collection statute for Virginia, see 15 Wm. and Mary L. Rev. 567 (1974).

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

Virginia Home Solicitation Sales Act. Va. Code § 59.1-21.1 (1970).

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. § 59.1-21.3(1). The buyer has 30 days to cancel the sale if the seller fails to immediately identify himself or herself as a seller or lessor, or misrepresents his purpose at the time of the solicitation. § 59.1-21.7. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. § 59.1-21.3(2). Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 59.1-21.3(3).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice

of cancellation, (B) in the case of goods, the goods cannot be returned to the seller in as good condition aswhen received by the buyer, and (C) the buyer has signed a waiver of his/her right to cancel. § 59.1-21.3(5). The sales agreement must contain a conspicuous notice of this cancellation right. § 59.1-21.4. Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his/her intention to cancel. § 59.1-21.4(3).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods, without obligation to pay for them, if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. § 59.1-21.6. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. If seller does not comply with return of goods, buyer may retain possession of the goods delivered to him/her by the seller, and have a lien on the goods in his/her possession for any recovery to which he/she is entitled (§ 59.1-21.5(3)) § 59.1-21.5.

The following transactions are not included in the protections provided by this statute:

(1) A sale or lease of farm equipment;

(2) A cash sale of less than $25;

(3) A sale or lease made pursuant to a preexisting revolving charge account; and

(4) A sale or lease made pursuant to prior negotiations between the parties. § 59.1-21.2.

MINOR'S CONTRACT

Age of majority to contract - 18. § 1-13.42 (1972). Minors, 15 or over may contract for life insurance, subject to written approval of parent if minor resides with parent.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 8.1-103.

Any eligible minor or widow relieved of disability (§ 11-8).

REPOSSESSION REQUIREMENTS

The creditor must apply to the court in an action of or warrant in detinue seeking the return of the specified property. Although the creditor is not required to make an affidavit, he may present evidence to the court in the form of verified petition. § 8.01-114(c) (1986). The creditor's evidence or that of his witnesses must show:

(1) The kind, quantity and value of the property;

(2) Reasonable cause to believe;

(A) That such property will be sold, removed, secreted, or otherwise disposed of by the debtor; or

(B) That such property will be destroyed or materially damaged or injured if permitted to remain longer in the debtor's possession; and

(3) That the creditor's claim of entitlement has a substantial basis. § 8.01-114(B) (1986).

The creditor also must execute a bond payable to the debtor with sufficient surety, to be approved by and filed with the clerk, judge, substitute judge or magistrate, in an amount at least double the estimated value of the property. § 8.01-115 (1987).

Within twenty-one days after the issuance of any ex parte order or process pursuant to § 8.01-114, or upon application of either party, in either event after reasonable notice, the court shall conduct a hearing to review the decision to issue the order or other process, or to consider the creditor's request for issuance of such order or process. If the creditor gives reasonable notice of his/her intention to apply for such an order or process before the court, the hearing may be held on the return day of the warrant. § 8.01-119. The debtor can secure the return of the property to his/her possession any time after seizure of the property by executing a bond payable to the creditor, with sufficient surety, to be approved by the officer, in an amount equal to double the estimated value of the property. § 8.01-116.

Virginia

STATUTE OF LIMITATIONS

Contract under seal - 5 years. § 8.01-246.

Simple written contract - 5 years. § 8.01-246.

Promissory notes - 5 years. § 8.01-246.

Contract for sale of goods - 4 years. § 8.2-725.

Oral contracts - 3 years. § 8.01-246.

Open accounts - 3 years. § 8.01-246.

Judgments - Courts of record - 20 years. § 8.01-251.

Personal injuries - 2 years. § 8.01-243 (1987).

Property damage - 5 years. § 8.01-243 (1987).

Wrongful death - 2 years. § 8.01-244.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - § 6.1-330.78 (effective Jan. 1, 1988). See § 6.1-330.79 (1987) mandating compliance with federal law (15 U.S.C. § 1601 and Regulation Z).

UNFAIR AND DECEPTIVE TRADE PRACTICES

Virginia Consumer Protection Act of 1977.

Va. Code § 59.1-198 (1992)

Prohibited Practices: 28 prohibited fraudulent acts, including catchall for deceptive practices. § 59.1-200 (1987).

Scope: Committed by a supplier in a consumer transaction, defined as advertising, sale, lease, or offer for sale or lease of goods or services for primarily personal, family or household purposes (including finding employment), or for resale from home as part of a business opportunity. § 59.1-198(1) (1992). The term goods applies to real property as well. § 59.1-198 (1992). Services includes work performed by

seller/supplier's agent whose costs are transferred to consumer. Id.

Exclusions: Acts authorized by state or U.S. laws, regulations or advisory opinions; advertisements done by publisher, radio and television media, with no knowledge of falsity; consumer transactions regulated by Federal Consumer Credit Protection Act; banking, loan companies, public service corporation and insurance companies regulated by State Corporated Commission or federal regulatory body; Licensed Employment Agencies. § 59.1-199 (1987).

Private Remedies: Actual damages, minimum $100; may be awarded attorney's fees and court costs; court may make additional orders, including restitution. § 59.1-204 (1977).

Limitations: State remedies predicated on notice given; private action based on loss suffered; restitution allowed if plaintiff identified within 180 days from grant of permanent injunction; suppliers who prove violation unintended, as result of act they had no control over or bona fide error despite reasonable procedures, limited to restitution. § 59.1-207 (1977).

State Remedies: AG, Commonwealth Attorney, City or County Attorney enforces; injunction; maximum $1000 per willful violation; maximum $200 expenses per willful violation; maximum $5000 per willful injunction violation with maximum $200 expenses per violation; contempt for violation of court order. § 59.1-206 (1977).

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 8.2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 8.2-315. Implied warranties, including the warranty

of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 8.2-316. Nevertheless, the ability to restrict implied auto warranties, may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

1. Virginia Health Spa Act. §§ 59.1-294 to 59.1-310.

Every health spa contract must be in writing and contain the following: a provision for cancellation within 3 business days of its making; a provision for cancellation if the spa relocates or goes out of business and fails to provide alternate facilities within 5 miles; and a provision for cancellation if buyer dies or becomes physically disabled for 30 days or more. Furthermore, no contract can have a duration of longer than 36 months.

The only private remedy provided for is rescission. However, a violation constitutes a Prohibited Practice under § 59.1-200 and is subject to its private remedy provisions.

2. Virginia Credit Services Business Act. 59.1-335.1 through 59.1-335.12.

Specifies disclosures to consumer, rights to cancellation, remedies for violation of Act. Deals with businesses that, in exchange for compensation, represent that they can improve a consumer's credit record or rating and/or obtain credit for the consumer.

3. Comparison Price Advertising Act. §§ 59.1-207.40 through 59.1-207.44 (1992).

Prohibits advertising a former price unless substantial sales were made at that price and the dates of such sales are conspicuously disclosed. Similar prohibitions on use of comparison prices. Violations may be prosecuted as a unfair trade practices ($100 minimum recovery, plus attorney fees) by consumers who have suffered loss as a result of a violation.

4. Automobile Repair Facilities Act. §§ 59.1-207.1 (1979) et seq.

Requires automobile repairers to provide, upon request, a written estimate of the cost and time needed

for car repairs. Actual charges may not exceed the estimate by more than ten percent without the customers approval. The customers rights must be prominently posted by a sign that conforms with statutory requirements. Consumers who suffer loss as a result of a violation may prosecute an unfair trade practice action, where they are entitled to a minimum recovery of $100, and attorney fees.

5. Lemon Law. §§ 59.1-207.9 (1992) et seq.

Grants customers the right to return a car that cannot be repaired in a timely fashion for defects that the customer has informed the dealer of during the warranty period.

Virginia

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

Territory - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

Territory - No statutory equivalent but V.I. Code Ann. tit. 12A, §§ 101, 102(a), and 102(b) (1973), referred to above, apply to the collection of consumer debts and § 110 provides for the act to supplement the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1), implementing rules, decisions of the FTC and judicial interpretations of the above.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

Territory - No statutory equivalent, but V.I. Code Ann. tit. 12A §§ 101 and 102(a) make deceptive trade practices and 12A § 102(b) including unconscionable trade practices including the sale or offering for sale of consumer goods or violation of the act and § 110 states that the provisions of the Consumer Protection Act are meant to supplement rules and regulations of the Federal Trade Commission.

Consumer contracts including residential leases and home owner insurance policies must be in plain language. V.I. Code Ann. tit. 12A, § 251 et seq (1985). The statute excludes other real estate contracts and contracts exceeding $25,000, except for homeowners and tenant insurance policies. V.I. Code Ann. tit. 12A, § 258.

MINOR'S CONTRACT

Age of majority to contract - 18. V.I. Code Ann. tit. 16, § 261.

Contractual liability A minor is liable only for necessaries received as a result of a contractual relationship. 3 V.I. Op. Atty. Gen. 343, cited in tit. 16, § 261, Effects of Age of Majority.

REPOSSESSION REQUIREMENTS

(1) Repossession of consumer goods purchased on credit. Prior to or after any action by the seller or his/er agents to repossess consumer goods under the terms of any such conditional sales contract or contracts involving both previous and subsequent purchases which have not been fully paid, the seller must retroactively allocate all payments received under the contract or contracts to the various purchases in the same proportion or ratio as the original cash prices of the various purchases bear to one another. However, the amount of initial or down payment involved in each purchase shall be allocated in its entirety to such purchase. The results of such allocation shall be reported to the buyer who has the right to complete payment on any of the purchases consolidated in the conditional sales contract within fifteen days from receipt of the allocation report from the seller. Any purchases upon which the payments have been so completed are exempt from repossession by the seller. Provisions of this section do not apply to sales involving equipment, parts, or other merchandise attached or affixed to goods previously purchased or repairs or services rendered by the seller in connection therewith at the buyer's request. Tit. 9, § 254 (1968).

(2) Procedures to Effect Repossession of Personal Property Owned by Plaintiff. Replevin. V.I. Code Ann. tit. 5, § 211 et seq.

(a) The creditor must allege by affidavit: That the creditor is the owner of the property claimed (particularly describing it) or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;

(b) That the property is wrongfully detained by the debtor;

(c) The alleged cause of the detention;

(d) That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the creditor's property; or if so seized, that it is by statute exempt from seizure; and

(e) The actual value of the property. Tit. 5, § 212.

The creditor also must execute a bond with two or more sufficient sureties, approved by the marshal, in double the value of the property as stated in the affidavit for the prosecution of the action.

The marshal must serve on the defendant a copy of the affidavit, indorsement thereon, and undertaking executed by 2 or more sureties approved by the marshal together with at least 5 days notice of intent to repossess and notice that defendant has the right to be heard and post a bond. Tit. 5, § 214 (Supp. 1987). At any time before the delivery of the property to the creditor, the debtor may, if he/she does not except to the creditor's sureties, require the return of the property to his/her possession by giving the marshal a bond executed by two or more sufficient sureties, to be approved by the marshal, in double the value of the property as stated in the affidavit of the creditor. Tit. 5, § 216.

Local court rules require the creditor to proceed by motion which is then reviewed by a judge who directs the clerk to issue the writ. The latter is then given to the Marshal for service. While this procedure has been sustained, the statute itself has never seen challenged directly on the merits. See Dowd v. Willers, 13 V.I. 420 (1977).

STATUTE OF LIMITATIONS

Contract under seal - 20 years. 5, § 31(1).

Simple written contract - 6 years. 5, § 31(3).

Contract for sale of goods - 4 years. 11A, § 2-725.

Oral contracts - 6 years. 5, § 31(3).

Judgments - Courts of record - 20 years. 5, § 31(1).

Personal injury, defamation, etc. - 2 years. Tit. 5, § 31(5).

Property damage - 6 years. Tit. 5, § 31(3)(D).

Medical malpractice in general - 2 years from injury may be longer if foreign object is involved. See Tit. 27, § 166(d) (1975).

Wrongful death - 2 years. See Cintron v. Bermudez, 6 V.I. 692 (1968).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

Territory - Disclosure of Finance Charges, tit. 9, §§ 251-257, and tit. 11, §§ 951 to 956 (Interest and Usury). Any person engaged in the business of extending credit shall furnish to each person to whom such credit is extended, concurrently with the consummation of the transaction or agreement to extend credit, a clear statement in writing setting forth the finance charges, expressed in dollars, rate of interest, or monthly rate of charge, or a combination thereof, to be borne by such person in connection with such extension of credit as originally scheduled. Tit. 9, § 252.

(2) Where a buyer makes any subsequent purchases of consumer goods from a seller from whom he/she has previously purchased goods or services under one or more conditional sales contracts, and the amounts under the contract or contracts have not been fully paid, the subsequent purchases may be included in and consolidated with one or more of the prior contract or contracts. A memorandum of the additional purchases shall be prepared by the seller, inserted in or attached to the seller's counterpart of the contract and shall set forth:

(a) A description of the additional goods or services so purchased;

(b) The consolidated total indebtedness of the buyer;

(c) The finance charge stated either as the additional amount on the subsequent purchase or as the total amount on the consolidated contract; and

(d) The revised installment payments. A copy of the memorandum shall be furnished to the buyer. Tit. 9, § 253.

(3) Persons engaging in the business of extending credit are required to post all fees and charges for

automobile loans specifically and all consumer laws generally, in a conspicuous public place. Tit. 9, § 257 (1983).

(4) Any person who willfully violates any provision of this chapter shall be fined not more than $500, or imprisoned not more than sixty days, or both. Tit. 9, § 258 (1983).

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. Tit. 11A, § 2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. Tit. 11A, § 2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. Tit. 11A, § 2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

Virgin Islands

Washington

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - See § 19.16.250(9)(a)-(c).

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State Wash. Rev. Code Ann. § 19.16.250 (1981) - No licensee (collection agency) or employee of a licensee shall:

(1) Directly or indirectly aid or abet any unlicensed person to engage in business as a collection agency in this state or receive compensation from such unlicensed person;

(2) Collect or attempt to collect a claim by the use of any means contrary to the postal laws and regulations of the United States postal department;

(3) Publish or post or cause to be published or posted, any list of debtors commonly known as "bad debt lists" or threaten to do so;

(4) Have in his/her possession or make use of any badge, use a uniform of any law enforcement agency or any simulation thereof, or make any statements which might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency, or any other governmental agency, while engaged in collection agency business;

(5) Perform any act or acts, either directly or indirectly, constituting the practice of law;

(6) Advertise for sale or threaten to advertise for sale any claim as a means of endeavoring to enforce payment thereof or agreeing to do so for the purpose of soliciting claims, except where the licensee has acquired claims as an assignee for the benefit of creditors or where the licensee is acting under court order;

(7) Use any name while engaged in the making of a demand for any claim other than the name set forth on his/her or its current license issued hereunder;

(8) Give or send to any debtor or cause to be given or sent to any debtor, any notice, letter, message, or form which represents or implies that a claim exists unless it shall indicate in clear and legible type:

(a) The name of the licensee and the city, street, and number at which he/she is licensed to do business;

(b) The name of the original creditor to whom the debtor owed the claim if such name is known to the licensee or employee;

(c) If the notice, letter, message, or form is the first notice to the debtor or if the licensee is attempting to collect a different amount than indicated in his/her or its first notice to the debtor, an itemization of the claim asserted must be made;

(9) Communicate or threaten to communicate, the existence of a claim to a person other than one who might be reasonably expected to be liable on the claim in any manner other than through proper legal action, process, or proceedings except under the following conditions:

(a) A licensee or employee of a licensee may inform a credit reporting bureau of the existence of a claim: Provided, that if the licensee or employee of a licensee reports a claim to a credit reporting bureau, the licensee shall upon receipt of written notice from the debtor that any part of the claim is disputed, forward a copy of such written notice to the credit reporting bureau;

(b) A licensee or employee in collecting or attempting to collect a claim may communicate the existence of a claim to a debtor's employer if the claim has been reduced to a judgment;

(c) A licensee or employee in collecting or attempting to collect a claim that has not been reduced to judgment, may communicate the existence of a claim to a debtor's employer if:

(i) The licensee or employee has notified or attempted to notify the debtor in writing at his/her last known address or place of employment concerning the claim and the debtor after a reasonable time has failed

to pay the claim or has failed to agree to make payments on the claim in a manner acceptable to the licensee, and

(ii) The debtor has not in writing to the licensee disputed any part of the claim: Provided, that the licensee or employee may only communicate the existence of a claim which has not been reduced to judgment to the debtor's employer once unless the debtor's employer has agreed to additional communications;

(d) A licensee may for the purpose of locating the debtor or locating assets of the debtor communicate the existence of a claim to any person who might reasonably be expected to have knowledge of the whereabouts of a debtor or the location of assets of the debtor if the claim is reduced to judgment, or if not reduced to judgment; when

(i) The licensee or employee has notified or attempted to notify the debtor in writing at his/her last known address or last known place of employment concerning the claim and the debtor after a reasonable time has failed to pay the claim or has failed to agree to make payments on the claim in a manner acceptable to the licensee, and

(ii) The debtor has not in writing disputed any part of the claim;

(e) A licensee may communicate the existence of a claim to its customers or clients if the claim is reduced to judgment, or if not reduced to judgment, when:

(i) The license has notified or attempted to notify the debtor in writing at his/her last known address or last known place of employment concerning the claim and the debtor after a reasonable time has failed to pay the claim or has failed to agree to make payments on the claim in a manner acceptable to the licensee, and

(ii) The debtor has not in writing disputed any part of the claim.

(10) Threaten the debtor with impairment of his credit rating if a claim is not paid;

(11) Communicate with the debtor after notification in writing from an attorney representing such debtor that

all further communications relative to a claim should be addressed to the attorney; Provided, that if a licensee requests in writing information from an attorney regarding such claim and the attorney does not respond within a reasonable time, the licensee may communicate directly with the debtor until he/she or it again receives notification in writing that an attorney is representing the debtor;

(12) Communicate with a debtor or anyone else in such a manner as to harass, intimidate, threaten, or embarrass a debtor, including but not limited to communication at an unreasonable hour, with unreasonable frequency, by threats of force or violence, by threats of criminal prosecution, and by use of offensive language;

(13) Communicate with the debtor through use of forms or instruments that simulate the form or appearance of judicial process, the form or appearance of government documents, or the simulation of a form or appearance of a telegraphic or emergency message;

(14) Communicate with the debtor and represent or imply that the existing obligation of the debtor may be or has been increased by the addition of attorney fees, investigation fees, service fees, or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation of such debtor;

(15) Threaten to take any action against the debtor which the licensee cannot legally take at the time the threat is made;

(16) Send any telegram or make any telephone calls to a debtor concerning a debt or for the purpose of demanding payment of a claim or seeking information about a debtor, for which the charges are payable by the addressee or by the person to whom the call is made;

(17) In any manner convey the impression that the licensee is vouched for, bonded to or by, or is an instrumentality of the state of Washington or any agency or department thereof;

(18) Collect or attempt to collect in addition to the principal amount of a claim any sum other than allowable interest, collection costs or handling fees

expressly authorized by statute, and, in the case of suit, attorney's fees and taxable court costs;

(19) Procure from a debtor or collect or attempt to collect on any written note, contract, stipulation, promise or acknowledgment under which a debtor may be required to pay any sum other than principal, allowable interest, and, in the case of suit, attorney's fees and taxable court costs. § 19.16.250.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - Wash. Rev. Code Ann. § 63.14.154 (1973) - The buyer has the right to cancel a home solicitation sale until midnight of the third day excluding Sundays and holidays, following execution of an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation by certified mail, return receipt requested, to the seller at the address stated in the agreement. § 63.14.154(1)(c).

The buyer must take reasonable care of the goods and tender the goods at the place of delivery to the seller. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. The buyer incurs no additional liability for cancellation of the sale. § 63.14.154(2). A cash sale is not included in the protections provided by this statute.

MINOR'S CONTRACT

Age of majority to contract - 18. §§ 26.28.010, 26.28.915 (1971); earlier, if married to a person of 18, § 26.28.020. Minors, 15 or over, may contract for life or disability insurances (§ 48.18.020).

Contractual liability - Minor is liable for necessaries and all other contracts unless disaffirmed within a reasonable time after age 18 and unless he/she returns all money and property remaining within his/her control which was received by virtue of the disaffirmed contracts. § 26.28.030.

Notwithstanding, a minor cannot disaffirm business contracts or those where the minor misrepresented his/her status. See § 26.28.040 (1866).

Washington

REPOSSESSION REQUIREMENTS

Wash. Rev. Code Ann. § 7.64.010, et seq. (Supp. 1988).

The creditor must make an affidavit showing:

(1) That the creditor is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property interest therein including a security interest, the facts in respect to which shall be set forth;

(2) That the property is wrongfully detained by the debtor;

(3) That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the creditor; and

(4) The actual value of the property. § 7.64.020.

At the time of filing the complaint or any time thereafter, the creditor may petition the judge to issue an order requiring the debtor to show cause why an order putting the creditor in possession of the property pending final disposition should not be issued. The hearing shall be set no earlier than 10 days and no later than twenty-five days from the date of the order. The order shall contain the date, time and place of the hearing and it must be served on the debtor no later than 5 days before the hearing date. A copy of the creditor's affidavit must also be served on the debtor. § 7.64.020. At the hearing on the order to show cause or at any time before the delivery of the property to the creditor, the debtor may require the return of the property to his/her possession upon giving to the sheriff or filing with the court a bond executed by one or more sufficient sureties to the effect that they are bound in an amount equal to the value of the bond filed by the creditor. § 7.64.050.

STATUTE OF LIMITATIONS

Contract under seal - 6 years. § 4.16.040.

Simple written contract - 6 years. § 4.16.040.

Washington

Contract for sale of goods - 4 years. § 62A.2-725.

Oral contracts - 3 years. § 4.16.080.

Judgments - Courts of record - 10 years. § 4.56.210.

Property damage - 3 years. § 4.16.080 (1937).

Personal injury - 3 years. § 4.16.080 (1937).

Defamation, assault, battery, false imprisonment - 2 years. § 4.16.100.

Wrongful death - 2 years. See § 4.16.130 (1881). See Steel v. Bell, 37 Wash. App. 337, 679 P.2d 964 (1984).

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - The Washington Credit Disclosure Act (Retail Installment Sales of Goods and Services) requires a seller to disclose to the buyer, usually before credit is extended, his/her credit service charges in dollars and cents and as an annual percentage rate. Disclosure is required for sales, but not for loans or revolving credit transactions. § 63.14.040. Service contracts subject to governmental price control and home improvement retail sale transactions which are financed or insured by the Federal Housing Administration are excluded from coverage under the Washington Credit Disclosure Act. §§ 63.14.010(2), 63.14.020.

A seller who violates an order or injunction issued pursuant to the Credit Disclosure Act shall forfeit and pay a civil penalty of not more than $1,000. § 63.14.210. Any seller who willfully and intentionally fails to provide information to a buyer which he/she is required to disclose is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $1,000, or imprisonment for not more than 6 months, or both. § 63.14.170.

UNFAIR AND DECEPTIVE TRADE PRACTICES

Wash. Rev. Code Ann. § 19.86.010 through § 19.86.920 (1978 & Supp. 1983-1984).

Washington

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts.

Special Requirements: Act must be injurious to public interest.

Scope: Trade and commerce; defined as sale of services or assets including any real or personal property, intangible and any other thing of value.

Exclusions: Nonprofit labor, agricultural or horticultural organization; civil penalties do not apply to advertisements done by publisher, radio and television media, in good faith and with no knowledge of falsity; actions permitted or regulated by state utilities, transportation commission, federal power commission or acts permitted by state or U.S. law or regulatory body.

Private Remedies: Injunction; actual damages; costs and attorney's fees; treble damages at court's discretion, provided such increased damage award not exceed $10,000. $ 19.86.090.

Limitations: Private action predicated upon injury to business or property; statute of limitations is 4 years after cause accrues, limitations tolled during pendency of AG action on same matter except for civil penalties for injunction violation.

State Remedies: AG enforces; court has discretion to award prevailing party costs and attorney's fees; additional orders necessary including restitution; maximum $2000 per violation, maximum $25,000 or dissolution of corporation per injunction violation.

Precedential Value of FTC Interpretations: Guided by FTC interpretations.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. $ 62A.2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods

are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 62A.2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 62A.2-316. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

MISCELLANEOUS

1. Credit Services Organization. §§ 19.134.010 to 19.134.900.

Credit services organization means any person who, with respect to the extension of credit by others, sells, provides, performs, or represents that the person can or will do, in return for payment of money or other consideration any of the following: improve a buyer's credit history, records, or rating; obtain extension of credit for the buyer; or provide advice or assistance with regard to the above.

An organization may not: charge money until completion of performance, charge for referral to retail seller, advise or make any untrue or misleading statement.

Before execution of the contract, the organization must provide buyer with a statement that contains the following: buyer's right to review any file on buyer maintained by consumer reporting agencies and charges for that right; buyer's right to dispute accuracy of file; description of organization services; information on the bond; and the organization's address.

Each contract must contain a statement, in bold face type, apprising the buyer that the buyer may cancel at any time prior to midnight of the fifth business day after the date of the transaction.

Private remedies include actual damages, punitive damages, reasonable attorney's fees and costs.

2. Health Studio Services. §§ 19.142.005 to 19.142.901.

Washington

"Health Studio" equates to spa or health club, (fitness center). A contract for health studio services shall include: (1) name and address of operator; (2) date buyer signed; (3) description of services and equipment; (4) duration of contract; (5) use of fees or dues; (6) statement of rules; (7) buyer's right to cancel - if buyer dies or becomes totally disabled, if buyer moves more than 25 miles and buyer cancels after 1 year if contract extends for more than 1 year, if contract extends more than one year or requires membership fee may cancel upon 30 days written notice, if permanently closes, or if facility is not completed on day represented in contract; and (8) buyer's right to refund on cancellation.

Violation constitutes unfair or deceptive act or practice and is a per se violation of the Consumer Protection Act § 19.86. Buyers who prevail are entitled to reasonable attorneys fees.

West Virginia

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - West Virginia Consumer Credit and Protection Act, § 46-1-101 et seq.

West Virginia law prohibits a debt collector or a debt collection agency from engaging in any of the following practices in an attempt to collect an alleged debt:

(1) Engaging in conduct deemed the practice of law, § 46A-2-123;

(2) Collecting or attempting to collect any money alleged to be due and owing by means of any threat, coercion, or attempt to coerce, § 46A-2-124;

(3) Unreasonably oppressing or abusing any person in the collection or attempt to collect any debt alleged to be due, § 46A-2-125;

(4) Unreasonably publicizing information relating to any alleged indebtedness or consumer, § 46A-2-126;

(5) Using any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers, § 46A-2-127;

(6) Using any unfair or unconscionable means to collect or attempt to collect any claim, § 46A-2-128; and

(7) Using, distributing, selling or preparing for use any written communication which violates or fails to conform to United States postal laws and Regulations, § 46A-2-129.

See also Collection Agencies, §§ 47-16-1 to 47-16-5.

Penalty - A person who violates any of the above provisions may be liable to the consumer for damages plus a penalty of $100 to $1,000. A person who willfully violates any of the provisions may be guilty of a misdemeanor punishable by a fine of up to $1,000, imprisonment in the county jail for up to one year, or both.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 46A-2-132.

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice of cancellation and (B) the goods cannot be returned to the seller in as good condition as when received by the buyer. § 46A-2-132. The sales agreement must contain a conspicuous notice of this cancellation right. Until the seller has notified the buyer of his/her rights of cancellation, the buyer may notify the seller in any manner of his intention to cancel. § 46A-2-133.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller fails to demand such possession within 20 days after receipt of the notice of cancellation. The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. § 46A-2-134.

The following transactions are not included in the protections provided by this statute:

(1) A sale of $25 or less;

(2) A sale made pursuant to a preexisting open end credit account;

(3) A sale made pursuant to prior negotiations between the parties;

(4) A sale of motor vehicles, mobile homes, or farm equipment; and

(5) A sale which is subject to rescission under the federal Truth-in-Lending Act. § 46A-1-102(19).

(6) Emergency order and work has begun or goods not returnable in good condition.

Buyers may disaffirm contracts with regard to future performance of certain correspondence business courses or multiple magazine subscriptions. W.Va. Code § 46A-2-138 (1987).

MINOR'S CONTRACT

Age of majority to contract - 18. § 2-3-1 (1972). Minors, 15 or over may contract for life, accident or sickness insurance (§ 33-6-4).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 46-1-103.

Disability of veterans and spouse is removed (§ 48-3-25).

REPOSSESSION REQUIREMENTS

W.Va. Code § 55-6-1 (1981).

The creditor is not required to make an affidavit concerning the property, but he/she must file a verified complaint describing the property. The creditor must initiate a civil action and demand immediate possession of the desired property. § 55-6-1. The creditor also must execute a bond, with good security to be approved by the clerk of the circuit court or the magistrate in an amount at least double the value of the property claimed. § 55-6-2. After the creditor has demanded immediate possession of the property, a prejudgment hearing must be held in not less than five nor more than ten days after service upon the debtor of the summons, a verified complaint, and a notice of the time, place, and purpose of the prejudgment hearing. § 55-6-1. If the court determines that there is a substantial

probability that the creditor will prevail upon trial, the court may order the immediate seizure of the property. § 55-6-2. The debtor can require the return of the property to his/her possession if within three days after such taking, he/she executes a bond with good security, to be approved by an officer, payable to the creditor, in an amount at least double the value of the property. § 55-6-4.

STATUTE OF LIMITATIONS

Contract under seal - 10 years. § 55-2-6.

Simple written contract - 10 years. § 55-2-6.

Contract for sale of goods - 4 years. § 46-2-725.

Oral contracts - 5 years. § 55-2-6.

Judgments - Courts of record - 10 years. § 38-3-18.

Wrongful death - 2 years. §§ 55-7-6.

Property damage - 2 years. § 55-2-12(a).

Personal injuries - 2 years. § 55-2-12(b).

Indemnity or contribution actions for injuries or wrongful death resulting from improvements to real property - 10 years. § 55-2-69.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - See W.Va. Code § 46A-2-111 with regard to disclosure in Consumer Lease Agreements and § 46A-3-116 (1987) with regard to disclosing charges in revolving charge agreements.

UNFAIR AND DECEPTIVE TRADE PRACTICES

W.Va. Code § 46A-6-101 (1986 & Supp. 1991).

Prohibited Practices: Unfair methods of competition and unfair or deceptive practices, including 16 enumerated prohibitions.

West Virginia

Scope: Trade or commerce defined as advertising, sale, offers for sale any goods or services.

Exclusions: Acts reasonable to develop and preserve business; acts not injurious to public interest; acts controlled by ch. 47 on Regulation of Trade, 47-11-A controlling antitrust, and 47-11-B controlling closeout sales, fire sales, and defunct business sales; advertisements done by disinterested publisher, radio and television media, with no knowledge of falsity.

Private Remedies: $200 minimum damages; actual damages; equitable relief in court's discretion if deemed necessary or proper; court may reform a consumer contract if defendant refuses to change contract to plain language after consumer so requests.

Limitations: Ascertainable loss for private action.

State Remedies: AG has rulemaking power; injunction action, other equitable relief, other appropriate relief.

Precedential Value of FTC Interpretations: Guided by federal court interpretations.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 46-2-314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 46-2-315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 46-2-316. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

West Virginia

New Motor Vehicles. Within 1 year of delivery of a new motor vehicle, or during the term of the express warranties, whichever occurs last, the manufacturer, its agent or dealer, must conform the vehicle to the express warranties within a reasonable number of attempts (presumed to be 3 § 46A-6A-5). If it cannot do so and if the defect substantially impairs use or value, the vehicle must be replaced. § 46A-6A-4.

Wisconsin

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - No statutory provision.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - "Wisconsin Consumer Act - Debt Collection." Wis. Stat. Ann. § 427.101 et seq. (West 1971) - In attempting to collect an alleged debt arising from a consumer credit transaction or other consumer transaction where there is an agreement to defer payment, a debt collector shall not:

(a) Use or threaten force or violence to cause physical harm to the customer, his/her dependents or his/her property;

(b) Threaten criminal prosecution;

(c) Disclose or threaten to disclose information adversely affecting the consumer's reputation for credit worthiness with knowledge or reason to know that the information is false;

(d) Initiate or threaten to initiate communication with the customer's employer prior to obtaining final judgment against the customer; but this paragraph does not prohibit a debt collector from communicating with the customer's employer solely to verify employment status or earnings or where an employer has an established debt counseling service or procedure;

(e) Disclose or threaten to disclose to a person other than the customer or his/her spouse information affecting the customer's reputation, whether or not for credit worthiness, with knowledge or reason to know that the other person does not have a legitimate business need for the information, but this paragraph does not prohibit the disclosure to another person of information permitted to be disclosed to him/her by statute;

(f) Disclose or threaten to disclose information concerning the existence of a debt known to be reasonably disputed by the customer without disclosing the fact that the customer disputes the debt;

(g) Communicate with the customer or a person related to him/her with such frequency or at such unusual hours or in such a manner as can reasonably be expected to threaten or harass the customer;

(h) Engage in other conduct which can reasonably be expected to threaten or harass the customer or a person related to him/her;

(i) Use obscene or threatening language in communicating with the customer or a person related to him/her;

(j) Claim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist;

(k) Use a communication which simulates legal or judicial process or which gives the appearance of being authorized, issued or approved by a government, governmental agency or attorney-at-law when it is not;

(l) Threaten action against the customer unless like action is taken in regular course or is intended with respect to the particular debt; or

(m) Engage in conduct in violation of a rule adopted by the administrator after like conduct has been restrained or enjoined by a court in a civil action by the administrator against any person pursuant to the provisions on injunctions against false, misleading, deceptive or unconscionable agreements or conduct. ($$ 426.109 and 426.110). § 427.104.

In addition to injunctive relief, the Commissioner of Banking (also known as the administrator) may recover civil penalties ranging from $100-$1000 per violation. If the violation is willful the penalty may range from $1000-$10,000. Wis. Stat. Ann. § 426.301 (West 1979).

Private Remedies - Actual damages, incidental and consequential damages, penalties between $100 - $1,000, plus damages for mental anguish and emotional distress; restitution of surrendered collateral (§ 427.105).

See also Collection Agencies § 218.04

Wisconsin

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - Applies to all consumer sales except sale of cemetery plots. Wis. Stat. Ann. § 423.101 et seq. (West 1971) - The buyer has the right to cancel a home solicitation sale (consumer approval transaction) until midnight of the third business day after the seller has given the written notice of cancellation rights required by statute. § 423.202(1). Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective when delivered or when deposited in the mail properly addressed to the seller. § 423.202(2). If the property which is the subject of the transaction must be custom made in the ordinary course of business, and is unique to that transaction, the merchant may require that the notice of cancellation, if given, be made by certified or registered mail. § 423.202(2m).

The buyer may not cancel a home sale if:

(A) The buyer has determined that a delay of 3 business days in performance of the merchants obligation under the transaction will jeopardize the welfare, health or safety of natural persons or endanger the buyer's property;

(B) The buyer furnishes the merchant with a separate dated and signed personal statement describing the situation requiring immediate remedy and modifying or waiving his/her right of rescission;

(C) The seller makes a substantial beginning of performance before the buyer gives notice of cancellation; and

(D) In the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer. § 423.202(4).

The sales agreement must contain a conspicuous notice of this cancellation right. § 423.203.

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand and seller's refund. However, the buyer takes title to the goods, without obligation to pay for

them, if the seller fails to demand such possession within 20 days after tender by the buyer. § 423.205. The seller must return any funds received to the buyer within 10 days after cancellation of the sale and all property traded in must be returned within 20 days after cancellation of the sale. § 423.204.

The following transactions are not included in the protections provided by this statute:

(1) A sale of $25 or less;

(2) A sale or lease or listing for sale of real property;

(3) A sale of goods at auction;

(4) A sale or lease of goods at auction for an agricultural purpose;

(5) Loans made to finance the sale of goods at auction for an agricultural purpose; and

(6) A catalog sale which is not accompanied by any other solicitation. § 423.201.

(7) A consumer loan conducted or consummated entirely by mail. § 423.201 (West 1983).

(8) Emergency order and work has begun or goods not returnable in good condition.

MINOR'S CONTRACT

Age of majority to contract - 18. § 990.01 (20).

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. § 401.103.

Minor and spouse may execute notes and mortgages (§ 880.32).

REPOSSESSION REQUIREMENTS

A secured party may repossess without legal action if it can be done without a breach of peace. § 425.205. Wis. Stat. Ann. 409.503 (West 1983).

Wisconsin

The statute provides for an apparently abbreviated procedure to recover possession in consumer transactions.

The plaintiff in a replevin action may claim the property prior to final judgment ($ 810.01, ch 308) by complaint or affidavit showing:

(1) That plaintiff is entitled to claimed property, particularly destribing it.

(2) The property is wrongfully detained by defendant.

(3) Alleged cause of detention to best of plaintiff's knowledge, information and belief.

(4) That property has not been taken for a tax, assessment or fine, or seized under an execution or attachment against the property of the plaintiff, or that if so seized that it is exempt from seizure.

(5) Value of property; and

(6) Location of the property with sufficient specificity for the judge or judicial officer to determine that there is reason to believe that the property is where the plaintiff says it is or under the control of defendant or his/her agent.

Plaintiff must execute a bound in an amount approved by the judge or judicial officer, with sufficient sureties approved by judge or judicial officer, to secure the value of the property, the prosecution of the action, the return of the property to the defendant if necessary, and payment of any sum recovered against the plaintiff ($ 810.03).

STATUTE OF LIMITATIONS

Contract under seal - 6 years. $ 893.43.

Simple written contract - 6 years. $ 893.43.

Contract for sale of goods - 6 years. $ 402.725.

Oral contracts - 6 years. $ 893.43.

Judgments - Courts of record - 20 years. $ 893.40.

Wisconsin

Property damage - 6 years. § 893.52.

Personal injury and wrongful death - 3 years. § 893.54.

Defamation, assault, false imprisonment - 2 years. § 893.57.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-in-Lending Act.

State - Wis. Stat. Ann. § 422.301 et seq. (West 1979). In general the statute imposes additional requirements: e.g., federal disclosure guidelines made applicable to installment credit sales where no finance charge is stated; those guaranteeing payment to be furnished with a special notice advising of responsibilities. Notice to be in at least 10 point type § 422.305. Prohibition against having consumers sign blank forms § 422.304 disclosure requirements covering open end credit accounts § 422.401 (West 1987); limitations on certain balloon payment provisions. § 422.402 (West 1987).

UNFAIR AND DECEPTIVE TRADE PRACTICES

Wis. Stat. Ann. § 100.20 (1988).

Prohibited Practices: Unfair methods of competition and unfair trade practices.

Scope: In business.

Private Remedies: Conditioned on pecuniary loss: actual damages, twice pecuniary loss awarded; costs and attorney's fees. § 100.20(5) (West 1969).

Limitations: Department acts after public hearing for rulemaking and injunction and cancellation; must give notice; private actions require pecuniary loss and existing order issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection.

State Remedies: Department has rulemaking and enforcement powers; injunction; court has discretion to make other orders, including: restitution, cancel corporate certificate if in public interest for substantial and willful violation. For violations of an

injunction under § 100.20(6), a fine of not less than $100 nor more than $10,000.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. § 402.314.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. § 402.315.

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. § 402.316. The ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

Motor Vehicles. If a consumer reports a non-conformity with a new car express warranty and makes it available for repair during the warranty period or one year, whichever is sooner, the manufacture or dealer must repair same. If he/she fails to do so within 4 attempts or the vehicle is out of service for 30 days, he/she must replace it or make complete refund. The consumer must consent to an informal dispute settlement procedure. § 218.015.

MISCELLANEOUS

1. Fitness Center Contracts. § 134.70.

Every contract must provide that performance of all agreed upon facilities and services will be available for buyer's use on specified date no later than 6 months after contract is signed. The contract must not exceed 2 years in duration and must contain a caption printed in bold face 'CANCELLATION AND REFUND" in which it states the buyer's right to cancel within 3 business days of signing the contact.

Wisconsin

No contract may require the buyer to pay more than $25 or 10% of total contract price whichever is less, prior to the date member receives written notice facilities are available for use. A member is entitled to a pro rata refund if the facilities are closed or if the member is unable to make use of the facilities because of death or disability.

A member injured as a result of the facility's violation of this Section may bring a civil action and recover actual damages together with costs and disbursements, including reasonable attorney's fees and other equitable relief.

2. Mail Order Sales. § 134.83.

It is unlawful for a mail-order seller who receives payment from a buyer to permit delivery period to extend beyond the designated delivery period without complying with one of the following:

(a) shipping goods;

(b) mailing refund; or

(c) mailing notice, in which case date may be extended, but no later than 30 days after expiration of delivery period.

Any person suffering pecuniary loss because of a violation of this section may bring a civil action to recover twice the amount of the loss, together with costs and disbursements, including reasonable attorney's fees, and for equitable relief as determined by the court.

The following summary was reviewed and updated by MAJ James L. Edwards, RCPAC, St. Louis, Missouri, Stevens, Edwards & Hallock, P.O. Box 1148, Gillette, Wyoming 82717-1148, Telephone Number: (307) 682-1444, FAX: (307) 687-2896.

Wyoming

CREDIT REPORTING

Federal - Fair Credit Reporting Act.

State - § 40-14-102(b)(vi) (1971) provides for Wyoming practice to conform with Federal Consumer Credit Protection Act. See also § 40-14-141.

DEBT COLLECTION

Federal - Fair Debt Collection Practices Act.

State - See § 33-11-114 (1957) which bars collection agencies from practicing law. In addition the state examiner has adopted the substantive provisions of the Federal Act under its rules.

ADDITIONAL INFORMATION:

W.S. § 33-11-101 et seq. was amended by the Wyoming legislature in the 1993 session to provide for new definitions of the terms "business debt," "collection agency," "communication," "consumer," "creditor," "debt," "debt collector," "location information," "revocation," "solicitor," and "suspension." The act was also amended to explain what entities and employees of those entities are covered by the act and the requirements which must be met by entities or individuals who wish to be licensed as a debt collector. Of particular note is W.S. § 33-11-115 which provides for penalties for violating the act by collection agencies. The fine was increased from not less than $50 to not more than $750 and imprisonment in the county jail for not more than six months or both.

HOME SOLICITATION SALE

Federal - FTC Trade Regulation Rule.

State - The buyer has the right to cancel a home solicitation sale until midnight of the third business day following execution of an agreement or offer to purchase and receipt of the completed contract including notice of cancellation rights. Cancellation occurs when

the buyer gives written notice of cancellation to the seller at the address stated in the agreement. Notice is effective when delivered or when deposited in the mail properly addressed to the seller, postage prepaid. § 40-12-104(b). The sales agreement must contain a conspicuous notice of this cancellation right. W.S. 40-12-104(d).

The buyer may not cancel a home solicitation sale if the buyer requested the services because of an emergency, and (A) the seller makes a substantial beginning of performance before the buyer gives notice of cancellation and (B) in the case of goods, the goods cannot be returned to the seller in as good condition as when received by the buyer. § 40-12-104(c).

The buyer must take reasonable care of the goods and tender the goods at his or her residence to the seller upon demand. However, the buyer takes title to the goods if the seller fails to demand such possession within 30 days after cancellation. § 40-12-104(f, g). The seller must return any funds received or goods traded in to the buyer within 10 days after cancellation of the sale. The seller may retain as a cancellation fee five percent (5%) of the cash price but not exceeding the amount of the cash down payment. § 40-12-104(e).

The following transactions are not included in the protections provided by this statute:

(1) A sale of farm equipment;

(2) A cash sale for $25 or less;

(3) A sale made pursuant to a preexisting revolving charge account;

(4) A sale made pursuant to prior negotiations between the parties at the seller's place of business; and

(5) A sale made pursuant to a telephone solicitation when the seller offers a full refund and right of cancellation for at least 10 days after receipt of the merchandise and the right of refund and cancellation is communicated during the initial telephone solicitation and is conspicuously displayed on the merchandise. § 40-12-104(a).

MINOR'S CONTRACT

Age of majority - 19. § 8-1-102. Marriage and becoming a member of the U.S. Military results in emancipation. § 14-1-201.

Age of majority to contract - 19. § 14-1-101.

Contractual liability - Minor is liable only for necessaries received as a result of a contractual relationship. Other contracts executed by minors are voidable. Wyoming appears to follow common law in this area. A minor is, however, able to consent to health care treatment when married, active duty military, or parent or guardian cannot be located and need is urgent. This consent is not subject to disaffirmance.

On reaching 18, an honorably discharged veteran who has served at least three months in the armed services shall be considered as having reached the age of majority in situations regarding property, contracts, and liabilities. (§ 19-6-103).

REPOSSESSION REQUIREMENTS W.S. 1-15-301 through 306.

The creditor must make an affidavit showing:

(1) A description of the property taken;

(2) That the creditor is the owner of the property or has special interest therein, and if the ownership or interest is special or partial, the fact shall be stated;

(3) That the property is wrongfully detained by the debtor; and

(4) The alleged cause of detention of the property according to the best knowledge, information, and belief of the affiant;

(5) The property has not been taken for lay assessment or pursuant to statute, or seized under execution or attachment, or if so seized, that it is exempt; and

(6) The actual value of the property. § 1-15-302.

The creditor must also execute a bond in an amount fixed by the court for payment of all costs and damages which may be incurred. § 1-15-104 and 306.

At any time the defendant may obtain a release of any property or discharge of the writ by furnishing a bond in a sum of not less than double the amount claimed by Plaintiff, but in no case less than $50. § 1-15-105. Within 5 days after court receives person's written request for hearing, a notice of the filing of the writ must be sent to the defendant and the defendant is entitled to a hearing. § 1-15-107. The court may issue a writ without notice if there is a present danger the property will be disposed of, concealed, or the value of the property will be impaired. § 1-15-103.

ADDITIONAL INFORMATION:

The age of majority in Wyoming has been changed to 18. All references to an individual being able to contract or marry or create wills as well as to any other actions which were previously prohibited are now allowable to those 18 and older.

STATUTE OF LIMITATIONS

Written contract - 10 years. § 1-3-105.

Contract for sale of goods - 4 years. § 34-21-299.5.

Oral contracts - 8 years. § 1-3-105.

Dormant judgments - (Courts of record) - 5 years. § 1-17-307, but the judgment may be revived within 21 years after it becomes dormant. § 1-16-503.

Recovery of Real Property - 10 years, § 1-3-103.

Property damage and personal injury - 4 years. §1-3-105(a)(iv)(B) & (C).

Defamation, assault, battery malicious prosecution - 1 year. § 1-3-105(v).

Wrongful death - 2 years. § 1-38-102.

TRUTH-IN-LENDING REQUIREMENTS

Federal - Truth-In-Lending Act.

State - The Wyoming Uniform Consumer Credit Code (UCCC) and the Rules of the State Examiner (R. St. Ex.) (the State Examiner is the Administrator of the Wyoming Uniform Consumer Credit Code), require a creditor to make a full disclosure of closing costs before a down payment is made. If the sale involves real property, the disclosure must be made when the creditor makes a commitment to lend. § 40-14-225 (1982).

The following transactions are exempted from coverage under the Wyoming UCCC provisions and the Rules of the State Examiner:

(1) Extensions of credit to the government or governmental agencies;

(2) The sale of insurance by an insurer if the premium is not financed (except as provided in Article 4 on Insurance);

(3) Transactions under public utility or common carrier tariffs if a subdivision or agency of Wyoming or of the United States regulates the charges for services;

(4) Ceilings or rates and charges or limits on loan maturities of a credit union organized under the laws of Wyoming or of the United States if ceilings or limits are established by these laws; and

(5) Credit Sales, loans or leases primarily for agricultural purposes except as provided in Articles 2 and 3 of Part 6 of this code. § 40-14-121 as amended.

(6) A consumer related loan not in excess of $25,000 if:

(a) debtor is a person other than an organization; or,

(b) debt is secured primarily by a security interest in a one or two family dwellings occupied by a person related to the debtor. § 40-14-355.

(7) Loans in excess of $25,000 (principal amount) or secured by an interest in land. § 40-14-304.

Wyoming

A creditor who fails to disclose information to a person entitled to the information relating to credit sales and loans is liable to that person in an amount equal to the sum of:

(A) Twice the credit service charge (but not less than $100 or more than $1,000); and

(B) In the case of a successful action to enforce the liability under paragraph (A), the costs of the action together with attorney's fees. § 40-14-522(a).

The statute of limitations for violations is one (1) year. § 40-14-522(f). The debtor has the right to rescind the transaction within three (3) business days following consummation of that transaction or delivery of the disclosures required whichever is later. § 40-14-523(a).

A creditor is not liable in an action brought against him/her if within 15 days after discovery of an error and prior to written notice of the error or institution of an action, the creditor makes the adjustments and notifies the debtor. § 40-14-522(b). A creditor that willfully and knowingly fails to provide information which is required to be disclosed, gives false or inaccurate information or otherwise fails to comply with the act is guilty of a misdemeanor and upon conviction may be punished by a fine not to exceed $5,000, or by imprisonment not to exceed one year, or both. W.S. 40-14-541. A creditor who willfully makes charges in excess of those permitted on loans is guilty of a misdemeanor and may be punished by a fine not to exceed $1,000, or by imprisonment not to exceed six months, or both. An unlicensed creditor who makes loans is guilty of a misdemeanor and is subject to a fine not exceeding $5,000, or one year imprisonment, or both. A creditor or assignor of a creditor who attempts collection or enforcement without proper notification or payment of fees is guilty of a misdemeanor and may be subject to a fine not exceeding $1,000. § 40-14-540(a)(b)(c).

UNFAIR AND DECEPTIVE TRADE PRACTICES

W. S. § 40-12-101 through 112 (1977 & Supp. 1987).

Prohibited Practices: 15 enumerated deceptive trade practices. W.S. 40-12-105.

Wyoming

Special Requirements: Violation must be knowing.

Scope: In course of business and in a consumer transaction, defined as the advertising, sale, offer for sale of any merchandise, including real or personal property, services, intangible or any other article of value for personal, family, or household purposes.

Exclusions: Non-consumer transactions; acts permitted by state or federal law, regulation or decision; advertisements done by publisher, radio and television media, with no knowledge of falsity. W.S. 40-12-110.

Private Remedies: Class actions or individual actions for actual damages and attorney's fees to prevailing plaintiff. W.S. 40-12-108.

Limitations: AG acts in public interest upon notice given in injunction; private action if consumer relies on uncured violation and suffers damages as result, "uncured" defined as notice given of violation and no offer of cure made within 15 days or within reasonable time; statute of limitations is 1 year from furnishing of notice of violation, notice must be given by consumer within 1 year of discovery or 2 years after consumer violation unless is uncured; statute is exclusive remedy for enumerated violations.

State Remedies: Attorney General enforces; injunction; maximum $5000 for violation of permanent injunction. W.S. 40-12-111.

WARRANTIES

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. W.S. 34.1-2-314

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. W.S. 34.1-2-315.

Wyoming

Implied warranties, including the warranty of merchantability can be limited or excluded in writing. Remedies for breach of warranty also can be limited. 34-21-233 W.S. 34.1-2-316. Notwithstanding, the ability to restrict implied auto warranties may be affected by 15 U.S.C. § 2308.

Express warranties cannot be negated if it is unreasonable to do so. W.S. 34.1-2-316.

MISCELLANEOUS STATUTES

1. Motor Vehicles. W. S. § 40-17-101 ("Lemon Law").

If a new motor vehicle does not conform to the express warranties and the consumer reports the nonconformity within one year of delivery, the manufacturer, dealer, or agent must repair the vehicle even if the one year period has expired.

If the motor vehicle is not able to be repaired after a reasonable number of attempts (defined as at least three (3) times) or the vehicle is out of service for repair for a cumulative total of thirty business days, the manufacturer shall:

(a) replace the vehicle with a new or comparable vehicle; or,

(b) accept the return of the vehicle and refund the full purchase price less reasonable allowance for use.

If a civil action is instituted by the consumer, attorney fees are recoverable from the manufacturer.

2. Telephone Solicitations. The Wyoming Consumer Protection Act, W. S. § 40-12-101 through 112, was amended in May 1987 to provide consumers more protection.

W. S. § 40-12-104 was amended to include contacts with the buyer in person or by telephone. If a sale is made pursuant to a telephone solicitation, it is not considered a home solicitation sale for purposes of the 3-day right of cancellation provision: "if the seller offers a full refund and allows cancellation for at least 10 days after receipt of merchandise and the right of refund and cancellation is communicated during the

initial telephone communication and is conspicuously displayed on the merchandise." W. S. § 40-12-104.

The Wyoming Attorney General interprets this section to require sellers to provide a written contract with the terms of the agreement and the right of cancellation. The time period for cancellation does not commence until the consumer receives the contract.

The Federal Trade Commission's definition of deceptive acts or practices has been added to the "laundry list" of unlawful practices. W. S. § 40-12-105(a)(i) - (xv). This will assist consumers and their counsel in determining what is or is not prohibited by being able to refer to federal interpretation of the statute.

The Attorney General is authorized to pursue restraint of unfair acts and home solicitation sales violations. Compensation and restitution can be paid to victims of the violations pursuant to the actions filed by the Attorney General.

3. Unsolicited Merchandise. Treated as unconditional gift. § 40-12-103.