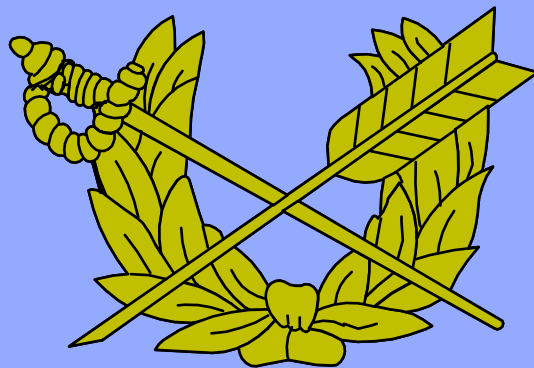


ADMINISTRATIVE AND CIVIL
LAW DEPARTMENT

CONSUMER LAW
DESKBOOK
2022



The Judge Advocate General's School
United States Army

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CHAPTER A

CONSUMER LAW OVERVIEW

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CHAPTER A

CONSUMER LAW OVERVIEW

Federal and state consumer protection laws govern a wide range of consumer transactions. This Guide does not attempt to cover every scenario in which the consumer may benefit from consumer protection law. It addresses the most common areas of applicability to military consumers, including purchases and transactions, payments, debt collection and consumer reporting, credit discrimination, credit repair, identity theft, and landlord-tenant law.

I. WHAT IS CONSUMER LAW?¹

A. Resources

1. NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (10th ed. 2021).
2. AMERICAN BAR ASSOCIATION, CONSUMER PROTECTION HANDBOOK (2nd ed. 2016).

B. Scope

1. Consumer law is broadly defined as “the law regulating consumer transactions.”
2. A consumer transaction occurs when a person obtains goods, real and personal property, credit, or services for personal, family, or household purposes.
3. Sources of substantive consumer law:
 - a) The body of consumer law includes established doctrines from common law (especially contracts), federal and state statutes, administrative rules, and judicial decisions that protect consumers.
 - b) Consumer law generally supplements established doctrines from the common law.

¹ This discussion is adapted from the Preface and Introductory comments in HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW (1986 & Supp. 2009-2010). All quotes are taken from that book.

- (1) Prior to the enactment of consumer protection statutes in the 1960's and 1970's, most consumer transactions were governed by the principle of *caveat emptor* (buyer beware). Common law fraud was hard to prove.
4. Consumer law generally does NOT include civil rights legislation, poverty law, minimum wage legislation, or antitrust.

C. Objectives and Means

1. Primary Objective. The primary objective of consumer law is to balance the interests of consumers and merchants in the marketplace.
 - a) The underlying assumption is that, without protection, consumers are at a disadvantage.
 - b) Consumer protection laws create a counterbalance to the inherent advantages of the merchant.
2. Primary Means. Consumer protection laws generally strive to achieve their objectives by giving special protection to the consumer in the form of:
 - a) Information contained in required disclosures; and/or
 - b) Limitations on merchant behavior (e.g. prohibitions on disclaimer of warranties or waivers of certain consumer rights).

D. The Players

1. State and federal legislatures.
2. State and federal administrative agencies.
 - a) Federal Trade Commission (FTC).
 - (1) Rules.
 - (a) Interprets and enforces Federal Reserve

Board Rules.

- (b) Develops its own rules and enforces certain federal consumer protections statutes.
- (2) Enforcement of FTC Act (and other Federal consumer financial laws and Rules).
- (a) Investigation
 - (1) Please note the FTC typically does not resolve individual consumer disputes. This complaint mechanism is designed to help law enforcement and regulators spot larger trends. Law enforcement agencies and personnel, including military legal assistance attorneys, are able to view millions of consumer complaints via a free subscription to the Consumer Sentinel Network. To register for an account, visit: <https://register.consumersentinel.gov/>.
 - (2) Consumer Sentinel is the central database for all consumer complaints received by various agencies. For example, the Consumer Financial Protection Bureau (see below), Veteran's Administration, U.S. Department of Education, Attorneys General Offices, and even the Better Business Bureau route all consumer complaints to the Consumer Sentinel database
 - (b) Agency Adjudication
- b) Consumer Financial Protection Bureau (CFPB)
- (1) Created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, (Dodd-Frank) Pub. L. 111-203, H.R. 4173 (2010) in response to the Great Recession of 2008. Officially operational as of July 21, 2011.
 - (2) The CFPB's central mission is to "make consumer financial markets work for consumers, responsible providers, and the economy as a whole." The CFPB

states, “In a market that works, the prices, risks, and terms of the deal are clear upfront so that consumers can understand their options and comparison shop. Companies all play by the same consumer protection rules and compete fairly on providing quality and service.” CFPB Website, <http://www.consumerfinance.gov/the-bureau/> (last visited 21 April 2020).

- (3) The CFPB’ strategic vision is three-pronged:
 - (a) Empower.
 - (b) Educate.
 - (c) Enforce.

- (4) The CFPB accomplishes its statutory mission of being the single point of contact to enforce federal consumer financial laws and protecting consumers in the financial marketplace by: (See <http://www.consumerfinance.gov/the-bureau/>):
 - (a) Eliminating unfair, deceptive, or abusive acts or practices through writing rules, supervising companies, and enforcing the law;
 - (b) Taking consumer complaints;
 - (c) Promoting financial education;
 - (d) Researching consumer experience of using financial products;
 - (e) Monitoring financial markets for new risks to consumers; and
 - (f) Enforcing laws that outlaw discrimination and other unfair treatment in consumer finance.

- (5) To file a complaint with the CFPB, visit www.consumerfinance.gov/complaint or call (855) 411-2372. Upon filing a complaint, the CFPB will

review and route it to the appropriate company for response and, with the permission of the consumer, ultimately publish the information on its Consumer Complaint Database at www.consumerfinance.gov/data-research/consumer-complaints. All complaints filed with the CFPB are sent to the FTC's Consumer Sentinel.

- (6) The CFPB, FTC, and other agencies have overlapping statutory enforcement authority over certain Federal consumer financial laws. Attorneys should research the latest agency guidance and laws when using these agencies to ensure they are providing their client the most accurate assistance.

c) Department of Justice

- (1) Fair Housing and SCRA Enforcement
- (2) Servicemembers and Veterans Initiative
- (3) Consumer Protection Branch

d) Attorney Generals Offices

- (1) Conducting rule-making for, and supervision and enforcement of Federal consumer financial laws;
- (2) Restricting unfair, deceptive, or abusive acts or practices;
- (3) Receiving and investigating consumer complaints;
- (4) Promoting financial education;
- (5) Researching consumer behavior;
- (6) Monitoring financial markets for new risks to consumers; and
- (7) Enforcing laws that outlaw discrimination and other unfair treatment in consumer finance.

3. Courts at all levels

II. ANALYZING CONSUMER PROTECTION PROBLEMS

In considering a consumer law problem, the attorney must consider all aspects of the transaction and use all available protections/solutions to develop the most effective course of action for the client. To aid in this thought process, consider the following phases of consumer transactions:

- A. The Transaction. The first thing to consider is the way the transaction occurred. Depending on where it took place, or the sales techniques used, federal and state laws may offer the consumer some protection.
 1. Federal laws
 - a) Truth-in-Lending Act 1968
 - b) Consumer Leasing Act (Chap. C)
 - c) Equal Credit Opportunity Act
 - d) Military Lending Act 2006
 - e) E-Sign Act
 - f) Dodd-Frank
 - g) Telephone Consumer Protection Act (TCPA) of 1991
 - h) Telephone Disclosure and Dispute Resolution Act
 - i) Telemarketing and Consumer Fraud and Abuse Prevention Act
 - j) Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (E-mail spam)
 2. Certain FTC Rules (Chap. C)
 - a) Door to Door Sales Rule
 - b) Telemarketing Sales Rule (TSR)
 - c) Mail Order and Telephone Merchandise Rule
 - d) Cooling-off Rule
 3. State laws, to include unfair and deceptive acts and practices

(UDAP) (Chap. 2 and Appendix B).

4. Traditional contract and tort law defenses and remedies. This guide does not cover basic contract law.
- B. The Goods. The second place to look for possible help is the goods themselves. There may be some deficiency in the quality of the goods that will allow your client to take advantage of some protections.
1. Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301-12) (Chap. 4)
 2. Uniform Commercial Code Warranty Provisions (§§ 2-312 - 2-318) (Chap. 5).
 3. Federal Odometer Act
 4. State Warranty Laws / “Lemon” Laws (Appendix B).
- C. The Payment. The next area to look for protection is the manner of payment for the goods. Specific federal protections applicable to credit transactions are discussed in Chapter 5.
1. Truth-in-Lending Act of 1968
 2. Fair Credit Billing Act 1974
 3. Electronic Funds Transfer Act 1978
 4. Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009
 5. Implementing Regulations found in the Code of Federal Regulations
- D. The Aftermath. Finally, the collection of debts by merchants and the reporting of consumer information to credit reporting agencies are governed by two federal statutes discussed in Chapter 6.
1. Fair Debt Collection Practices Act 1977
 2. Fair Credit Reporting Act 1970
 3. Enforcement of security interests
 - a) Repossession

b) Foreclosure

4. Bankruptcy

E. Other protections.

1. Servicemember Civil Relief Act

2. Identity theft prevention and protections

3. Credit repair

4. Landlord-tenant

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CHAPTER B

UNFAIR AND DECEPTIVE ACTS AND PRACTICES (UDAP)

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CHAPTER B

UNFAIR AND DECEPTIVE ACTS AND PRACTICES (UDAP)

I. RESOURCES

- A. NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (10th ed. 2021)¹

NATIONAL CONSUMER LAW CENTER, FEDERAL DECEPTION LAW (4th ed. 2022).
- B. Federal Trade Commission Act, 15 U.S.C. § 45, *et seq.*
- C. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 53, *et seq.* (Dodd-Frank Act).
- D. State UDAP Statutes (listed by state at Appendix B).

II. INTRODUCTION

- A. The Federal Trade Commission (FTC) enforces the FTC Act, protecting consumers against unfair and deceptive acts and practices (UDAP). The Consumer Financial Protection Bureau (CFPB) enforces the Consumer Financial Protection Act (CFPA), protecting consumer against unfair, deceptive and abusive acts and practices (UDAAP) in the financial marketplace.
- B. The FTC Act, CFPA, and other UDAP statutes sharply limit the doctrine of caveat emptor, providing consumer redress for abuse of consumers and misconduct by certain business entities.
- C. PRACTICE POINTER: Neither the FTC Act nor the CFPA provides a private cause of action. A legal assistance practitioner must research **state law** UDAP and also apply basic contract or tort law principles when advising consumer clients.

All states have established UDAP statutes in varying degrees and under various names. This outline addresses general UDAP principles and does not provide comprehensive UDAP coverage.
- D. Attorneys should consult any recent laws, regulations, or

¹ The National Consumer Law Center (NCLC) is a key resource for Unfair and Deceptive Acts and Practices.

interpretations from the FTC and CFPB. Always consult a CFPB attorney within the Office of Enforcement with any questions or concerns. As of the time of publication, the CFPB's contact for military attorneys is:

Ms. Angela Martin
1700 G Street NW
Washington, DC 20552
Angela.Martin@cfpb.gov
202-578-6956 (cell)

III. UNFAIR AND DECEPTIVE ACTS AND PRACTICES (UDAP) - WHAT ARE THEY?

- A. UDAP is a general label for a variety of statutes with broad applicability to consumer transactions aimed at preventing unfair, deceptive, and abusive conduct in the marketplace.
- B. Coverage. UDAP statutes cover a wide range of consumer topics. They range from regulation of sales practices to regulation of advertising, warranties, and credit offers. UDAP can include a wide range of merchant activity. It is a general umbrella term that includes a wide range of consumer protection statutes.
- C. UDAP statutes typically do not require proof of the seller's fraudulent intent or knowledge. In some cases, consumer reliance, damage, or even actual deception is not a prerequisite to a UDAP action. As a result, a UDAP claim is a far easier cause of action to prove than common law fraud.
- D. Federal Trade Commission Act. 15 U.S.C. § 45.
 - 1. “[U]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”
 - 2. The Federal Trade Commission power under 15 U.S.C. § 45 is, however, in addition to the authority of the states. The FTC does not displace state law unless the state law is inadequate or contrary to the Commission's regulations. See *American Financial Services v. FTC*, 767 F. 2d 957 (D.C. 1985).
 - 3. Enforcement only by the FTC
- E. The Wall Street Reform and Consumer Financial Protection Act. 12 U.S.C. § 53, *et seq.* (The Dodd-Frank Act)

1. Under the Dodd-Frank Act “The Bureau may take any action authorized under subtitle E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.” 12 U.S.C. § 5531(a). The Enforcement Powers in Subtitle E include:
 - a) Investigation (§ 5562(a));
 - b) Subpoena (§ 5562(b));
 - c) Civil Investigative Demand (§ 5562(c));
 - d) Hearing and Adjudication (§ 5563);
 - e) Civil Litigation and Standing (§§ 5562, 5564);
 - f) Referral to Department of Justice for Criminal Proceedings (§ 5556).
2. Rulemaking. Congress has given the CFPB the authority to “prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules ... may include requirements for the purpose of preventing such acts or practices.” Dodd-Frank Act, § 5531(b).
3. Outlines of the key UDAP definitions under the Dodd-Frank Act are located in Section IV of this chapter and throughout the Act.
4. Absent special rules for banks, the Dodd-Frank Act is intended to supplement, rather than replace, state laws. See Dodd-Frank Act, § 5551(a). While the Supremacy Clause will likely apply to provisions that are directly and clearly inconsistent in both letter and intent, “a statute, regulation, order, or interpretation in effect in any State not inconsistent with the provisions of this title if the protection ... affords to consumers is greater than the protection

provided under this title.”

5. Enforcement only by the CFPB and State Attorneys General.
- F. State UDAP statutes. The provisions of these statutes vary by state. Thus, legal assistance practitioners must familiarize themselves with the protections their state offers when they arrive at a new installation. Some general features of these statutes include the following:
1. Every state, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have passed at least one statute that deals broadly with most consumer transactions. See Appendix B. Almost any abusive business practice aimed at consumers is at least arguably a UDAP violation, unless the trade practice falls clearly outside the scope of the statute.
 2. Many state attorneys general compile and publish case summaries, attorney general opinions, regulations, and enforcement proceedings. If available, you should keep a file of your local attorney general summaries. Further, numerous states have manuals or texts on applicable consumer protection laws. If possible, legal assistance offices should obtain a copy of the appropriate state’s manual.
 3. States call these statutes a variety of names including consumer protection acts, consumer sales acts, unfair trade practice acts, deceptive and unfair trade practices acts, deceptive consumer sales acts, deceptive trade practices acts, and consumer fraud acts. The National Consumer Law Center labels all state consumer statutes of general applicability as Unfair and Deceptive Acts and Practices (UDAP) statutes.²
 4. “Legislatures and courts have been careful to guarantee that UDAP statutes are broad and flexible, so that they can apply to creative, new forms of abusive business schemes in almost all types of consumer transactions. Even when UDAP statutes enumerate specifically prohibited practices, most statutes also prohibit other unfair, unconscionable, and/or deceptive practices in more general terms.”³
 5. State statutes usually authorize enforcement by state

² NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, § 1.2 (10th ed. 2021).

³ *Id.*

authorities (e.g., the Attorney General), as well as private enforcement. Many of the statutes authorizing private enforcement include awards of actual damages, attorney's fees, and punitive, treble, or minimum statutory damage awards. This is often a critical aspect of an effective consumer protection statute for the legal assistance practitioner. Absent an Expanded Legal Assistance Program (ELAP) at an installation legal assistance attorneys will have to refer many of these cases to private practitioners if the parties do not resolve the matter out of court.

6. UDAP laws may provide a source of counterclaims. Many cases in the consumer area come to light as counterclaims to acts or practices taken against the consumer. For example, a creditor sues the consumer to recover a debt allegedly owed. The consumer will then raise consumer protection violations by the creditor as defenses or counterclaims against the creditor.

IV. GENERAL UDAP PRINCIPLES

A. Burden of Proof:

1. Pleadings must allege a UDAP statute violation.
2. The burden of proof is on consumers to prove facts that meet the elements required by the statute.

- B. Liberal Construction.** UDAP statutes should be interpreted liberally to achieve their objective to eradicate deception, protect consumers, and correct marketplace imbalances. UDAP statutes are generally considered remedial in nature. Thus, courts often construe them liberally in favor of consumers. See e.g., *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410 (Mo. banc 2014); *Deegan v. Windemere Real Estate/Center-Isle, Inc.*, 391 P.3d 582 (Ct. App. Wash. 2017); *Schnall v. Hertz Corp.*, 93 Cal. Rptr. 2d 439 (2000); *Helton v. Glenn Enterprises, Inc.*, 209 S.W.3d 619 (Tenn. Ct. App. 2006); *McCullough v. Johnson, Rodenber, & Lauinger*, 610 F. Supp. 2d 1247 (D. Mont. 2009); *Shumaker v. Hamilton Chevrolet, Inc.*, 920 N.E.2d 1023 (Ct. Ap. Ohio 2009).

V. SCOPE

- A. Statutory Definitions:** Many state statutes limit their applicability to certain kinds of transactions. The common definitions for the

general types of transactions covered are below.

1. Trade or commerce. Usually, this is a very broad interpretation that would apply to almost any profit-oriented transaction. This would normally include sales, financing, debt collection, and warranty actions. Some things not commonly thought to be trade or commerce are considered to fall into this category. For example, in some states, doctors, lawyers, and other professionals are considered to be conducting trade or commerce. See, e.g., *Crowe v. Tull*, 126 P.3d 196 (Co. banc 2006). But see *Shelton v. Duke Univ. Health System, Inc.*, 633 S.E.2d 113 (N.C. App. 2006). A scheme to defraud workers compensation insurers may be held to be in trade or commerce. See *St. Paul Fire & Marine Ins. Co v. Ellis & Ellis*, 262 F.3d 53 (1st Cir 2001) (Mass. Law). Academic Research and publication is generally not considered trade or commerce because they are not entrepreneurial. See *Johnson v. Schmitz*, 119 F. Supp. 2d 90 (D. Conn. 2000)
2. Goods.
 - a) Many UDAP statutes apply to the sale of “goods,” and a key question will be whether a particular transaction involves “goods.” Where the UDAP statute itself does not provide a definition of “goods,” some UDAP cases refer to the UCC definitions from sections 2-105 and 9-102(a)(44). The UDAP statute may define the term differently than the UCC, so practitioners should review the statutory language carefully.⁴
 - b) Case law has generally found:
 - (1) Goods: generally, includes tangible goods. Note: house/horse
 - (2) Are NOT Goods: money, or an intangible property right, such as a joint venture. See *Stroud v. Meister*, 2001 U.S. Dist LEXIS 13282 (N.D. Tex. Aug. 22, 2001).
3. Merchandise. Sometimes given a broader scope than goods, merchandise usually includes various types of property such as goods, services, realty, commodities, and intangibles. Thus, money and real property have been considered merchandise

⁴ *Id.* at § 2.1.5.

even though they are not “goods.”

4. Services. Performance of services for consumers generally includes home construction, tax and investment advice to include brokerage, snow removal, heir tracking, banking services, mortgage brokering, snow and trash removal, and insurance adjusting and legal services. See *Cuyler v. Minns*, 60 S.W. 3d 209 (Tex App. 2001) (Client could sue even though attorneys did not charge for their services.). Hotels may also be seen as providing services. See *Helton v. Glenn Enterprises, Inc.*, 209 S.W.3d 619 (Tenn. Ct. App. 2006).
5. Personal, family or household use. Many UDAP statutes limit applicability to personal, family, and household related transactions, expressly excluding business related transactions.
 - a) Objective v. Subjective. Courts differ as to the standard for determining what constitutes a personal versus business transaction.
 - (1) Subjective refers to the consumer’s personal intent for the use of the goods or service.
 - (2) Objective refers to the intended use of the good or service by a reasonable (typical) consumer.
 - b) Other statutes (such as Truth in Lending, Magnuson-Moss Warranty Act, Fair Debt Collection) also contain the element of “personal, family, or household use,” making cases decided under those statutes persuasive precedent for UDAP cases.
 - c) A wide variety of things have been found to be for personal, family or household use. For example, an antique is personal even when bought for display at the office.⁵ A pyramid scheme has been considered a consumer transaction, even though it is a “business” opportunity,⁶ For pyramid schemes, consider whether a

⁵ *Adam A. Wechsler & Son, Inc. v. Klank*, 561 A.2d 1003 (D.C. 1989).

⁶ See, e.g., *Fed. Trade Comm’n v. Affordable Media*, 179 F.3d 1228 (9th Cir. 1999) (affirming contempt order for violation of preliminary injunction requiring defendants who telemarketed a Ponzi scheme to repatriate assets held outside U.S.); *Fed. Trade Comm’n v. Dluca*, 2018 WL 4775634 (S.D. Fla. Sept. 5, 2018) (operation of a “chain referral” or pyramid scheme is an unfair or deceptive act in violation of the

referral to the Securities and Exchange Commission (SEC) is also appropriate.⁷ Where a use is part personal and part commercial, courts generally find the transaction to be covered by UDAP statutes. See, e.g., *Marascio v. Campanella*, 689 A.2d 852 (App. Div. 1997) (commercially owned, unoccupied property that is part residential and part commercial still covered by UDAP statute).

- d) Courts have found numerous transactions not to be for personal, family or household use. For example, the purchase of a hay baler to be used on family farm;⁸ ownership of a house for use as rental property;⁹ the making of business loans; investment advice; political solicitations; and a debt for taxes.

B. Scope issues that may sometimes exempt a transaction from UDAP coverage.

1. Credit and banking activities.

- a) Usually INCLUDED where UDAP statute applies to “goods & services” or “Trade or Commerce.”

FTCA; applying this well-established rule to a novel area, here cryptocurrency investing, did not violate fair notice principle); *Fed. Trade Comm'n v. Vemma Nutrition Co.*, 2015 WL 11118111 (D. Ariz. Sept. 18, 2015) (granting preliminary injunction; pyramid scheme's claim of high earnings, when most affiliates did not earn enough to recoup their initial investments, was false and misleading); *Fed. Trade Comm'n v. SkyBiz.com, Inc.*, 2001 WL 1673645 (N.D. Okla. Aug. 31, 2001) (preliminary injunction) (discussing distinctions between pyramid scheme and legitimate multi-level marketing program), *aff'd*, 2003 WL 202438 (10th Cir. Jan. 30, 2002); *Fed. Trade Comm'n v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502 (S.D.N.Y. 2000). Many other FTC actions against pyramid sellers can be found on its website, www.ftc.gov.

⁷ A Legal Assistance attorney can help a client submit a question or a complaint at Investor.gov or submit a Tip, Complaint or Referral to SEC.gov | Office of the Whistleblower. If the SEC brings an action, it may be able to help return assets to investors in the scheme.

⁸ *Andrews & Lawrence Prof. Servs., L.L.C. v. Mills*, 223 A.3d 947, 965, 968 (Md. 2020); *Miller v. Hubbard-Wray*, 633 P.2d 1 (Or. Ct. App. 1981).

⁹ *Hua v. Wells Fargo Bank*, 2017 WL 5624878 (E.D. Pa. Nov. 22, 2017) (inapplicable to mortgage loan on investment property); *Alston v. Wells Fargo Home Mortgage*, 2016 WL 816733 (D. Md. Feb. 26, 2016); *Llewellyn-Jones v. Metro Prop. Group, L.L.C.*, 22 F. Supp. 3d 760, 789 (E.D. Mich. 2014) (UDAP statute inapplicable to individuals' purchase of homes as investments); *Cannon v. Wells Fargo Bank*, 926 F. Supp. 2d 152 (D.D.C. 2013) (UDAP statute inapplicable to financing for home described as daycare center); *Price v. Independence Fed. Sav. Bank*, 110 A.3d 567 (D.C. 2015); *Linthicum v. Archambault*, 398 N.E.2d 482 (Mass. 1979); *Growall v. Maietta*, 931 A.2d 667 (Pa. Super. Ct. 2007); *Lal v. Ameriquest Mortgage Co.*, 858 A.2d 119 (Pa. Super. Ct. 2004) (purchase of real property as an investment). See also *DiLucido v. Terminix Int'l, Inc.*, 676 A.2d 1237 (Pa. Super. Ct. 1996) (purchase of extermination services for rental property is not consumer transaction). But cf. *Barrett v. Adirondack Bottled Gas Corp.*, 487 A.2d 1074 (Vt. 1984) (landlord's purchase of propane for tenants' use is consumer transaction).

- b) When credit and banking activities are not covered, the UDAP statute will generally use express language to exempt these activities. But look to other statutes for relief in credit and banking cases, such as the Truth in Lending Act or the Truth in Savings Act.
2. Debt collection
- a) Usually INCLUDED where UDAP statute applies to “Trade or Commerce.” A Florida Court and the Tennessee Supreme Court have decided that post-sale repossession practices do not relate to the original sale and thus are not covered. See *City of Cars, Inc v. Simms*, 526 So. 2d 119 (Fla. Dist. Ct. App. 1988); *Pursell v. First Am. National Bank*, 937 S.W.2d. 838 (Tenn. 1996). But see *Holley v. Gurnee Volkswagen & Oldsmobile Inc.*, 2001 U.S. Dist LEXIS 7274 (N.D. Ill. Jan 4, 2001) (The court held repossession is covered).
 - b) The underlying debt, however, must be connected to the sale of goods and services for the collection to be covered.
3. No-purchase activities
- a) UDAP statutes generally require a purchase (sale) or solicitation in order to apply.¹⁰ Thus, shoplifters, free counseling, mere offers to sell have been found to NOT fall under UDAP statutes.
 - b) Where dealer loaned car to consumer free of charge UDAP does not apply.
4. Post sale activities - most states do include this in “trade or commerce” and in “sales of goods and services.” Thus failure to pay out an insurance claim is within trade or commerce.¹¹

¹¹ The general scope provisions of most UDAP statutes extend to insurance transactions. *NN&R, Inc. v. One Beacon Ins. Group*, 362 F. Supp. 2d 514, 521 (D.N.J. 2005) (UDAP statute provides private cause of action for sale of insurance, although possibly not for payment of insurance benefits); *Sparks v. Allstate Ins. Co.*, 98 F. Supp. 2d 933 (W.D. Tenn. 2000) (Tennessee definitions of “trade,” “commerce,” and “consumer transaction” encompass post-sale insurance claim settlement practices); *White v. Consol. Planning, Inc.*, 603 S.E.2d 147, 161–162 (N.C. Ct. App. 2004).

5. Real property. States split on this issue.
 - a) “Trade or commerce” and “merchandise” states: Courts in these states consistently find that real property falls within the UDAP statute. A UDAP statute that applies to “property” typically covers real estate sales.
 - b) “Sales of consumer goods & services” states may or may not find that real property falls within the UDAP scope.
 - c) Some states include real estate transactions but have special provisions; for example, Indiana’s UDAP statute covers real estate transactions, but only the attorney general may bring action and only if the seller intended to defraud or mislead. In New York, the highest court held that the UDAP statute may not apply to a simple sale of a house, but would apply to a seller of homes who promoted the sale of over-priced homes, promised repairs, claimed FHA involvement, steered buyers to affiliated banks and lawyers who would not alert the buyer to problems, and threatened to withhold down payments. See *Polonetsky v. Better Homes Depot*, 97 NY.2d 46, 760 N.E.2d 1274 (2001).

 6. Residential Leases; Mobile Home Parks.
 - a) Many states include these within UDAP, especially those that use the “trade or commerce” definition.
 - b) Minnesota and Texas courts have found UDAP statutes to apply to landlord-tenant matters. See *Love v. Amsler*, 441 N.W.2d 555 (Minn. Ct. App 1989) and *Myers v. Ginsburg*, 735 S.W.2d 600 (Tex. App. 1987).
 - c) A few states (including Kansas, Ohio, and Washington) have held that comprehensive landlord-tenant regulation occupies the field and prevents UDAP action.
 - d) Rental of real property is explicitly included in UDAP statutes in Maryland, Michigan, and New Jersey.
-

VI. ANALYZING UDAP CASES

- A. Look for *per se* violations in all aspects of the transaction.
1. Statutory "Laundry list" (*per se* violations). Some UDAP statutes have a laundry list of prohibited practices plus a catchall phrase prohibiting other deceptive practices.
 2. State UDAP regulations (*per se* violations). About half of the states have regulations making listed activities a *per se* UDAP violation.
 3. Violation of Federal Consumer Protection Statutes.
 4. Make sure violation is within the scope of the UDAP statute.
 5. Even if the deceptive act or practice falls under a *per se* violation, pleadings should always include a general or catch all claim in case the *per se* violation fails because of a technical reason.
- B. Proving violation when there is no *per se* violation. When a practice must be proven without the aid of a *per se* theory, the consumer should adopt a three-prong approach.
1. Develop the Facts. Painting a broad detailed picture will help the judge or jury find in favor of the consumer and help the consumer (plaintiff) identify corroborating victims. The consumer lawyer should carefully investigate the following:
 - a) Advertising
 - b) Written promotional material
 - c) Oral claims
 - d) Key facts not disclosed
 - e) Sales techniques
 - f) Contract terms

- g) Collection practices
 - h) Credit terms
2. Look for precedent applicable to a specific practice that holds that the exact practice or a similar practice is a UDAP violation. Look for the following:
- a) Case law
 - b) State and federal statutes and regulations (Don't forget legislative history!)
 - c) Staff commentaries
 - d) FTC Cases/Consent Agreements
 - e) FTC Trade Regulations, Rules, Letter Rulings
 - f) State Attorney General Opinions
3. Use general UDAP standards to show how the action violates broad deception and unfairness standards in UDAP statutes.

VII. GENERAL UDAP VIOLATIONS

A. Deception/Statutory Fraud. Some states prohibit deception. Others prohibit misleading or fraudulent conduct. Many state UDAP statutes prohibit both deceptive and unconscionable practices. Consumers need to show only one or the other, not both.

- 1. Compare to common law fraud.
 - a) Common law fraud requires proof of:
 - (1) A false representation of a material fact. A fact is material if reasonable consumers would attach importance in deciding on a course of action or would have acted differently if they had the information.¹²

¹² *Saucier v. Countrywide Home Loans*, 64 A.3d 444–445 (D.C. 2013); *Cole v. Hewlett Packard Co.*, 84

- (2) Detrimental reliance on the fact at issue. Damages as a result of the reliance.
 - (3) Scier-usually requiring the defendant to have knowledge of the falsity.
 - (4) Defendant's intentional misrepresentation seeking reliance.
- b) Deception - modern conception virtually eliminates these proof requirements.
- (1) Shaped by federal court interpretation of the FTC Act. To show deception under the FTC Act, intent, scier, actual reliance or damage, and even actual deception are unnecessary.
 - (2) Capacity to deceive is enough! Proof that a practice has a tendency or capacity to mislead or deceive even a significant minority of consumers may be sufficient to support a finding that the practice is deceptive.
 - (a) FTC has interpreted to the FTC Act to require that the practice be “likely” to deceive.
 - (b) Most state courts have continued to follow

P.3d 1047 (Kan. Ct. App. Feb. 27, 2004) (fact is material if reasonable person would attach importance to it in determining course of action); *Green v. H&R Block, Inc.*, 735 A.2d 1039 (Md. 1999); *State v. Cottman Transmissions Sys., Inc.*, 587 A.2d 1190 (Md. Ct. Spec. App. 1991). See also *Tomasella v. Nestlé USA, Inc.*, 364 F. Supp. 3d 26, 35 (D. Mass. Jan. 30, 2019) (nondisclosure is not UDAP violation if it is unlikely to lead consumers to act differently than they otherwise would; not UDAP violation for manufacturer to fail to disclose on product packages that its supply chain likely included child labor and slave labor, where manufacturer disclosed this information on its website), *aff'd*, 962 F.3d 60 (1st Cir. 2020); *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 830 (D. Ariz. 2016) (defining an omission as material if it is “logically related to the transaction in which it occurs and rationally significant to the parties in view of the nature and circumstances of the transaction”); *Azar v. Prudential Ins. Co.*, 68 P.3d 909, 930 (N.M. Ct. App. 2003) (omissions are material if they would have induced reasonable consumer in same circumstances to enter into transaction); *Carter v. Gugliuzzi*, 716 A.2d 17 (Vt. 1998) (objective standard for materiality is what a reasonable person would regard as important in making a decision). But *cf.* *Thompson v. Jiffy Lube Int'l, Inc.*, 505 F. Sup. 2d 907, 929 (D. Kan. 2007) (repair technicians’ compensation system not material since it does not relate to the goods or services purchased and it is common knowledge that sales representatives receive commissions); *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 256 (D.C. 2013) (bank’s legal assessment about possibility that customer service calls that were routed overseas would be intercepted by U.S. government is not material, so need not be disclosed).

the standard of “tendency or capacity” to support a finding of deception under state UDAP statutes.

- (3) Jurisdictions that require proof of actual damages generally construe the requirement liberally in favor of the consumer.
- (4) The burden of proof is normally preponderance of the evidence, unlike the clear and convincing standard for proving common law fraud.
- (5) Seller’s behavior may not cure an otherwise deceptive practice.
 - (a) A good faith effort, e.g. acting on advice of counsel is not a defense. Cessation of practice at time of suit is not a defense under FTC act (but will be considered in a case seeking an injunction).
 - (b) Industry-wide practice. It is not a defense that the challenged practice is prevalent throughout the industry or is a customary business practice. For example, it is not a defense that none of the state’s auto repair shops comply with a written authorizations regulation.
 - (c) Mere Puffing. To show that a practice amounts to mere puffing the seller must demonstrate that the practice is harmless, fanciful, and has no capacity to deceive.

2. Vulnerable Consumers.

- a) Historically - “the ignorant, the unthinking, and the credulous . . .” *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F.2d 676, 679 (2d Cir. 1944). Courts today label these consumers the “least sophisticated.” See, e.g., *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2010).
- b) The CFPB and FTC often look at the target audience

and see if they are behaving reasonably for that audience under the circumstances.

- c) Courts have stuck to the least sophisticated standard such that a practice can be deceptive even if most consumers are not misled and only especially vulnerable consumers are deceived.

B. Unfairness. Does not mislead, merely takes advantage of. In states providing a private right of action for unfair practices, consumers are given a highly flexible remedy that can be used innovatively. See *Curtis Mfg. Co. v. Plastic-Clip Corp.*, 888 F. Supp. 1212 (D.N.H. 1994) (holding that New Hampshire UDAP statute's list of unfair and deceptive acts is non-exhaustive, and the facts can establish that other conduct is unfair).

1. Broader than deception. Historical Criteria. *FTC v. Sperry and Hutchinson Company*, 405 U.S. 233, 244-45 (1972) [hereinafter "S&H"]. Do not have to prove all three, can show practice unfair with showing just one of the elements listed in the S&H case. The criteria include the following:

- a) Does the practice offend public policy? (Is it within the penumbra of some common law, statutory, or other established concept of unfairness?)
- b) Is the practice immoral, unethical, oppressive, or unscrupulous?
- c) Does the practice cause substantial injury to consumers?

2. FTC Standard (1980; codified in 1994, 15 U.S.C. § 45(n))

- a) Fairly broad acceptance federally. However, States tend to stick to the S & H standard and their own jurisprudence.
- b) Focuses almost exclusively on substantial consumer injury.
- c) Criteria for FTC and CFPB standard.

(1) Likely to cause substantial injury to consumers;

- (2) The injury must NOT be outweighed by any countervailing benefits to consumers or competition that the practice produces; AND
 - (3) The injury must be of the type that the consumers themselves could not have reasonably avoided.
- d) The distinctions between the current FTC/CFPB standard and the S&H standard may have little practical effect because unfairness is a question of fact for the jury or judge.
- e) Application of Unfairness. For purposes of state UDAP statutes unfairness is not limited to traditional notions of deception or fraud, but encompasses other types of wrongful business conduct and can be unfair even if it is permitted by statute or common law principles. The following are examples of practices found to be unfair.
- (1) Contract of adhesion
 - (2) Coercive (high pressure) sales
 - (a) Intimidation
 - (b) Coercion
 - (c) Personal disparagement
 - (d) Refusing to let customers leave until they sign contracts.
 - (e) Dismantling equipment and refusing to put it back together until customer signs service contract.
 - (f) Refusing to return down payment unless customer agrees to forfeit portion of down payment.

C. Unconscionable Practices

1. Unconscionable practices are also unfair. UDAP cases found it

to be unfair to charge unconscionable high prices for autos or lease to own TVs that cost twice as much than if you bought it directly. In Texas, it is a UDAP violation to take advantage of a disaster declaration by charging exorbitant prices for necessities. An \$1156 fee to cash an \$11,171 social security check has been found to be a UDAP violation. See *In re Wernly*, 91 B.R. 702 (Bankr. E.D. Pa. 1988).

2. Factors:
 - a) Seller took advantage of inability of consumers to protect their interests.
 - b) Price grossly exceeded that of similar available items.
 - c) Consumer unable to receive a substantial benefit from transaction.
 - d) No reasonable probability that the consumer could pay in full.
 - e) Transaction was excessively one-sided in favor of the seller.
 - f) Seller made a misleading statement of opinion that was likely to cause the consumer to rely to his/her detriment.
3. Many jurisdictions (including Arkansas, Florida, Idaho, Indiana, New York, Utah, and Washington, D.C.) statutorily purport to prohibit unconscionable practices. The effectiveness of these statutes, however, largely depends on case law interpretation. See *also* Cal Civ Code § 1770(a)(19).

VIII. TYPES OF UDAP ACTIONS

- A. Unsubstantiated claims. It is a UDAP to make an unsubstantiated claim about a product even if the claim later turns out to be true.¹³

¹³ *Fed. Trade Comm'n v. Lane-Labs-USA, Inc.*, 624 F.3d 575 (3d Cir. 2010) (claim that calcium supplement increased bone density was substantiated; other claims were not); *Fed. Trade Comm'n v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010) (affirming injunction and damages regarding unsubstantiated statements in infomercial for supplements alleged to cure or prevent wide array of diseases); *Fed. Trade Comm'n v. Tashman*, 318 F.3d 1273 (11th Cir. 2003) (franchisor's sales

1. Deception action. More than just wishful thinking about a product. Every product claim carries with it a representation that the party making the claim possesses a reasonable basis for doing so.
2. Unfairness action. Based on an imbalance of knowledge. Economically more reasonable for the manufacturer to substantiate a claim than for the consumer. Easier to show seller did not have an adequate basis for making a claim at the time it was made. If an advertiser makes claims allegedly based on scientific surveys or studies, they must meet scientific standards and results have to be accurately and fairly reported.

B. Deceptive inducement.

1. Bait and switch. The advertising of a product with no intention of selling it (the bait) in order to get consumers into the building and get them to buy something else (the switch), usually a higher priced product.¹⁴
2. Unavailability of advertised items.¹⁵ Similar to a bait and switch, except the business does intend to sell the advertised products, but has very few of them. The purpose is the same. Once the business sells the few it has, the business will try to get the consumer to buy something else. Stores can comply by clearly and adequately disclosing limitations of availability on advertisement.

projections, backed up by nothing, were deceptive); *Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994); *Removatron Int'l Corp. v. Fed. Trade Comm'n*, 884 F.2d 1489 (1st Cir. 1989); *Jay Norris, Inc. v. Fed. Trade Comm'n*, 598 F.2d 1244 (2d Cir. 1979); *Fedders Corp. v. Fed. Trade Comm'n*, 529 F.2d 1398 (2d Cir. 1976); *Firestone Tire & Rubber Co. v. Fed. Trade Comm'n*, 481 F.2d 246 (6th Cir. 1973); *Sears Roebuck Co.*, 95 F.T.C. 406 (1980); *Jay Norris, Inc.*, 91 F.T.C. 751 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979); *Chrysler Corp.*, 87 F.T.C. 719 (1976); *National Comm'n on Egg Nutrition*, 88 F.T.C. 89 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977); *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *aff'd*, 429 F.2d 1333 (2d Cir. 1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973). See generally FTC Policy Statement Regarding Advertising Substantiation, 48 Fed. Reg. 30,999 (Aug. 2, 1984).

¹⁴ FTC Guides Against Bait Advertising, 16 C.F.R. pt. 238. See also *Freight Liquidators*, 85 F.T.C. 274 (1975); *Tashof*, 74 F.T.C. 1361 (1968), *aff'd*, 437 F.2d 707 (D.C. Cir. 1970); *McGough v. Oakwood Mobile Homes, Inc.*, 779 So. 2d 793 (La. Ct. App. 2000) (non-UDAP case reciting salesman's testimony about use of bait-and-switch tactics). But cf. *Patel v. Zillow, Inc.*, 2018 WL 2096453 (N.D. Ill. May 7, 2018) (false advertisements to draw potential customer into a transaction do not violate bait-and-switch prohibition where the scheme does not involve switching the consumer to a higher-priced product), *aff'd*, 915 F.3d 446 (7th Cir. 2019).

¹⁵ *Great Atl. & Pac. Tea Co.*, 85 F.T.C. 601 (1975).

3. Bargain sales. Comparing a “sale” price to a reference price that makes it appear that consumers are getting a bargain when, in fact, they are not.
4. Other: Wholesale, factory-direct, seconds, "below-cost/invoice," "liquidation sale," "going-out-of-business." The special circumstance such as the bankruptcy or flood sale must be true, the prices have to be lower than regular, and the seller cannot order additional goods for the sale.
5. Free. Usually to get the “free” item, you must buy another item that is marked up to help defray the cost of the “free” item to the business. The FTC also prohibits many of these types of schemes. Not allowed to mark up price on non-free item.
6. Low-balling. The seller advertises a low price, but through a variety of means, ends up selling it to the consumer for a higher price. This frustrates the consumer’s comparison-shopping. It is deceptive to sell goods above advertised price.¹⁶
7. Consumer special selection/winning. Making the offer seem like a good deal by saying the consumer is “specially selected” or has won the opportunity for the deal when the scheme is really designed to make contact with prospective buyers and special prices are not being offered.¹⁷
8. Offering goods and services to consumers without disclosing all conditions and limitations on the offer is deceptive.¹⁸

¹⁶ See *Florida Dep’t of Consumer Affairs v. Father & Son Moving & Storage*, 643 So. 2d 22 (Fla. Dist. Ct. App. 1994); *Truex v. Ocean Dodge, Inc.*, 529 A.2d 1017 (N.J. Super. Ct. App. Div. 1987).

¹⁷ *Mkt. Dev. Corp.* 95 F.T.C. 100 (1980); *Household Sewing Mach. Co.*, 76 F.T.C. 207 (1969); *Raylew Enters., Inc.*, 74 F.T.C. 1093 (1968); *E.W. Sederstrom*, 66 F.T.C. 973 (1964); Herbert Howell, 62 F.T.C. 1240 (1963); *Van-R, Inc.*, 62 F.T.C. 1215 (1963).

¹⁸ See *Fed. Trade Comm’n v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205 (D. Nev. 2010) (telemarketers called consumers at work and purported to be taking survey, leading consumers to believe that subscription was free gift); *Fed. Trade Comm’n v. Magazine Solutions, L.L.C.*, 2010 WL 1009442 (W.D. Pa. Mar. 15, 2010) (telemarketers promoted worthless coupon book; consumers led to believe that magazine subscription was free gift, or would be paid for by savings from coupons), aff’d, 432 Fed. Appx. 155 (3d Cir. 2011); *Fed. Trade Comm’n v. City West Advantage, Inc.*, 2008 WL 2844696 (D. Nev. July 22, 2008) (offer of “free” internet shopping spree was deceptive where shipping and handling fees often exceeded the value of the products purchased); *Value Am., Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 24,766, F.T.C. Dkt. C-3976 (F.T.C. Sept. 5, 2000) (consent order concerning ads for low-price computers that did not adequately disclose that a three-year internet service contract was required); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069 (Del. 1983); *Luskin’s, Inc. v. Consumer*

C. General Misrepresentation

1. Uniqueness. Making false claims about a product's uniqueness, exclusiveness, or originality.¹⁹
2. Safety. Failure to disclose latent safety risks associated with a product.²⁰
3. Quality and comparison. Misrepresenting "a product's quality, style, nature, composition, identity or ingredients." (NCLC UDAP at § 5.4.3)
4. Size. Misrepresenting a product's size or weight usually by using oversized containers, slack fill in the container, etc.²¹
5. Endorsement. Misrepresenting the endorsement or approval of a product by an agency, company, or government organization.
6. Products characteristics, uses and benefits. A representation that an insurance policy would last as long as the plaintiff lived was a UDAP violation because it misrepresented the

Prot. Div., 726 A.2d 702 (Md. 1999).

¹⁹ *Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Fedders Corp.*, 85 F.T.C. 38 (1975), *aff'd*, 529 F.2d 1398 (2d Cir. 1976); *Revere Chem. Corp.*, 80 F.T.C. 85 (1972).

²⁰ *Hendricks v. StarKist Co.*, 30 F. Supp. 3d 917, 931–932 (N.D. Cal. 2014) (denying motion to dismiss claim that the appearance of a container that fails to comply with FDA fill standards is misleading); *Klein v. Chevron U.S.A.*, 137 Cal. Rptr. 3d 293 (Cal. Ct. App. 2012) (reversing dismissal of claim that sale of gasoline by the gallon without adjusting for fact that hot weather causes gasoline to expand in volume was unfair and deceptive).

²¹ *Bratton v. Hershey Co.*, 2017 WL 2126864 (W.D. Mo. May 16, 2017) (refusing to dismiss UDAP claim that slack-filling violated federal regulations and was deceptive; claim not defeated by package's disclosure of weight, number of pieces, and number of servings); *Izquierdo v. Mondelez Int'l, Inc.*, 2016 WL 6459832, at *6–7 (S.D.N.Y. Oct. 26, 2016) (slack-filling may violate UDAP statute even if weight and number of pieces are stated on the package); *Avalon Indus.*, 83 F.T.C. 1728 (1974); *Papercraft Corp.*, 63 F.T.C. 1965 (1963); *Hobby Indus. Ass'n of Am., Inc. v. Younger*, 161 Cal. Rptr. 601 (Cal. Ct. App. 1980). See also 15 U.S.C. §§ 1451 to 1461 (Fair Packaging and Labeling). But see *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016) (lip balm container that, because of its shape, did not dispense all of the product, is not deceptive, where remaining product was clearly visible and was retrievable by means other than the package's screw mechanism, nor was its larger-than-necessary package deceptive to a reasonable consumer); *Hilleen v. Blistex, Inc.*, 2017 WL 2868997 (N.D. Ill. July 5, 2017) (package that, because of its shape, did not effectively dispense all of the product is not deceptive). But cf. *Stewart v. Riviana Foods Inc.*, 2017 WL 4045952 (S.D.N.Y. Sept. 11, 2017) (claim that pasta package was deceptive because it was same size as packages that contained more pasta is not preempted by federal law, but no reasonable consumer would be deceived where net weight is prominently displayed and box has distinct color and design); *Bautista v. Cytosport, Inc.*, 223 F. Supp. 3d 182 (S.D.N.Y. 2016) (slack filling of containers that is allowed by FDA regulation cannot be UDAP violation).

characteristics of the policy. See CONN. GEN. STAT. § 38a-815; *Jones v. Ray Ins. Agency*, 59 S.W.3d 739 (Tex. App. 2001); *Mullen v. Allstate Ins. Co.*, 2009 WL 2782224 (Colo. App. 2009).

7. Product's method of manufacture such as made by handicap persons or "Made in America."
 8. Approval or affiliation of a product.
- D. Deceptive performance practices.
1. Layaway. Sellers must disclose all aspects of their layaway policies to consumers. Specifically, they must disclose the goods covered, the period the offer is held open, the down payment, and the cash price. The seller must hold the specific goods or an exact duplicate when payment is made, and must be for the price originally agreed upon.
 2. Delay and non-delivery. Failure to make prompt delivery or to honor a request for a full refund when delivery is delayed unreasonably. If delivery is going to be late seller must disclose right to full refund. FTC's Mail, Internet, or Telephone Order Merchandise Rule (16 C.F.R. pt. 435).
 3. Damaged and defective goods. Failure to disclose defects or damages known to the seller, even if the sale is "as is."²² Most of these cases deal with automobile sales. Concealment of known defects could also be fraud.
 4. Used as new. Sellers must disclose when a product is rebuilt, reconditioned, etc. See *Bourgi v. West Covina Motors, Inc.*, 83 Cal. Rptr. 758 (2008). Selling demonstrator car as new not UDAP when seller told buyer it was a demonstrator and buyer signed knowing mileage. See *Hodges v. Koons Buick Pontiac GMC, Inc.*, 2001 U.S. Dist. LEXIS 9591 (Jan 3, 2001).
 5. Packaging – Oversized boxes or containers misrepresenting the size, amount, or dimension of the product.

²² *Adkins v. Apple, Inc.*, 147 F. Supp. 3d 913 (N.D. Cal. 2014) (applying California's Secondhand Merchandise Labeling Law; holding that this law's disclosure requirements apply to replacement merchandise); *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411 (1st Cir. 1985) (Mass. law); *Automobile Trader v. Simmons*, 22 Ohio Op. 3d 149 (Ohio Ct. App. 1981); *Metro Ford Truck Sales, Inc. v. Davis*, 709 S.W.2d 785 (Tex. App. 1986). But see *Erwin v. Smiley*, 975 S.W.2d 335 (Tex. App. 1998).

IX. UDAP APPLICATION TO SELECTED AREAS

A. Debt collection

1. UDAP statutes may provide relief when Fair Debt Collection Practices Act cannot such as:
 - a) For creditor abuses;
 - b) When creditors do not oversee the collection practices of the collections agencies they hire to collect their debts;
 - c) May provide for better relief such as attorney fees.
2. Misrepresentations as to:
 - a) Identity/affiliations of collector such as:
 - (1) Work with U.S. Marshall or Sheriff's office.
 - (2) Work for government agency.
 - (3) Use of fictitious titles for their job position.
 - (4) The debt collector or creditor must disclose that letters, forms, questionnaires are for the purpose of collecting a debt.
 - b) Imminence of threatened actions.
 - (1) Cannot threaten that nonpayment "may" result in litigation unless suit is the ordinary response.
 - (2) Cannot threaten that if no payment is received within a specified number of days, a specified action will be initiated if that determination has yet to be made.
 - (3) Cannot use simulated telegrams to

misrepresent the urgency of the matter.

- c) Legal consequences.
 - (1) Cannot be designed to create fear and take advantage of consumer's ignorance of legal procedures.
 - (2) Cannot threaten garnishment without telling the consumer a court order is required.
 - (3) Cannot say debtor is subject to prosecution under Federal Mail Fraud Statutes.

3. Harassment

- a) Threats of violence
- b) Threats of ridicule
- c) Threats to inform employers

4. Contracts/Warranties.

- a) A mere breach of contract without anything else does not necessarily lead to a UDAP violation.
- b) Systematic breach of many consumer contracts or a failure to disclose is a UDAP violation. *See Guste v. Orkin Exterminating Co.*, 528 So.2d 198 (La. Ct. App. 1988) (Orkin promised fixed annual renewal prices and then unilaterally raised the fees for 200,000 customers.).
- c) It is an unfair practice not to provide disclosures in the same language as the advertisement.
- d) Cancellation rights.
- e) Confusing contract terms may even be unfair. *See, e.g., Michaels v. Amway Corp.*, 522 N.W.2d 703 (1994); *Orlando v. Finance One*, 369 S.E.2d 882 (W.Va.

1988). Oral representations inconsistent with the written contract, even if the contract states that oral representations inconsistent with the contract, are not part of the deal. See also *Commonwealth v. Monumental Properties*, 329 A.2d 812 (1974); *Oldendorf v. Gen. Motors Corp*, 751 N.E.2d 214 (2001); *Gonsalves v. First Ins. Co.* 516 P.2d 720 (1973).

- f) Entering into a contract with no intention to fulfill obligations is a UDAP violation.
- g) UDAP violation to conceal breach of contract as long as possible.
- h) Most state courts find warranty breach as a *per se* UDAP violation.

B. Insurance.

1. Look at State Unfair Insurance Practices (UNIP). Every state has adopted UNIP legislation, which defines and prohibits unfair methods of competition and unfair or deceptive acts and practices in the insurance business.
2. Violations of state UNIP are probably *per se* violations of state UDAP.
3. If not UNIP violation, still look to State UDAP.

C. Rent-to Own (RTO).

1. The RTO industry is a major source of sales, particularly of appliances, to the low income community. The industry markets to low income consumers by advertising in minority media, on buses, and in public housing projects.²³
2. Deceptive inducements or sales practices. RTO companies will often use many of the techniques already mentioned including bait and switch, low-balling, etc. In addition, look carefully for other misrepresentations, such as describing the transaction as a lease when it is in fact a contract for sale.

²³ NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, § 8.7.1 (10th ed. 2021, updated at www.nclc.org, updated at www.nclc.org/library).

3. Disclosure problems. Look for lack of disclosure in the sale. Usually, the companies will not disclose the total of all the payments (which is 3 or 4 times the normal sale price) or the effective annual percentage rate, which is often usurious.
4. Repossession. Many times the RTO companies will use misrepresentations in repossession efforts to coerce the consumer into paying. This includes threats of criminal or civil actions they have no intention of pursuing, misrepresenting their workers as law enforcement officials, and seeking more than they are entitled to under the contract to settle the matter.

X. GENERAL UDAP PROCEDURE.

A. Notice or Demand Letter

1. Required in at least nine states (AL, CA, GA, IN, ME, MS, TX, WV, WY) as a precondition to suit. (MS requires that the consumer utilize an informal dispute resolution procedure prior to the suit).²⁴
2. Gives seller an opportunity to resolve informally.
3. Different from notice provisions. Notice to the Attorney General before judgment is entered is a precondition to suit.
4. Must give the seller sufficient information to review the law and determine whether the requested relief should be granted.
 - a) Identify claimant.
 - b) Reasonably describe the unfair and deceptive practice.
 - c) Reasonably describe the injury.
5. In writing.
6. Mailbox Rule. The principle that when a pleading or other document is filed or served by mail, filing or service is deemed

²⁴ *Id.* at § 11.4.4.1.

to have occurred on the date of mailing.

- B. Elements to Plead. Some state courts have developed a standard list of elements for a UDAP claim. (CO, DE, GA, HI, IL, MN, NH, NJ, NY, NC, OK, OR, PA, SC, TN, TX, VT, WA, WI).
- C. Allegations should be specific in order to organize the case and to make it more credible.
- D. Public interest.
 - 1. In some states (CO, GA, MN, NE, NY, SC), the suit must be in the public interest.
 - a) Violates a statute that has a specific legislative declaration of public interest impact, or
 - b) Part of pattern or general course of conduct that has the real potential of repetition.
 - 2. Most states do not have this requirement. This area of law can be very complex in the State of Washington. Legal assistance attorneys in Washington should consult with experienced practitioners.
- E. Damages. A private cause of action exists in every state except Iowa, but actual damages may be a prerequisite in some states.
 - 1. Actual. Some damage.
 - 2. Consequential damages, all damages foreseeable flowing from a UDAP.
 - 3. Statutory. Vary between \$25 to \$10,000, even if actual damages have not been proven.
 - 4. Treble damages are possible for willful, bad faith, and intentional violations.
- F. Class actions. Preconditions by one may satisfy preconditions for all. Class actions adjudicate numerous claims that individually damaged consumers would not pursue because they are uninformed of their rights, deterred from filing individual suits because of ongoing relationships with defendant, or because their claims may be too small to merit

adjudication.

G. Attorney's fees.

1. Almost all states that authorize a private cause of action authorize reasonable attorney's fees for successful litigants.
2. UDAP statutes make it possible for attorneys to devote significant resources to a case even if the consumer's dollar loss is relatively minor. This encourages consumers to remedy marketplace abuses and increases the seller's maximum liability if they refuse to settle.
3. However, some limit the amount/allowance of fees based on the consumer status (personal v. business); certain defenses (bona fide error defense); or the seller's conduct (willful v. negligent).

H. Evidence to look for in UDAP cases:

1. Pattern of practice
 - a) Sales manuals
 - b) Training materials
 - c) Internal memos
2. Former employees
3. Look at all written materials to see if they are deceptive on their face or fail to comply with applicable rules or regulations.
4. Seek discovery of all persons who have purchased or borrowed from the merchant within specified time frame—relevant for punitive damage claims, can also show impact on public.
5. Evidence of merchant's financial status.
6. Look for collected consumer complaints from FTC, Better Business Bureau, and state or local enforcement agencies.

(Military Sentinel website).

7. The merchant's own business web site.
8. Past court records.
9. Publicity about consumer's plight may bring out other victims or disgruntled past employees.
10. Consider expert testimony.

XI. CONCLUSION

See Appendix A of the Consumer law guide for state UDAP statutes.

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CHAPTER C

PROTECTIONS BASED ON THE TRANSACTION

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September 2022

CHAPTER C

PROTECTIONS BASED ON THE TRANSACTION

I. **RULE CONCERNING COOLING-OFF PERIOD FOR SALES MADE AT HOMES OR AT CERTAIN OTHER LOCATIONS (a.k.a. COOLING OFF PERIOD FOR DOOR-TO-DOOR SALES.**

A. References

1. 16 C.F.R. § 429. Promulgated by the FTC under its authority to regulate unfair and deceptive acts and practices, the Rule Concerning Cooling-Off Period For Sales Made at Homes or at Certain Other Locations is found in the CFR rather than a consumer protection statute.
2. National Consumer Law Center, Consumer Warranty Law §15.7.3, National Consumer Law Center, Consumer Warranty Law (6th ed. 2021).
3. State statutes, Appendix B.

B. General

1. The Rule gives the consumer the unilateral right to rescind consumer purchase contracts for three business days following a door-to-door sale.
 - a) It is purely a unilateral right. The consumer does not need to have any reason at all.
 - b) This is separate authority from any other source of claim that the consumer may have, such as a warranty or other protection.
 - c) Right to rescind may be exercised even if the seller has performed the service before cancellation. Example – A home improvement contractor performs right away, consumer cancels, the builder can only take back

material, but cannot charge for the service. Could be a UDAP if the seller performed in order to frustrate consumer's cancellation right.

2. Rule contains disclosure requirements and notice requirements.
 - a) Violations of either the disclosure or notification rules can arguably give rise to a remedy.
 - b) A potential problem, as we shall see below, is that the rule itself contains no private right of action; the FTC enforces the rule. However, some courts have found violations of FTC trade regulations to be *per se* UDAP violations.¹

C. Definitions and exclusions

1. Door-to-door Sale.
 - a) Sale, lease, or rental (rent-to-own companies routinely do not provide notice).
 - b) Consumer goods and services (primarily for personal, family, or household purposes).
 - c) Total purchase price of \$25.00 or more (includes interest and service charges) if sale is made at the buyer's residence or total purchase price of \$130.00 or more if made at a place other than the buyer's residence.
 - d) Personal solicitation by the seller.
 - e) At a place other than the permanent place of business of the seller. For example:
 - (1) Buyer's residence. A company that persuades a

¹ See *Swiss v. Williams*, 445 A.2d 486 (N.J. Super. Ct. Dist. Ct. 1982) (finding of UDAP violation buttressed by reference to federal legislation and FTC Cooling-Off Period Rule regulating the same subject matter and designating the conduct as unfair and deceptive); *Eastern Roofing and Aluminum Co. v. Brock*, 320 S.E.2d 22 (N.C. Ct. App. 1984). See generally National Consumer Law Center, Federal Deception Law § 2.5 (3d ed. 2017), updated at www.nclc.org/library (detailed analysis of FTC door-to-door sales rule).

sale prospect to invite their neighbors to an in-home sales meeting is covered under the rule.

- (2) Facilities rented on a temporary or short-term basis including hotel or motel rooms, convention centers, fairgrounds, or restaurants.
 - (a) This could happen to servicemembers. A Marine was on liberty and eating pizza in a local pizza parlor. He was approached by an attractive young female who struck up a conversation with him. During the conversation the talk gradually turned to what a wonderful job she had and what a great boss she had. As it turned out (no coincidence) the boss was also in the pizza parlor. He came over and began a sales pitch. Before it was over, the Marine had purchased a photographic reproduction package. The Rule applies to this scenario because it occurred in a place other than the regular place of business of the seller.
- (3) Sales at the buyer's workplace.
- (4) Sales in dormitory lounges (barracks).

2. Business day. Any calendar day except Sundays and federal holidays. The current federal holidays are New Year's Day, Martin Luther King, Jr.'s Birthday, President's Day, Memorial Day, Juneteenth, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving and Christmas. The day of sale is excluded in the calculation.

3. Exclusions

- a) Pre-arranged visits after initial contact at a seller's regular place of business. An example would be if you went to Home Depot for vinyl siding. The person at the counter makes an appointment for the sales rep to come to your house. The Rule does not apply because it is a pre-arranged visit.
- b) Contracts in which the cooling-off period of the

Truth-in-Lending Act applies. (See TILA outline).

- c) Buyer-initiated contacts for a bona-fide emergency need, provided the seller obtains a written waiver dated and signed by the buyer explaining the emergency. This is designed to eliminate the rule's applicability to items such as purchases of a new heating unit in the middle of winter when the old one gives out.
- d) Solicitations by mail or telephone, but the Mail and Phone Order Rule or the Telemarketing Sales Rule may apply. The FTC has adopted telemarketing rules that include disclosure requirements and cooling off rules for certain transactions.
- e) Buyer-initiated visit for repairs of personal property. This eliminates the appliance repairman, and similar workers, from coverage under the rule.
- f) Sale (or rental) of:
 - (1) Real property
 - (2) Insurance
 - (3) Securities
- g) Automobile tent sales/auctions (where dealer has permanent place of business elsewhere).
- h) Craft Fairs

D. Requirements of the Rule

1. Copy of the **fully completed** contract for the consumer to retain. This means no blanks. **PRACTICE POINTER**: This is a common way for legal assistance attorneys to win - look for blanks - the more the better and particularly those in the cooling off period part of the form or the TILA disclosures. Sellers often copy other seller's disclosure notices not realizing that the other seller has properly deleted language not applicable to their sale, however the deleted language is applicable to the new seller.

2. Oral and written notice of the rescission right.
 - a) One easily detachable, fully completed copy for the consumer to retain and one copy for consumer to send to seller to cancel the contract;
 - (1) Although the market is improving, ensure that the consumer received sufficient copies of the form. If the rescission is printed on the back of the Truth in Lending disclosures, that likely does not meet the requirements of the rule.
 - b) Date of transaction, and;
 - c) Name and address of seller. This is the permanent address for purpose of sending the notice of rescission.
 - d) Seller must orally inform the consumer of the right to rescind.
 - (1) This becomes a problem of proof with a he said, she said scenario. The rule requires oral notice but the legal assistance client frequently denies it. The company rarely has proof, although some may record a verification call and have proof.
 - e) Notice of the right to rescind must be in close proximity to the signature block of the consumer.
 - f) Seller must not attempt to misrepresent right to rescind.
 - g) Notice must be in bold print.
 - h) Notice must be in the same language as that used during the sales presentation.
 - i) Notice need not conform exactly to FTC recommended language.
3. Waiver is not allowed. (Exception - emergency needs).
4. Sellers must honor rescission.

a) Seller not permitted to sell or transfer credit note before midnight on the fifth business day following the transaction.

(1) Frequent violation. The seller cannot transfer any note until the rescission period has passed.

b) If the consumer cancels the contract, the seller has 10 days within which to provide the consumer with instructions regarding the disposition of the goods already delivered to the consumer.

E. Mechanics of rescission

1. Consumer must mail or deliver written notice to seller before midnight of the third business day following the transaction.

a) Problem of proof - mailing - best to use return receipt mail - that leaves the consumer with a form to keep. If you fax etc - get some sort of proof of transmission. PRACTICE POINTER: when mailing something return receipt be sure to also mail a copy via regular first-class mail. A recipient can decline delivery of return receipt mail but first-class mail is always delivered. A recipient can return to the sender or refuse to accept but it is always delivered.

b) State law may provide for a continuing right to cancel beyond the three days if the notice is defective. See *Pinnacle Energy, L.L.C. v. Price*, 2001 Del. C.P. LEXIS 28 (Mar. 21, 2001), *Williams v. Shroyer*, 2000 Ohio App. LEXIS 5798 (Dec. 13, 2000), and *Crystal v. West & Callahan, Inc.*, 614 A.2d 560 (Md. 1992).

2. Use cancellation form provided by the seller or any written form that communicates the desire to rescind to the seller.

a) Rule really does mean any form - you can write it on an MRE, mail it, and it is effective – “Dear Seller, I cancel. Love, Buyer.”

b) However, mere stopping payment on a check may

not be enough.

3. Seller must return trade-in, if any, within 10 days or receipt of consumer's notice.
4. Consumer's responsibilities following rescission.
 - a) Make goods already delivered available to the seller, or,
 - b) Follow the seller's instructions regarding return of the goods.
5. Return is at the seller's expense.
6. Risk of loss during return is on the seller.
7. If the seller fails to pick up the goods within 20 days, the consumer may retain the goods with no further obligation to the seller.

F. FTC Application and Interpretation of the Rule.

1. Strict interpretation against the seller.
2. If the buyer cancels the contract after the seller has performed, there is no recovery for the seller based on *quantum meruit*. Some states, however, do interpret their own rule to allow for *quantum meruit* recovery. If the seller is performing work in order to discourage the buyer from exercising cancellation rights, look to state UDAP statutes for relief.
3. The federal rule does not provide for an extended right to rescind for noncompliance with the notice provisions, but state UDAP statutes may.

G. Remedies.

1. No independent cause of action for rule violation.
2. Rule violation may be *prima facie* evidence of a state UDAP violation.

- H. Relationship with state and local laws.
1. Rule does not preempt state law, except when state law is directly in conflict with the rule.
 2. Examples.
 - a) State law authorizing a cancellation fee is preempted.
 - b) State law with no requirement for providing notice is preempted.
 3. Some state laws have broader coverage than the FTC Rule. See *Williams v. Schroyer*, 2000 Ohio App. LEXIS 4798 (Dec. 13, 2000) (home repair transactions are covered where buyer originally calls seller but then further negotiations take place at the buyer's home.)
 4. Some municipalities and jurisdictions prohibit door-to-door solicitation via local laws and ordinances, commonly known as "Green River Ordinances." Although properly tailored ordinances are potentially permissible, some may be overbroad and violate the First Amendment. See, e.g., *Project 80s, Inc. v. City of Pocatello*, 942 F.2d 635 (9th Cir. 1991). PRACTICE POINT: Analyzing whether or not a commander may or may not regulate speech on an installation is separate and distinct from analyzing whether or not a "Green River Ordinance" is permissible, as the law regarding federal installations includes numerous additional and different variables.

II. TELEPHONE AND INTERNET TRANSACTIONS

- A. References
1. National Consumer Law Center, Federal Deception Law, Chapters 6 and 7 (4th ed. 2022), updated at www.nclc.org/library.
 2. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2006).
 3. Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 - 6108 (2006) [implemented by the

Telemarketing Sales Rule].

4. Telemarketing Sales Rule, 16 C.F.R. § 310.
5. Telephone Disclosure and Dispute Resolution, 15 U.S.C. § 5711 [implemented by the Telephone Disclosure and Dispute Resolution Rule].
6. Telephone Disclosure and Dispute Resolution Rule, 16 C.F.R. § 308.
7. FCC Report and Order In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 03-153 (July 3, 2003).
8. State telemarketing statutes (see Appendix B).

B. Overview.

1. Developments in communications technology, including widespread use of the internet, cellular telephones, and autodialing, have resulted in new and overlapping rules and regulations governing solicitation of consumers.
2. Both the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) have important roles in protecting consumers from abusive practices involving telephone, computer, and facsimile solicitations.
3. The manner in which a consumer may enforce substantive rights, including his or her entitlement to damages, will be determined by the applicable federal statute, an analogous state statute, or an applicable state UDAP statute.

C. Telephone Consumer Protection Act (TCPA) of 1991.

1. General. The TCPA is implemented by the FCC through its promulgation of Restrictions on Telephone Solicitation, 47 C.F.R. § 64.1200.
2. Unlike other consumer protections statutes that address deficiencies in traditional contract law as applied to consumers, the TCPA is primarily concerned with protecting consumer

privacy by preventing unwanted or harassing commercial solicitations.

3. Prohibitions and requirements. The statute and rule create the following prescriptions and prohibitions.
 - a) Automatic telephone dialing systems, or an artificial or prerecorded voice, may not be used to initiate a telephone call to any of the following:
 - (1) Emergency telephone lines; including "911", or emergency numbers to hospitals, doctors, health clinics, poison control center, or fire or police departments.
 - (2) Guest room or patient room of a hospital, health care facility, elderly home, or similar establishment.
 - (3) Any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.
 - b) Artificial or prerecorded voice may not be used to initiate any telephone call to any residential line without the prior consent of the called party, unless the call:
 - (1) Is made for emergency purposes;
 - (2) Is not made for a commercial purpose;
 - (3) Is made for a commercial purpose but does not involve an unsolicited advertisement;
 - (4) Is made to a person with whom the caller has an established business relationship at the time the call is made; or
 - (5) Is made by or on behalf of a tax-exempt nonprofit organization.

- c) A telephone facsimile machine, computer, or other device may not be used to send an unsolicited advertisement to a telephone facsimile machine.
- d) Telemarketing calls that are legally permissible may not be disconnected prior to 15 seconds or 4 rings.
- e) No more than 3 percent of answered calls may be “abandoned,” meaning that no live sales representative is connected to the call within 2 seconds after the called person’s greeting.
- f) All artificial or prerecorded telephone messages must initially state clearly the identity of the individual or business responsible for initiating the call; and, prior to the conclusion of the call, a telephone number at which the responsible entity may be called.
- g) Telemarketing calls may not be initiated to a residential telephone subscriber between 9:00 p.m. and 8:00 a.m. (local time at the called party’s location).
- h) In a separate rule, the FCC has required all telemarketers to transmit Caller ID information to the called party. 47 C.F.R. § 64.1601(e).

4. Do-Not-Call Registry

- a) The most widely publicized provision of the TCPA requires telemarketers to maintain a company specific do-not-call list and to not call numbers listed on the national do-not-call registry.
- b) The FTC’s Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(ii)-(iii), discussed elsewhere in this outline, contains similar provisions for do-not-call lists.
- c) The National Do-Not-Call Registry referred to in both the FCC’s Restrictions on Telephone Solicitation and the FTC’s Telemarketing Sales Rule is located on the Internet at <https://www.donotcall.gov>.

- (1) Registrations of residential telephone numbers,

including cell phones, become effective after 31 days. The Do-Not-Call Improvement Act of 2007 removed the requirement for re-registration after 5 years. See 15 U.S.C. § 6155.

- (2) Complaints of telemarketer violation of the Do-Not-Call provisions of either rule may be submitted on the same website.

d) Specific requirements concerning do-not-call lists.

- (1) Initiation of a telephone solicitation to a number on the national do-not-call registry is a violation of the rule unless the telemarketer can demonstrate one of the following:

- (a) Adequate business procedures designed to comply with the rule;
- (b) That the subscriber has provided a prior express invitation or permission for the call; or
- (c) The telemarketer has a personal relationship with the subscriber.

- (2) Telemarketers are required to maintain a company specific do-not-call list of subscribers who do not wish to receive telemarketing calls by or on behalf of that entity.

- (3) Telemarketers must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.

- (4) Tax-exempt nonprofit organizations are not required to maintain an entity specific do-not-call list.

5. Key definitions applicable to the Restrictions on

Telephone Solicitation

- a) “Established business relationship” means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber on the basis of the subscriber’s purchase or transaction with the entity within the previous 18 months; or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the previous 3 months.
- b) “Telemarketer” means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.
- c) A “telephone solicitation” does not include a call or message
 - (1) to any person with the person’s prior express invitation or permission;
 - (2) to any person with whom the caller has an established business relationship; or
 - (3) by or on behalf of a tax-exempt nonprofit organization.

6. Enforcement

- a) The TCPA creates a private cause of action in federal or state court authorizing either actual damages or statutory damages of \$500, whichever is greater, for each violation. Treble damages are available for violations that are willful or knowing.
- b) Violations supporting a cause of action include the provisions regarding prerecorded telephone calls; autodialers; receipt of more than one call in any 12-month period in violation of the do-not-call registry provisions; calls outside of the permissible time frame; blocking Caller ID; abandoning calls; and failing to provide required identification.
- c) Complaints may also be filed directly with the FCC.
- d) Although the federal statute does not authorize attorney’s

fees, state UDAP statutes may provide such an award.

D. Telemarketing and Consumer Fraud and Abuse Prevention Act

1. General. The Telemarketing Consumer Fraud and Abuse Prevention Act, passed in 1994, is partially implemented by the FTC's Telemarketing Sales Rule.²
 - a) The purpose of the statute is to empower the FTC to issue regulations "prohibiting deceptive and abusive telemarketing acts and practices."
 - b) Violations of the Telemarketing Sales Rule are generally defined as unfair or deceptive acts or practices.³
 - c) Unlike the FCC's Restrictions on Telephone Solicitation, the Telemarketing Sales Rule does not create a private cause of action unless actual damages exceed \$50,000. The consumer must also show a pattern or practice of rule violations. Thus, enforcement is primarily accomplished by the FTC, CFPB, or by use of a state UDAP statute that creates a separate cause of action.
2. Telemarketing Sales Rule – Prescriptions and Prohibitions
 - a) Deceptive Telemarketing Acts or Practices (16 C.F.R. § 310.3). The following conduct is defined as a deceptive act or practice:
 - (1) Failure to truthfully disclose, in a clear and conspicuous manner, the following material information before customer pays for goods or services:
 - (a) Total costs of the transaction and the quantity of any goods or services subject to the sale;

² 16 C.F.R. 310, <https://www.ecfr.gov/current/title-16/chapter-I/subchapter-C/part-310>

³ The authority for the TSR is not the Federal Trade Commission Act ("the FTC Act") but the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA) 15 U.S.C. §§ 6101 to 6108, But cf. *N. River Ins. Co. v. Guarantee Tr. Life Ins. Co.*, 2014 WL 1493951 (Ill. App. Ct. Apr. 14, 2014) (insurance coverage dispute; noting that, even though the TSR was adopted under the TCFAPA, that Act states that a violation also violates the FTC Act).

- (b) All material restrictions, limitations, or conditions of the transaction;
 - (c) Any policy of not making refunds, cancellations, or exchanges;
 - (d) All material terms and conditions of any refund, cancellation, or repurchase policy that is mentioned in the call;
 - (e) In a prize promotion, the odds of receiving a prize and all material conditions or costs to receive or redeem the prize, that no purchase or payment is required to win a prize or to participate in a prize promotion or payment does not increase chances to win;
 - (f) In the sale of goods or services to protect, insure or otherwise limit a customer's liability in the event of unauthorized use of a customer's credit card, the limits on a cardholder's liability pursuant to 15 U.S.C 1643. (Liability limit \$50);
 - (g) If there is a negative option feature, all material terms, including that the customer's account will be charged unless the customer takes an affirmative action to avoid the charges; or
 - (h) In a request for charitable contribution: the identity of the charitable organization and the purpose to solicit a charitable contribution.
- (2) Misrepresenting, directly or by implication, any of the following:
- (a) Total costs of transaction;

- (b) Any material restrictions, limitations, and conditions of transaction;
 - (c) Any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services;
 - (d) Any material terms and conditions of any refund, cancellation, or repurchase policy;
 - (e) Any material aspect of a prize promotion;
 - (f) Any material aspect of an investment opportunity;
 - (g) Seller's affiliation with any government or third-party organization;
 - (h) That any customer needs offered goods or services to provide protections already provided under 15 U.S.C. § 1643 (\$50 limit of liability for credit card unauthorized use; or,
 - (i) Any material aspect of negative options.
- (3) Solicitors for charitable organization even if they seek donations rather than purchases of goods or services cannot misrepresent the following:
- (a) The nature, purpose, or mission of the charity;
 - (b) That any charitable contribution is tax deductible;
 - (c) The purpose for which any charitable contribution will be used;
 - (d) The percentage or amount that goes to the charity after admin fees are deducted;

- (e) Material aspects of prize promotions; or
 - (f) Affiliation, endorsements or sponsorship by any person or government.
- (4) Obtaining or submitting for payment a form of negotiable paper without the person's express verifiable authorization. (Includes charitable contributions).
- (5) Authorization must include the following: the number of payments; the dates the authorization will be submitted for payment; the customer's name and billing information; the date of customer's oral authorization; and the telephone number the customer can call for inquiry.
- (6) Authorization is verifiable if it is:
- (a) Express and in writing;
 - (b) Express and made orally and is tape-recorded; or
 - (c) Written confirmation of the transaction has been sent to the customer by first-class mail and contains all information required for oral authorization above prior to submission for payment and the confirmation includes all disclosures required under the Rule.
 - (d) Express verifiable authorization is not needed if the method of payment is a credit card subject to protections of the Truth in Lending Act and Regulation Z (12 C.F.R. Part 226) or a debit card subject to the protections of the Electronic Fund Transfers Act and Regulation E (12 C.F.R. Part 1005); or
- (7) Making a false or misleading statement to induce

any person to pay for goods or services or to induce a charitable contribution.

- b) Assisting and facilitating. It is a deceptive telemarketing act or practice to provide substantial assistance or support to a telemarketer who that person knows, or consciously avoids knowing, is engaged in a violation of the Telemarketing Sales Rule.
- c) Credit card laundering. It is a deceptive telemarketing act or practice for a merchant, or an employee of a merchant, to engage in any credit card action not authorized directly by the cardholder or the merchant agreement with the cardholder.
- d) Abusive Telemarketing Acts or Practices. (16 C.F.R. § 310.4)
 - (1) Abusive conduct, generally. The following are defined as abusive telemarketing acts or practices:
 - (a) Threats, intimidation, profane, or obscene language;
 - (b) Requesting or receiving payment for goods and services to fix credit reports UNLESS:
 - (i) The time frame in which the seller is supposed to have provided all goods and services has passed; and
 - (ii) The seller provides the person with documentation of success in the form of a credit report having been issued more than 6 months after the results were achieved.
 - (c) Requesting or receiving payment for goods and services to obtain the return of money or other value from a previous telemarketing transaction until 7 business days after the money or other item is returned to the consumer;

- (d) Requesting or receiving payment or fee in advance of obtaining a loan or other extension of credit;
 - (e) Using pre-acquired account information without the expressed informed consent of the consumer including, at a minimum, obtaining from the customer the last four digits of the account number to be charged and making an audio recording of the entire transaction;
 - (f) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; except in processing of payment for a business transaction; or,
 - (g) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer.
- (2) A pattern of telephone calls. The following are defined as abusive telemarketing acts or practices when engaged in by a telemarketer:
- (a) Causing the phone to ring repeatedly and continuously with intent to annoy, abuse, or harass any person at the called number;
 - (b) Denying or interfering in any way with a person's right to be placed on the "do-not-call" registry;
 - (c) Initiating a call when that person's telephone number is on the "do-not-call" registry maintained by the FTC. Unless the seller:
 - (i) Has obtained an express agreement in writing with the person authorizing calls to that person; or

- (ii) Has an established business relationship (within 18 months of last purchase or 3 months of inquiry) with that person and they have not said they do not want to receive calls under another section of the rule.
- (d) Initiating a call with a person who has previously stated that he or she does not wish to receive calls made by or on behalf of the seller whose goods or services are being offered or on behalf of a charitable organization EXCEPT, seller or telemarketer is not liable IF:
- (i) It has established and implemented WRITTEN procedures to comply with this rule;
 - (ii) It has trained its personnel on these procedures;
 - (iii) The seller or telemarketer maintains a list of those who may not be called; and,
 - (iv) The subsequent call is a result of error.
- (e) Abandoning an outbound telephone call. If a person answers it and the telemarketer does not connect the call to sales rep in two seconds or promptly plays a recorded message that states the number and name of the seller on whose behalf the call was placed.
- (3) Calling time restrictions. It is an abusive telemarketing act or practice for telemarketers a call a consumer earlier than 8:00 a.m. or later than 9:00 p.m. at the called person's location UNLESS the person consents to such calls. Required oral disclosures in the sale of goods or services. It is an abusive telemarketing

act or practice for a telemarketer to fail to make the following oral disclosures:

- (a) The identity of the seller;
 - (b) That the purpose of the call is to sell goods and services;
 - (c) The nature of the goods and services; and
 - (d) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered.
- (4) Required oral disclosures in the sale of goods or services in a charitable solicitation.
- (a) The identity of the charitable organization; and
 - (b) The fact that the purpose of the call is to solicit a charitable contribution.

3. Record Keeping Requirements:

- a) Seller or telemarketer must keep for 24 months:
 - (1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;
 - (2) The name and last known address of each prize recipient and the prize awarded for all prizes represented to have a value of \$25 or more;
 - (3) The name and address of each customer who purchases goods, the date the goods were shipped, and the amount paid;
 - (4) The names and addresses of all current and

former employees directly involved in telephone sales; and,

(5) All verifiable authorizations (for cashing checks, etc.) required by the rule.

b) Records may be kept in any form that the seller or telemarketer keeps similar records in the ordinary course of its business and if there is an ownership change successor must maintain records.

4. Key Definitions.

a) MATERIAL means likely to affect a person's choice of, or conduct regarding, goods or services.

b) CUSTOMER means any person who is or may be required to pay for goods or services offered through telemarketing.

c) DONOR means any person solicited to make a charitable contribution.

d) ESTABLISHED BUSINESS RELATIONSHIP means a relationship between seller and consumer based on:

(1) The consumer's purchases, rental, or lease of the seller's goods or services or a financial transaction between the consumer or seller within the eighteen months immediately preceding the date of the telemarketing call; or

(2) The consumer's inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of the telemarketing call.

- e) SELLER means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.
- f) TELEMARKETER means any person who, in connection with telemarketing, initiates or receives telephone calls to or from the customer.

5. Scope

- a) Telemarketing is defined as any plan, program or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.
- b) Specifically excluded are:
 - (1) Catalog sales where
 - (a) The catalog:
 - (i) Contains written description or illustration of goods;
 - (ii) Gives the business address of seller;
 - (iii) Contains multiple pages of written material and illustrations; and
 - (iv) Is issued at least once per year.
 - (b) AND the seller only RECEIVES calls initiated by consumer to take orders without further solicitation.
 - (2) Sale of pay-per-call services (already regulated under 16 C.F.R Part 308).
 - (3) Sale of franchises (already regulated under 16

C.F.R. Part 436).

- (4) Calls where the sale is not complete until after a face- to-face presentation by the seller.
- (5) Calls initiated by consumer:
 - (a) Without any solicitation on the part of the seller;
 - (b) In response to an advertisement through any media, EXCEPT:
 - (i) Investment opportunities,
 - (ii) Services to remove derogatory credit information,
 - (iii) Services to assist in the return of money or value for previous telemarketing transactions, and
 - (iv) Ads that promise a high degree of success in obtaining or arranging extensions of credit.
- (6) In response to a direct mail solicitation that clearly, conspicuously, and truthfully discloses all material information required by the Rule except for solicitations for investment opportunities, prize promotions, and business opportunities other than business arrangements covered by the franchise rule.
- (7) Calls between a telemarketer and any business (except for the sale of nondurable office or cleaning supplies).
- (8) Businesses not covered under the Rule:
 - (a) Banks, federal credit unions, and federal

savings and loans,

(b) Common carriers (long distance telephone companies and airlines), and

(c) Non-profit organizations.

(9) Charities are not required to comply with “Do Not Call” registry, however you can tell them not to call and they must stop.

6. Enforcement of the Rule

- a) Violation of the Rule is an unfair and deceptive act or practice under 15 U.S.C. § 57a.
- b) Any authorized state officer can bring an action on behalf of consumers.
- c) Actual damages or up to \$500 statutory damages are available for violations of the “no call” provision or for calls at inconvenient times under the Telephone Consumer Protection Act. The consumer need not prove any monetary loss or actual damages to recover under the Telephone Consumer Protection Act.
- d) Prior to initiating an action (if feasible), notice is to be given to the FTC.
- e) If a telemarketer violates the “do not call” registry, they can be fined up to \$16,000 per violation.

7. Interrelationship with Other Protections. As with all consumer cases, attorneys must look to all available protections to protect the consumer’s interests. Here are two protections related to telemarketing that a consumer might be able to assert.

- a) Fair Credit Billing Act (FCBA) (15 U.S.C. § 1666-1666j)
 - (1) If the consumer purchases goods from a telemarketer using a credit card, consider the

claims and defenses protections under the FCBA.

- (2) Basic Requirements (For more detail, see Chapter E).
 - (a) Claims and defenses may include a dispute as to quality of merchandise and non-delivery of goods.
 - (b) A consumer has right to assert against card issuer claims or defenses concerning property or services purchased with credit card, if:
 - (i) The consumer has made a good faith effort to resolve the problem with the merchant honoring the card;
 - (ii) The amount of the initial transaction exceeds \$50;
 - (iii) The initial transaction was in the same state as the cardholder's designated address or within 100 miles of such address; and
 - (iv) 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.
 - (c) In a telemarketing case, the consumer's position is that the transaction took place in her home state because the telemarketer conducted the solicitation there. You, as the attorney should anticipate an argument from the telemarketer.
 - (d) The merchant is not controlled by or the same as the card issuer (e.g. store cards).

8. The FTC Mail or Telephone Order Merchandise Rule. 16 C.F.R. Part 435. (See below). This rule requires delivery of goods ordered over the phone within 30 days.
- E. Unsolicited Bulk Commercial E-mail (Spam) 15 U.S.C. §§ 7701-7713 (2006).
1. Unsolicited bulk commercial e-mail, commonly known as “spam,” is a problem for consumers for a number of reasons, to include its use by fraudulent sellers. Internet Service Providers must add increased capacity to handle the spam. Consumers may be scammed via spam. At best, consumers must take the time to filter through spam. Additionally, spam undermines the legitimate use of e-mail, as Congress intended for email to be an efficient, cost-effective way for companies to communicate with consumers.
 2. On January 1, 2004, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM) became effective.
 3. CAN-SPAM requires:
 - a) Transmission information, such as email address, domain name, or IP address not to be false or misleading;
 - b) Subject headings not be misleading to a reasonable recipient;
 - c) Commercial e-mail must provide the valid postal address and actual e-mail address of the sender;
 - d) If a recipient asks not to receive emails, the sender must not send commercial emails that fall within the scope of the request more than 10 business day after receipt of the request; and
 - e) Commercial email must clearly be identified as an advertisement and provide clear and conspicuous ability to opt out of further emails.

III. THE MAIL OR TELEPHONE ORDER MERCHANDISE RULE

- A. References

1. 16 C.F.R. Part 435.
2. National Consumer Law Center, Federal Deception Law, §2.6 (4th ed. 2022).

B. Requirements of the Rule (16 C.F.R. § 435.1).

1. **TIMELY SHIPMENT.** It is an unfair and deceptive act or practice for a seller to solicit any order for the sale of merchandise to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:
 - a) Within that time clearly and conspicuously stated in any such solicitation, OR
 - b) If no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer.
2. Seller's duty to maintain systematic records. Failure of the merchant-seller to have records or other documentary proof establishing its use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within the time period required above will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within that time.
3. Buyer's option to cancel. Where a seller is unable to ship merchandise within the time set forth above, the seller must:
 - a) Offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping; or to cancel the buyer's order and receive a prompt refund.
 - b) The offer must be made within a reasonable time after the seller first becomes aware of its inability to ship within the time limit, but in no case later than the end of the time limit.

- c) Any offer to the buyer of such an option shall fully inform the buyer about the buyer's right to cancel the order and to obtain a prompt refund and shall provide either a definite revised shipping date or notice that the seller is unable to make any representation regarding the length of the delay.
 - d) If the revised shipping date is 30 days or less AFTER the applicable time limit expires, the buyer is deemed to have consented to the delay if:
 - (1) Seller does not receive, prior to shipment and prior to the expiration of the definite revised shipping date, a response from the buyer rejecting the delay and canceling the order; and
 - (2) The merchandise arrives on or before the revised shipping date.
 - e) If the definite revised shipping date is more than 30 days AFTER the applicable time limit expires, the buyer is automatically deemed to have CANCELED UNLESS
 - (1) The seller ships the merchandise within 30 days of the expiration of the applicable time limit (and has not received an affirmative cancellation before shipping) OR
 - (2) The seller has received from the buyer within 30 days of the applicable time limit a response specifically consenting to the shipping delay.
 - f) The seller may solicit buyer's consent to further unanticipated delay.
4. Exercising the option to cancel. The seller must:
- a) Furnish the buyer with adequate means to exercise the option and notify the seller regarding cancellation.
 - b) Return of the merchandise is at the seller's expense.

5. Seller's duty to honor cancellation. The seller must deem an order canceled and make a prompt refund to the buyer whenever the seller receives, prior to the time of shipment, notification from the buyer canceling the order pursuant to any option described above.

C. Definitions (16 C.F.R. § 435.1)

1. MAIL OR TELEPHONE ORDER SALES: sales in which the buyer has ordered merchandise from the seller by mail or telephone, regardless of the method of payment or the method used to solicit the order.
2. TELEPHONE: any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both.
3. SHIPMENT: the act by which the merchandise is physically placed in the possession of the carrier.
4. RECEIPT OF A PROPERLY COMPLETED ORDER:
 - a) Where the buyer tenders full or partial payment in the proper amount in the form of cash, check, money order, or authorization from the buyer to charge an existing charge account, THEN "receipt of a properly completed order" means the time at which the seller received both said payment and an order from the buyer containing all of the information needed by the seller to process and ship the order.
 - b) However, if the seller receives notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" means the time at which:
 - (1) The seller receives notice that a check or money order for the proper amount tendered by the buyer has been honored,
 - (2) The buyer tenders cash in the proper amount, OR

- (3) The seller receives notice that the buyer qualifies for a credit sale.
- c) Refund
- (1) RULE 1: Cash sales/Goods not shipped
 - (a) the buyer tendered full or partial payment in the form of cash, check or money order, AND
 - (b) the merchandise has not been shipped.
 - (c) Refund = a return of the amount tendered in the form of cash, check or money order.
 - (2) RULE 2. Credit Sales
 - (a) There is a credit sale, AND
 - (b) The seller is a creditor.
 - (c) Refund = a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account.
 - (3) RULE 3: Credit Sales/Third-party Creditor
 - (a) There is a credit sale, AND
 - (b) A third party is the creditor.
 - (c) Refund = a copy of an appropriate credit memorandum or the like to the third-party creditor which will remove the charge from the buyer's account OR a statement from the seller acknowledging the cancellation of the order and representing that it has not taken any action regarding the order which will result in a charge to the buyer's account with the third party.

- (4) PROMPT REFUND shall mean:
- (a) Cash, Check, or Money Order: refund sent by first class mail within 7 working days of the date on which the buyer's right to refund vests.
 - (b) Credit Sale: a refund sent to the buyer by first class mail within 1 billing cycle from the date on which the buyer's right to refund vests.
- (5) The TIME OF SOLICITATION of an order shall mean that time when the seller has:
- (a) Mailed or otherwise disseminated the solicitation to a prospective purchaser,
 - (b) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like, or on radio or television, which cannot be changed or canceled without incurring substantial expense, or
 - (c) Made arrangements for the printing of a catalog, brochure or the like, which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.
- (6) Failure to refund shipping and handling charges is a UDAP. See United States v. Lillian Vernon Corp., 5 Trade Reg. Rep (CCH) 23,270 (S.D.N.Y. 1992).

D. Exclusions (16 C.F.R. § 453.3). The following are excluded from the Mail or Telephone Order Merchandise Rule:

1. Subscriptions, such as magazine sales, ordered for serial delivery, after the initial shipment is made in compliance with this part.

2. Orders of seeds and growing plants.
3. Orders made on a collect-on-delivery (C.O.D.) basis.
4. Transactions governed by the Federal Trade Commission's Trade Regulation Rule entitled "Use of Prenotification Negative Option Plans," 16 C.F.R. part 425.

E. Relationship to Other Laws/Rules

1. The FTC does not intend to preempt action in the same area, which is not inconsistent with this part, by any State, municipal, or other local government.
2. The Rule does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this part.
3. The Rule does not supersede those provisions of any State law, municipal ordinance, or other local regulation, which imposes obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith.
4. The Rule supersedes those provisions of any State law, municipal ordinance, or other local regulation, which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights, which are equal to or greater than those rights granted a buyer by this part.

F. Internet fraud

1. The Mail or Telephone Merchandise rule is broad enough to cover Internet fraud when the problem is failure to deliver, or delay in delivering merchandise. (See FTC, Dot Com Disclosure § 4 (2000) providing guidance on how on-line sellers should comply with the Mail or Telephone Order Merchandise Rule.) The FTC can proceed against deceptive on-line services under its general authority.
2. Examples of businesses subject to Internet fraud include:

- a) Credit repair services,
- b) Miracle cures and weight loss products,
- c) Pyramid schemes,
- d) Off-site betting, or
- e) Bogus income opportunities.
- f) Billing consumers for “free” website services or for unauthorized purchases by asking consumer to provide credit card number just to prove they were eighteen. For example, an adult website which advertised it was for free and then charged the credit card number used to prove the consumer was eighteen was required to pay \$30 million to settle a suit brought by the FTC and New York Attorney General. See *FTC v. Crescent Publishing Group, Inc.*, 129 F.Supp.2d 311 (S.D.N.Y. 2001).

G. Enforcement Provisions

- 1. No Private Cause of Action under the Federal Rule.
- 2. Federal Trade Commission
- 3. Look to State UDAP statutes. These may provide a private cause of action.

IV. UNORDERED MERCHANDISE

A. References

- 1. 39 U.S.C. § 3009 (2006).
- 2. National Consumer Law Center, Federal Deception Law § 12.2 (4th ed. 2022), updated at www.nclc.org/library.

B. General

- 1. Consumers unsure of their legal rights find it inconvenient to send back items and are scared of debt collection threats. In the

past, sellers have threatened to turn over accounts to a debt collection agency or report the delinquency to a credit reporting agency.

2. Federal law prohibits use of the mails to send unordered merchandise, except for free gifts and merchandise mailed by a charitable organization soliciting contributions. 39 U.S.C. § 3009.
3. Merchants mailing free samples to consumers must clearly and conspicuously mark the sample as such, and provide notice that the consumer may treat the unsolicited merchandise as a gift.
4. UNORDERED MERCHANDISE is merchandise mailed without the prior expressed request or consent of the recipient.
5. Violations of this rule constitutes an unfair method of competition and an unfair trade practice in violation of the FTC act.
6. Consumers may generally bring an action under the state UDAP statute or federal law.
 - a) Example. It is a UDAP violation to send a document that looks like an invoice as part of an offer of services attempting to imply services were ordered.
 - b) Example. It is a UDAP violation to deliver and bill the consumer for more than the consumer ordered.

C. Schemes invoking unordered goods

1. A seller promised free gifts to business employees to get their names on invoices for unordered merchandise as a means of leading the company to believe the merchandise had been properly ordered.
2. Consumers were induced to call a 900 number to claim a package being held after failed attempts of delivery. The packages contained unordered merchandise and were not being held by postal carrier.

3. Representation that they were customer's normal supplier, shipped unordered merchandise, sent bills, and used a fictitious law firm's name to collect the debts.
 4. Company sent past due and renewal invoices to organizations, including churches, for unordered computer service contracts and then rarely performed the services.
- D. Negative Option Plans – book of the month club is an example. FTC requires sellers to disclose plan terms, including the negative option, minimum purchase requirements, postage charges, and refusal rights. Membership must be canceled upon request once minimum order has been met. The seller must give the consumer written notice of the nature of the goods before arrival, including a form allowing the consumer to reject the selection.

V. TELEPHONE DISCLOSURE AND DISPUTE RESOLUTION ACT (900 NUMBERS)

A. References

1. Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. § 5711.
2. Telephone Disclosure and Dispute Resolution Rule, 16 C.F.R. § 308.

B. General. The Telephone Disclosure and Dispute Resolution Act regulates the use of 900 numbers on the federal level and is enforceable by the FTC.

1. This rule prohibits common carriers from disconnecting a subscriber's local or long-distance service because of unpaid 900 number charges.
2. Consumers whose telephone bills include fraudulent 900 number charges should be advised to refuse to pay.
3. Carriers are required to itemize 900 number charges on the bill separately to alert consumers of the charges.
4. Carriers must establish procedures to handle customer

complaints about 900 number charges but have discretion about the standards used for forgiving charges. Carriers must forgive the debt if the FTC, the FCC, or a court finds that the 900 number service violates federal law.

5. If feasible, telephone companies should offer the option of blocking access from their telephone to 900 numbers.
6. Businesses must make disclosures regarding costs and chance of winning prizes at the beginning of the call and must allow the consumer to hang up with no charge after the introductory disclosures. They must also disclose an alternate free way to enter contests for prizes.
7. Businesses cannot direct advertisement to children under 12 except for bona fide education products. Advertisements directed to children under 18 are allowed but must include a warning to get parental permission.
8. Providers cannot switch consumers from 800 numbers to 900 numbers, nor from an 800 number to a collect call.
9. Telephone companies must require their subscribers to comply with the statute and must terminate subscribers that violate the statute.

VI. CONSUMER LEASING ACT (CLA)

A. References

1. Truth in Lending Act, Part E, 15 U.S.C. § 1667a-f.
2. Regulation M, 12 C.F.R. Part 213.
3. National Consumer Law Center, Truth in Lending, Chapter 13 (10th ed. 2019), updated at www.nclc.org/library.

B. Purpose

1. To ensure that lessees of personal property receive meaningful disclosures that enable them to compare lease terms with other leases and, where appropriate, with credit transactions;

2. To limit the amount of balloon payments in consumer lease transactions; and
3. To provide for the accurate disclosure of lease terms in advertising.

C. Key Definitions (12 C.F.R. § 213.2)

1. OPEN-END LEASE means a consumer lease in which the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property and its realized value.
2. CLOSED_END LEASE means a consumer lease other than an open-end lease as defined in this section. As a practical matter, closed-end leases are the most common for legal assistance attorneys because at the end of a closed term lease, you can simply return the vehicle, pay any remaining close-out costs, and be done.
3. REALIZED VALUE means:
 - a) The price received by the lessor for the leased property at disposition;
 - b) The highest offer for disposition of the leased property; or
 - c) The fair market value of the leased property at the end of the lease term.
4. RESIDUAL VALUE means the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment.

D. Scope

1. Requirement 1: A "CONSUMER LEASE. These are contracts in the form of a bailment or lease for the use of personal property
2. By a natural person

3. Primarily for personal, family, or household purposes. A consumer's submission of documentary evidence not rebutted by lessor is sufficient to prove lease for consumer purposes. See *Clement v. American Honda Finance Corp.*, 145 F. Supp. 2d 206 (D. Conn. 2001).
4. For a period exceeding four months, and
 - a) Rent-to-Own appliance leases that can be terminated at any time without penalty have been held to NOT meet this requirement. Thus, the Act would not apply to them. See *Construction and Application Of Consumer Leasing Act* (15 U.S.C.A. SS 1667- 1667E), 129 A.L.R. Fed. 587, §3a. (1996).
 - b) However, if there is a penalty to terminate, the Act has been held to apply. See *Official Staff Commentary*, § 213.2(e)-2(ii).
5. For a total contractual obligation **not exceeding \$50,000**.
 - a) Total contractual obligation is not defined in the statute or rule.
 - b) A provision in the *Official Staff Commentary*, however, indicates that the total contractual obligation is not necessarily the same as the total of payments disclosed under §213.4(e). The total contractual obligation includes nonrefundable amounts a lessee is contractually obligated to pay to the lessor, but excludes items such as:
 - (1) Residual value amounts or purchase-option prices;
 - (2) Amounts collected by the lessor but paid to a third party, such as taxes, license and registration fees.
 - (3) This requirement exempts many automobile leases from the Act. State law may help here.
 - c) The applicability of the Act does NOT depend on whether or not the lessee has the option to purchase or otherwise

become the owner of the property at the expiration of the lease.

6. Requirement 2: A LESSOR makes the lease. This is:

- a) A person who regularly leases, offers to lease, or arranges for the lease of personal property under a consumer lease.
- b) A person who has leased, offered, or arranged to lease personal property more than five times in the preceding calendar year or in the current calendar year is subject to the act

E. Exclusions

- 1. The Act does NOT apply to “credit sales” under Regulation Z (12 CFR 226.2(a)).
- 2. It also does not apply to leases for agricultural, business, or commercial purposes or a lease made to an organization.
- 3. The Act does not apply to a lease transaction of personal property which is incident to the lease of real property and which provides that:
 - a) The lessee has no liability for the value of the personal property at the end of the lease term except for abnormal wear and tear; and
 - b) The lessee has no option to purchase the leased property.

F. Requirements of the Act

- 1. Disclosures. Regulation M (12 C.F.R., Part 213) substantially changes disclosures under the Act.
 - a) Form of Disclosures (12 C.F.R. § 213.3)
 - (1) The disclosures shall be made

- (a) clearly and conspicuously, and
- (b) in writing.
- (c) in a form the consumer may keep.
- (d) The CLA requirement that disclosures be made in writing is overridden only if the lessor companies comply with the requirements of the Electronic Signatures in Global and National Commerce Act, effective October 1, 2000, which was enacted to validate electronic signatures, documents and disclosures. If the lessor did not comply, then the consumer should be entitled to the standard CLA penalties. The lessor's use of electronic disclosures may also be relevant to a fraud claim if the consumer can show that it was part of a scheme to dupe the consumer to enter into a highly disadvantageous transaction.

2. The writing must

- a) be dated; and
- b) identify the lessor and the lessee.
- c) Disclosures may be made:
 - (1) in the contract or other document evidencing the lease; or
 - (2) in a separate statement that identifies the consumer lease transaction.
 - (3) Disclosures required to be segregated may be provided in a separate dated statement that identifies the lease, and the other required disclosures may be provided in the lease contract or other document evidencing the lease.

3. Timing of disclosures. A lessor shall provide the disclosures to

the lessee prior to the consummation of a consumer lease. A dealer violates the CLA if the dealer provides a vehicle to a consumer contingent on financing coming through, then later cancels the contract, rewrites it as a lease on terms less favorable to the consumer, and back dates that lease to when the consumer received the vehicle. See *Jafri v. Lynch Ford*, 2000 WL 36688914 (N.D. Ill. Aug. 25, 2000).

Minor variations. A lessor may disregard the effects of the following in making disclosures:

- (1) That payments must be collected in whole cents;
- (2) That dates of scheduled payments may be different because a scheduled date is not a business day;
- (3) That months have different numbers of days; and
- (4) That February 29 occurs in a leap year.

4. Content of disclosures. 12 C.F.R. § 213.4. For any consumer lease subject to this part, the lessor shall disclose the following information, as applicable.

- a) Segregation of certain disclosures. The following disclosures shall be segregated from other information and shall contain only directly related information. The disclosures shall be provided in a manner substantially similar to the applicable model form in Appendix A to Regulation M. (2) §§213.4(b) through (f), (g)(2), (h)(3), (i)(1), (j), and (m)(1).
- b) Amount due at lease signing. The total amount to be paid prior to or at consummation, using the term "amount due at lease signing." The lessor shall itemize each component by type and amount. Where a disclosure required the consumer to pay \$1,582, the CLA was violated when the lessor instead promised to pay this amount for the consumer, and does not pay the amount. See *Patterson v. Bob Wade Lincoln-Mercury, Inc.*, 55 Va. Cir. 499, (2000). *But* see *Dauti v. Hartford Auto Plaza, Ltd.*, 2002 WL 1727916 (D. Conn. June 4, 2002) (no violation where

dealer agreed to accept \$3000 instead of the disclosed \$3045.15).

- c) Payment schedule and total amount of periodic payments. The number, amount, and due dates or periods of payments scheduled under the lease, and the total amount of the periodic payments.
- d) Other charges. The total amount of other charges payable to the lessor, itemized by type and amount that are not included in the periodic payments.
 - (1) Total of payments. The total of payments, with a description such as "the amount you will have paid by the end of the lease." This amount is the sum of the amount due at lease signing (less any refundable amounts), the total amount of periodic payments (less any portion of the periodic payment paid at lease signing), and other charges. In an open-end lease, a description such as "you will owe an additional amount if the actual value of the vehicle is less than the residual value" shall accompany the disclosure.
 - (2) Payment calculation. In a motor-vehicle lease, a mathematical progression of how the scheduled periodic payment is derived. The calculation must show the following 11 steps:
 - (a) Gross capitalized cost. If requested by the lessee, an itemization shall be provided before consummation.
 - (b) Capitalized cost reduction. "The amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost."
 - (c) Adjusted capitalized cost.
 - (d) Residual value. The value the lessor claims the car will be worth at the end of the lease.

- (e) Depreciation and any amortized amounts. The difference between the adjusted capitalized cost and the residual value.
 - (f) Rent charge. This is the difference between the total of the base periodic payments over the lease term minus the depreciation and any amortized amounts.
 - (g) Total of base periodic payments.
 - (h) Lease term.
 - (i) Base periodic payment.
 - (j) Itemization of other charges. An itemization of any other charges that are part of the periodic payment.
 - (k) Total periodic payment. The sum of the base periodic payment and any other charges that are part of the periodic payment.
- (3) Early-termination notice. In a motor-vehicle lease, a notice substantially similar to the following: "Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be." The CLA requires the disclosure to be "clear" and the term clear means more than just legible, but must also include the ability to understand the formula in the disclosure. See Applebaum v. Nissan Motor Acceptance Corp., 226 F.3d 214 (3rd Cir. 2000).
- (4) Notice of wear and use standard. In a motor-vehicle lease, a notice regarding wear and use substantially similar to the following: "Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use." The notice shall also specify the amount or

method for determining any charge for excess mileage.

- (5) Purchase Option at End of lease term. Notice of the purchase price and when the lessee may exercise this option.
 - (6) Statement referencing non-segregated disclosures. A statement that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable.
 - (7) Rent and other charges. The rent and other charges paid by the lessee and required by the lessor as an incident to the lease transaction, with a description such as “the total amount of rent and other charges imposed in connection with your lease [state the amount].”
- e) Other (Non-segregated) Disclosures
- (1) Description of property. A brief description of the leased property sufficient to identify the property to the lessee and lessor.
 - (2) Conditions and disclosure of charges for early termination. A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term; and the amount or a description of the method for determining the amount of any penalty or other charge for early termination, which must be reasonable.
 - (3) Maintenance responsibilities. The following provisions are required:
 - (a) Statement of responsibilities. A statement specifying whether the lessor or the lessee is responsible for maintaining or servicing the leased property, together with a brief

description of the responsibility;

- (b) Wear and use standard. A statement of the lessor's standards for wear and use (if any), which must be reasonable
- (4) Purchase option during the lease term. A statement of whether or not the lessee has the option to purchase the leased property and, if prior to the end of the lease term, the purchase price or the method for determining the price and when the lessee may exercise this option.
- (5) Liability between residual and realized values. A statement of the lessee's liability, if any, at early termination or at the end of the lease term for the difference between the residual value of the leased property and its realized value.
- (a) The lessor has a duty to mitigate damages and must use reasonable diligence in selling the vehicle. A court can use UCC Article 9 to determine commercial reasonableness.
 - (b) If formula fails to provide credit for realized value, the formula is unreasonable. See Atel Financial Corp v. Quaker Coal Co., 132 F. Supp. 2d 1233 (N.D. Cal. 2001).
 - (c) Dealers systematically inflate the residual value and then in default use the realized value (how much they got at a car auction) to determine the default charge. Federal courts have stated that this is unreasonable. This shows how arbitrary it is for lessors forcing the risk of a low sale price on consumers at early termination or default, while bearing that risk at scheduled termination. For example, a consumer turns in a vehicle at the end of the lease period, having missed some early lease payments. Under a default formula, the

consumer would potentially pay a much greater amount of the difference between the residual value and the realized value, while if not in default would only owe the payments he missed in the lease.

- (6) Right of appraisal. If the lessee's liability at early termination or at the end of the lease term is based on the realized value of the leased property, a statement that the lessee may obtain, at the lessee's expense, a professional appraisal by an independent third party. The third party must be mutually agreeable to the lessee and the lessor and will estimate the value that could be realized at sale of the leased property. The appraisal shall be final and binding on the parties. PRACTICE POINTER: identify the appraiser at the beginning of the transaction.
- (7) Liability at end of lease term based on residual value.
- (8) Fees and taxes. The total dollar amount for all official and license fees, registration, title, or taxes required to be paid to the lessor in connection with the lease.
- (9) Insurance. A brief identification of insurance in connection with the lease including:
 - (a) Voluntary insurance. If the insurance is provided by or paid through the lessor, the types and amounts of coverage and the cost to the lessee; or
 - (b) Required insurance. If the lessee must obtain the insurance, the types and amounts of coverage required of the lessee.
- (10) Warranties or guarantees. A statement identifying all express warranties and guarantees from the manufacturer or lessor with respect to the leased property that apply to the lessee.
- (11) Penalties and other charges for delinquency. The

amount or the method of determining the amount of any penalty or other charge for delinquency, default, or late payments, which must be reasonable.

- (12) Security interest. A description of any security interest held or to be retained by the lessor; and a clear identification of the property to which the security interest relates.

G. Limits on Advertisement (12 C.F.R. § 213.7)

1. General rule. An advertisement for a consumer lease may state that a specific lease of property at specific amounts or terms is available only if the lessor usually and customarily leases or will lease the property at those amounts or terms. The FTC has brought actions against dealerships alleging that advertising disclosures were in too fine of print, were inadequately conspicuous, or the proper disclosures were not given.
2. Clear and conspicuous standard. Disclosures required by this section shall be made clearly and conspicuously.
 - a) Amount due at lease signing. Any affirmative or negative reference to a charge that is a part of the total amount due at lease signing shall not be more prominent than the disclosure of the total amount due at lease signing.
 - b) Advertisement of a lease rate. If a lessor provides a percentage rate in an advertisement, the rate shall not be more prominent than any of the disclosures required to accompany the rate; and the lessor shall not use the term "annual percentage rate," "annual lease rate," or equivalent term.
 - c) Advertisement of terms that require additional disclosure.
 - (1) Triggering terms. An advertisement that states any of the following items shall contain the disclosures required by paragraph (2):
 - (a) The amount of any payment;

- (b) The number of required payments; or
 - (c) A statement of any capitalized cost reduction or other payment required prior to or at consummation, or that no payment is required.
- (2) Additional terms. An advertisement stating any item listed in paragraph (1) shall also state the following items:
- (a) That the transaction advertised is a lease;
 - (b) The total amount due at lease signing, or that no payment is required;
 - (c) The number, amounts, due dates, or periods of scheduled payments, and total of such payments under the lease;
 - (d) A statement of whether or not the lessee has the option to purchase the leased property, and where the lessee has the option to purchase at the end of the lease term, the purchase-option price;
 - (e) A statement of the amount, or the method for determining the amount, of the lessee's liability (if any) at the end of the lease term; and
 - (f) A statement of the lessee's liability (if any) for the difference between the residual value of the leased property and its realized value at the end of the lease term.
- (3) Alternative disclosures -- merchandise tags. A merchandise tag stating any item listed in paragraph (1) may comply with paragraph (2) by referring to a sign or display prominently posted in the lessor's place of business that contains a table or schedule of the required disclosures.
- (4) Alternative disclosures -- television or radio

advertisements.

- (a) Toll-free number or print advertisement. An advertisement made through television or radio stating any item listed in paragraph (1) complies with paragraph (2) if the advertisement states the items listed in paragraphs (2)(a) - (c), and:
 - (i) Lists a toll-free telephone number along with a reference that such number may be used by consumers to obtain the other information required; or
 - (ii) Directs the consumer to a written advertisement in a publication of general circulation in the community served by the media station, including the name and the date of the publication, with a statement that information required by paragraph (2) is included in the advertisement. The written advertisement shall be published beginning at least three days before and ending at least ten days after the broadcast.
- (b) Establishment of toll-free number.
 - (i) The toll-free telephone number shall be available for no fewer than ten days, beginning on the date of the broadcast.
 - (ii) The lessor shall provide the information required by paragraph (d)(2) of this section orally, or in writing upon request.

H. Taking Leased Vehicles Overseas.

- 1. The SCRA provides for the termination of auto leases. See 50 U.S.C. § 3955.
 - a) A lease for a military service member or a servicemembers'

dependents for personal or business use may be terminated if:

- (1) During the term of the lease the servicemember enters military service for a term not under 180 days or gets extended to a period of not under 180 days.
- (2) While in military service, executes a lease and then receives military orders for a permanent change of station outside the continental United States or deploys with a military unit for a period of not less than 180 days.

b) Termination of the lease is made by:

- (1) Return of the motor vehicle to the lessor or their agent, not later than 15 days after delivery of written notice.
- (2) The written notice can be any time after the lessee's entry into military service or the date of the lessee's military orders.

I. State Leasing Disclosure Statutes. States with statutes setting out leasing or motor vehicle leasing disclosure requirements may have additional disclosure provisions not required by Regulation M, apply to leases outside the scope of the CLA (such as leases without a dollar limit), have longer or different limitation periods, or offer a different remedial scheme (such as treble damages and enhanced damages if the consumer is over sixty-two years old). There is little uniformity among state statutes.

The following states have leasing disclosure statutes that, at the time of publication, may provide additional protections:

1.	California	Cal. Civil Code § 2985.8
2.	Connecticut	Conn. Gen. Stat. §§ 42-270 et. seq., §§ 42-390
3.	D. C.	D.C. Code Ann. § 28-3810
4.	Florida	Fla. Stat. § 521
5.	Hawaii	Haw. Rev. Stat. § 481L
6.	Illinois	815 Ill. Comp. Stat. Ann. § 636
7.	Indiana	Ind. Code §§ 9-23-2.5-1/24-4.5-2-101
8.	Iowa	Iowa Code § 537.1101
9.	Kansas	Kan. Stat. Ann. § 16a-1-101
10.	Louisiana	La. Rev. Code § 9:3301
11.	Maine	Me. Rev. Stat. Ann. Tit. 9-A § 5-101
12.	Maryland	Md. Code Ann. Com. Law § 14-2001
13.	Michigan	Mich. Comp. Laws § 445.991
14.	New Hampshire	N.H. Rev. Stat. Ann. Ch. 361-D
15.	New Jersey	N.J. Rev. Stat. § 56:12-60
16.	New York	N.Y. Pers. Prop. Law § 331
17.	Oklahoma	Okla. Stat. Ann. Tit. 14A § 1-101
18.	South Carolina	S.C. Code Ann. § 37-1-101
19.	Washington	Wash. Rev. Code § 63.10.010
20.	West Virginia	W.Va. Code § 46A-1-104
21.	Wisconsin	Wis. Stat. § 429-101

CHAPTER D

PROTECTIONS BASED UPON PROBLEMS WITH THE GOODS

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CHAPTER D

PROTECTIONS BASED UPON PROBLEMS WITH THE GOODS

I. REFERENCES.

- A. UCC Article 2.
- B. Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1975).
- C. 16 C.F.R. Subchapter G - Rules, Regulations, Statements, and Interpretations Under the Magnuson-Moss Warranty Act (Parts 700-03).
- D. National Consumer Law Center, Consumer Warranty Law (6th ed. 2021).

II. INTRODUCTION

- A. Consumer warranty law focuses on the rights of the consumer where personal property has been purchased or leased, and it does not live up to the consumer's expectations.
- B. Most of us make purchases today with at least the belief that the seller is going to stand behind the product. If nothing else, consumers can resort to the concept of offer and acceptance and hope that what they actually receive is what they bargained for in the first instance.
- C. In this chapter we will cover, Article 2 of the Uniform Commercial Code (UCC), the Magnuson-Moss Warranty Act, state Lemon Laws, the FTC Used Car Rule, and used car Lemon Laws.

III. THE UNIFORM COMMERCIAL CODE, ARTICLE 2 (SALES)

- A. The basic premise is that the warranty is part of the basis of the bargain between seller and consumer. The buyer agrees to limit his or her ability to revoke acceptance under the UCC in return for the promise by the seller to repair or replace the goods. The buyer and seller may also agree to a limit on consequential or incidental damages.

The UCC establishes a consumer remedy whenever a warranty is not fully met, even if the breach is relatively minor or unintentional and even if the seller is unaware of the defect, acts in good faith, and is not at fault. The UCC provides self-help remedies of canceling the contract and deducting the consumer's damage from the outstanding balance.

UCC Article 2 provides the basic framework for warranty law.

1. Determines when express and implied warranties are created.
2. Provides initial regulation of disclaimers of implied warranties.
3. Initially determines the rules concerning privity of contract.
4. Sets out requirements as to notice of breach of warranty and creates standards for determining when a warranty is breached.

B. Scope of Article 2.

1. Has been enacted in every state EXCEPT LOUISIANA.
2. Applies to "transactions in goods." (§ 2-102).
3. UCC shall be liberally construed and applied to promote its underlying purposes and policies. § 1-102. The UCC does not supersede earlier consumer protection laws. All statutes provide cumulative protections to buyers.
4. Generates two main questions when deciding UCC applicability.
 - a) Are "goods" involved?
 - (1) Applies to both new and used goods. For example, virtually every state applies the UCC warranty of merchantability to used automobile sales by merchants.
 - (2) Services are not covered under Article 2.

- (3) Real property and houses are not covered. However, mobile homes are generally covered as well as some prefab homes to the extent they are treated as personalty, not realty.
 - (4) Mixed goods and services.
 - (a) Predominant Purpose Test: Was the predominant purpose of the transaction the purchase of goods?
 - (b) Courts use varying tests - know your state. Two of the more popular are:
 - (i) The Finished Product Test: Are the goods finished and just being installed or are the goods being created from raw materials specifically for this job? (NJ)
 - (ii) The *Bonebrake v. Cox* Test: Is the case one of the sale of a service with goods incidentally involved (contract with an artist for a painting as an example) or is it a sale with labor incidentally involved (contract for the purchase of a water heater that includes installation.)
Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974) (applying Iowa law).
 - b) Was there a “transaction” or a “sale” involving those goods?
 - (1) A "sale" consists of the passing of title from the seller to the buyer for a price (§ 2-106)
 - (2) Article 2 may apply to leases. However, a majority of jurisdictions have enacted Article 2A, which covers leases specifically.
5. Some UCC provisions apply to private sellers as well as merchants. (Compare § 2-103(1)(d) (“Seller”) with § 2-104(1) (“Merchant”).)

C. Warranties in General, (§§ 2-312 through 2-318).

1. Inspection of the goods.
 - a) May limit the defects the consumer can complain about. In order to vitiate an express warranty, the inspection must be sufficiently thorough and the buyer sufficiently sophisticated to make material discoveries. Inspection after sale does not avoid an express warranty.
 - b) May also expand the basis of the bargain. Discovered characteristics constitute an express warranty that the goods will be sold and delivered in the present condition or will conform to the characteristics of the inspected sample or model.
2. When one or more warranties arise, they are cumulative unless they are inconsistent.
3. Resolving Inconsistent Warranties (§ 2-317). Warranties, whether express or implied, shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply.
 - a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
 - b) A sample from existing bulk displaces inconsistent general language of description.
 - c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.
 - d) In order to invoke section 2-317, the inconsistencies must be between two warranties. If one of the two statements is not a warranty, section 2-317 has no

application.¹

D. Warranty of Title. (§ 2-312)

1. Every contract for sale includes a warranty by the seller that the title conveyed is good and its transfer rightful, and that the goods will be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge. There is no need to show that the seller knew of the problem with the title, as the warranty arises by operation of law regardless of the seller's knowledge.
2. The warranty of title arises by operation of law, not by express statements. If warranties are to be categorized as either express or implied, the warranty of title is an implied warranty. Even if the warranty of title is not an implied warranty, a title defect is likely to amount to a breach of the implied warranty of merchantability, which is actionable under Magnuson-Moss.
3. Warrants that the goods are transferred free of any security interest, lien, or encumbrance that was not known to buyer at the time of contract formation.
4. Disclaimer or modification of the warranty of title is allowed, as long as the buyer is protected from surprise.
5. An "as is" disclaimer is insufficient to disclaim the warranty of title. *Ulbrich v. Groth*, 78 A.3d 76 (Conn. 2013); *Rochester Equip. & Maint. v. Roxbury Mtn. Serv., Inc.*, 891 N.Y.S.2d 781 (N.Y. App. Div. 2009).
6. The seller is obligated, as part of the contract, to deliver good title. The implied warranty of title is also made by a secured party upon resale of repossessed goods.
7. A claim for breach of warranty does not require evidence that the seller knew of the defect in the title.
8. For a breach of the warranty of title, the buyer is entitled to damages based on the value of the goods "at the time and place of acceptance." § 2-714.

¹ *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Practices Litig.*, 2017 WL 3863866, at *19 (W.D. Mo. Aug. 3, 2017) (U.C.C. § 2-317 will be relevant only if fine-print statement on the back of can of motor oil, stating that it was not suitable for use in engines manufactured after 1930, is found to be a warranty).

9. Warranty of title issues arise in the sale of “Gray Market Vehicles” (manufactured for sale outside of the U.S.) which may not meet the U.S. safety and emission standards. If the state refuses to issue certificate of title, it is a breach of the implied warranty of title.²
10. As with any other warranty claim, the buyer must give notice of breach of the warranty of title. Particularly when the seller is not acting in good faith, the requirement of a timely notice of breach should receive a “very liberal construction” in favor of the buyer.³

E. Warranties of Quality - Express Warranties. § 2-313.

1. Express warranties are created in a number of ways:
 - a) Orally or in writing.
 - b) Advertising or pictures of product.
 - c) Label or words on container.
 - d) Observable qualities of product (odometer reading, etc.).
2. Three Types of express warranties: (1) affirmation of fact or promise or quality; (2) description of the goods; or (3) representation of the goods by sample or model. (§ 2-313)
 - a) Affirmation of fact or promise. This type of express warranty is proven by showing that an affirmation of fact or promise of quality was made by the seller to the buyer which related to the goods and became a basis for the bargain.
 - (1) An affirmation of fact or promise.

² See *Elmore v. Doenges Bros. Ford, Inc.*, 21 P.3d 65 (Okla. Civ. App. 2000). But cf. *Sims v. Fla. Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449 (11th Cir. 1989) (Clean Air Act preempts state statute that prohibits sale, titling, or registration of non-complying vehicle); *Ga. Auto. Importers Compliance Ass'n, Inc. v. Bowers*, 639 F. Supp. 352 (N.D. Ga. 1986) (state prohibition against registering vehicles that did not comply with federal emissions requirements is preempted by Clean Air Act).

³ U.C.C. § 2-312 cmt. 2.

- (a) Includes broad statements of quality, characteristics or conditions, such as “mechanically perfect;” “This car has never been in an accident;” “This car is still under the manufacturer’s warranty;” or “The car is in good working condition”
 - (b) Statements of gas mileage, prior repairs, or maintenance, such as “We gave it a full inspection and tune-up;” “It was driven only on Sundays to church . . .;”
 - (c) Salesman’s oral statement that the transmission had been redone created an express warranty. See *Moore v. Mack Trucks, Inc.*, 40 S.W. 3d 888, (Ky. Ct. App. 2001)
 - (d) Promise to repair problems with car found in first 30 days was an express warranty. See *Fassi v. Auto Wholesalers of Hooksett*, 762 A.2d. 1034 (N.H. 2000)
 - (e) Distinguish from mere opinion (“puffing”). Statement must be the kind of statement that reasonably could play a role in the buyer’s decision.
 - (i) “This car is what a car should be.”
 - (ii) Buyer’s sophistication may be a factor.
 - (iii) Statements that horse had no problems and would make a good show horse were either true or merely puffing. See *Sheffield v. Darby*, 535 S.E.2d 776 (Ct. App. Ga. 2000).
- (2) Made by the seller to the buyer.
- (a) The affirmation need not be made by the actual retail seller (could be made by manufacturer, for example, in advertising).

- (b) The affirmation need not be in the seller's own words (the seller can incorporate third party statements into the bargaining).
 - (c) An express warranty by affirmation may be created by a non-merchant seller.
 - (d) The statement may be made to the public, rather than directly to the individual buyer. The buyer must in fact see or hear the statement.
- (3) Which relates to the goods. The description of the goods creates a core warranty that cannot be disclaimed. "A contract is normally a contract for a sale of something describable and described." § 2-313 comment 4.
- (4) Becomes part of the "Basis of the Bargain."
- (a) Encompasses the entire transaction, not just the contract or negotiations, including all reasonable assumptions and inferences.
 - (b) Do NOT have to prove actual reliance. The seller has the burden to show statement was not a basis of the bargain.
 - (c) Warranty can be part of basis of bargain even though not incorporated into a written contract.
 - (d) May include statements made after the deal is complete:
 - (i) Statements in product labels at delivery.
 - (ii) Written Manufacturer Warranty received with goods.

- b) Description of the goods.
 - (1) Any description that is reasonably part of the basis of the bargain, regardless of the source. It can be picture or a label.
 - (2) The warranty is that the goods will meet that description.
 - (3) For example, a “wool coat” must be made of wool. A “1974 Pontiac” must be one.
- c) Sample or model.
 - (1) If a sample or model is used, the seller is warranting that the item purchased is the same as the sample or model.
 - (2) A sample is an example piece drawn from a group of virtually identical products to be purchased. When the seller shows a buyer a sample, the buyer reasonable expects that the goods delivered will be substantially similar to the sample.
 - (3) A model is an example offered for inspection when the product being purchased is not present (e.g. the buyer test-drives a car on the lot, then orders the same car in a different color).
 - (4) Generally, whatever the buyer sees in the example must be in the goods purchased unless the seller warns of discrepancies.
- 3. The seller’s intent to create a warranty is not an element.
- 4. An express warranty may not be disclaimed by language in the same contract. § 2-316(1). Where a general disclaimer is inconsistent with an express warranty, the express warranty will survive as an exception to the disclaimer. Purchasers of consumer products are generally protected by a strict construction of warranties in favor of the consumer buyer.

5. Three questions of fact must be answered in an express warranty action.

- a) Was there an express warranty?
- b) What did the warranty cover?
- c) Did the product live up to the warranty?

F. Warranties of quality - Implied Warranties.

1. These warranties do not arise unless there is a possessory interest. See *Evans v. Chrysler Fin. Corp.*, 44 UCC Rep. 2d 1003 (Mass. Super. Ct. 2001) where no warranty arose when potential buyer test started a car.

2. Warranty of merchantability. (§ 2-314).

a) The most important warranty in the code. Unless excluded or modified, a warranty that the goods shall be merchantable is implied in every contract if the seller is a merchant with respect to goods of that kind.

b) The warranty of merchantability requires that the goods will pass without objection in the trade or business. Fungible goods must be of fair average quality. The item must be fit for the ordinary purpose for which such goods are used.

c) Elements of the Warranty of merchantability.

(1) Sale of goods. § 2-105.

(2) By a seller. Although usually not an issue, a question may arise whether a distributor or indirect manufacturer is a "seller."

(3) Who is a merchant with respect to goods of that kind. A merchant "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the

transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” § 2-104(1).

- (a) Applies to the first sale someone ever makes in the business.
 - (b) “Goods of that kind” are not limited to specific makes and models. For example, a car dealer is a merchant with respect to cars, even if he is a Ford dealer selling a used Chevrolet.
- d) Goods must be merchantable. (UCC § 2-314(2)) Six factors. The goods must be of the type that:
- (1) Pass without objection in the trade under the contract description;
 - (2) In the case of fungible goods, are of fair average quality within the description;
 - (3) Are fit for the ordinary purposes for which such goods are used;
 - (a) A tractor that continually stalled was not merchantable. *See Eggl. v. Letvin Equip. Co.*, 632 N.W. 2d 435, (N.D. 2001).
 - (b) Used car must be fit for ordinary purpose of driving, i.e. must be safe and substantially free of defects; excessive oil consumption would be breach. *See Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 759 N.E.2d 66(III. App. Ct. Oct. 19, 2001).
 - (4) Run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;
 - (5) Are adequately contained, packaged, and labeled as the agreement may require; and

(6) Conform to the promises or affirmations of fact made on the container or label if any.

e) Basic Principles.

(1) Strict Liability - "No Fault"

(2) No language/assertions are required.

(3) No reliance is required.

(4) Ensures a basic standard or quality.

(a) Quality measured at the time of the sale or delivery.

(b) The buyer must prove that a defect exists.

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

f) In an action based on breach of the implied warranty of merchantability, the plaintiff must show not only the existence of the warranty but the fact that the warranty was broken and the breach of warranty was the proximate cause of the loss sustained.

3. Warranty of fitness for a particular purpose. § 2-315.

a) Basic provisions.

(1) Imposed by law whenever the seller at the time of contracting has reason to know:

(a) Any particular purpose for which the goods are being purchased, and

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

- (2) Implied warranties of fitness for a particular purpose and merchantability can exist in the same transaction.
- b) Elements of the warranty of fitness for a particular purpose:
- (1) The “seller” . . .
 - (a) Does not have to be a merchant. § 2-103.
 - (b) However, the seller must have appropriate “skill and judgment” about the goods.
 - (c) Warranty only extends to the items of goods the seller sells, not the other components of the product into which it is installed.
 - (2) At the time of the contracting, has reason to know...
 - (a) Told by buyer.
 - (b) Actual knowledge is not required. Constructive knowledge from the circumstances is sufficient. *See Visual Commc’ns, Inc. v. Konica Minolta Bus. Solutions, U.S.A.*, 611 F. Supp. 2d 465 (2009) (“A plaintiff need not show ‘actual knowledge . . . if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists.’”)
 - (c) Example. “I need a car that gets thirty miles to the gallon, what do you recommend?”
 - (d) *But see Ford Motor Co. v. Gen. Accident Ins. Co.*, 779 A. 2d 362, (Ct. App. Md. 2001) (A manufacturer’s knowledge that a chassis cab could be modified for use as a tow truck did not, without more, create an implied warrant for a particular purpose).

- (3) Any particular purpose . . .
 - (a) May be a related “special” or non-customary purpose.
 - (b) “Ordinary Use” may qualify. For example, a salesman who bought a car that turned out to be unreliable. The problem was that the product could not perform its ordinary use – to drive. However, the buyer had a particular purpose in that his livelihood depended on that ordinary use.
 - (c) See *Bako v. Crystal Cabinet Works, Inc.*, 44 UCC Rep. 2d 1048 (Ohio Ct. App. 2001). Seller breached implied warranty by selling a stain that was incompatible with the sealant the buyer stated she was using.
- (4) And that the buyer is relying.
 - (a) The buyer must actually rely upon the seller’s skill and judgment.
 - (b) Reliance only requires that the buyer be influenced by the seller’s skill and judgment.
- (5) On the seller’s skill and judgment . . .
 - (a) Third party statements do not create skill and judgment (ex. Gov’t study, another retailer, or friend)
 - (b) The seller must hold himself out to have certain skill and judgment.
- (6) To select or furnish suitable goods . . .
 - (a) Can be a group of goods – “Any of my four cylinder cars will get 30 MPG” - whichever car the buyer buys, the warranty will apply

for MPG.

(b) Seller must make the decision that the goods are suitable for the buyer's purpose.

(7) The goods are impliedly warranted to be fit for that purpose.

(a) More specific than other warranties.

(b) The goods may do exactly what the manufacturer intended but violate the warranty because they do not meet the buyer's intended purpose.

(8) Seller's good faith is irrelevant.

G. Disclaimers and modifications of warranties of quality. §2-316.

1. Disclaimers are disfavored by the UCC. Courts generally construe disclaimers as narrowly as possible to protect the consumer.

2. Express warranties. § 2-316(1).

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

b) Express warranties may NOT be disclaimed. § 2-316(1).

c) Whenever reasonable, language of express warranties should be construed consistently with words or conduct which may be construed to limit or negate those warranties. The negation or limitation of warranty is excluded if it is irreconcilable with warranty creation.

3. Implied warranties. § 2-316(2).

a) Modifying implied warranties.

(1) Exclusion or modification of the implied warranty of merchantability requires express language

that is both conspicuous and uses the word “merchantability.”

- (2) Exclusion or modification of the implied warranty of fitness for a particular purpose may be accomplished by general language, but must still be conspicuous.
 - (3) Implied warranties, including the warranty of merchantability, may be excluded or modified by course of dealing or usage of trade, use of recognized language like “as is” or “with all faults,” or by the buyer's prior inspection of the goods.
- b) State specific. About half of the states preclude or restrict a seller’s ability to disclaim implied warranties. Be sure to check your state law.
- c) Disclaimers. The following arguments may be used to defeat disclaimers of warranties in contracts. They are based largely on the UCC policy that disclaimers are NOT favored.
- (1) Must be conspicuous – written so that a reasonable person against whom it is to operate should have noticed it.
 - (2) Must be available before the contract signed.
 - (3) Some states require that the consumer have actual knowledge of the disclaimer. *See Materials Mktg. Corp. v. Spenser*, 40 S.W.3d 172, (Tex. App. 2001). (holding that a limitation of liability clauses on the back of the contract was ineffective without evidence that the buyer was aware of it or that it was given to the buyer).
 - (4) A disclaimer of the warranty of merchantability must have the word merchantability in it (UCC § 2-316), unless the words “as is” or “with all faults” are used in a clear conspicuous manner.
 - (5) “As Is” disclaimers may be attacked using the

circumstances of the sale to include the seller's conduct and the level of the consumer's knowledge. The "as is" disclaimer may be ineffective in circumstances where the disclaimer is unclear to the buyer because of the circumstances, i.e. contract signing rushed or the seller discouraged the buyer from reading the contract—"It's just a bunch of legalese."

H. Procedural requirements for enforcing rights for breach of warranty.

1. 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. § 2-607(3)(a). Failure to do so precludes most UCC remedies.
2. Actions must also be brought within the statute of limitations. § 2- 725.
 - a) The UCC defines the statute of limitations as 4 years after the cause of action accrues.
 - b) The UCC statute of limitation begins to run at the time of delivery of the goods, not from the time the defect is discovered or the time of injury.

I. Buyer's remedies for breach of UCC warranties.

1. Buyer's remedies prior to acceptance. § 2-711.
 - a) When the seller tenders non-conforming goods, i.e. goods that fail to meet the terms of the contract, including all express and implied warranties, the buyer has a right to reject the goods within a reasonable time. § 2-601. The buyer's right to reject goods may be limited by the terms of the contract, i.e. a provision giving the seller the right to repair or replace non-conforming goods within a specified time period. § 2-719.
 - b) Rejection of the goods requires the buyer to notify the seller of both the rejection, and the specific defects in the tender. § 2-602. Failure to notify the seller of the

specific defects may result in waiver of those defects as a basis for rejection. § 2-605.

- c) In circumstances where the seller fails to timely cure the defect, or has no right to cure, the buyer is entitled to cancel the contract, to receive a prompt refund of any of the purchase price already paid, and to receive damages associated with “covering” the breach with goods from another seller, including incidental and consequential damages.

2. Buyer’s remedies following acceptance. § 2-714.

- a) The buyer may revoke acceptance of non-conforming goods under two circumstances: (1) when he accepted the goods assuming that the seller would cure the non-conformity and the seller has failed to do so; or (2) when he accepted the goods because of the seller’s assurances or because discovery of the non-conformity at the time of delivery was unreasonable, i.e. latent defect.

- b) Following a proper revocation, the buyer’s remedies will be under § 2-711, above.

- c) When the buyer’s time for revocation has passed, the buyer may still be entitled to damages for breach of warranty, provided the buyer has given timely notice to the seller of the suspected breach. § 2-607(3).

- (1) Following acceptance, the buyer has the burden of proving the goods failed to meet the warranty standard. § 2-607(4).

- (2) The buyer’s damages may be determined in any manner which is reasonable, but are generally equal to “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” § 2-714.

3. Types of damages for breach of warranty.

- a) General damages. UCC § 714. Generally this is the difference at the time of acceptance between the value of the goods as accepted and the value the goods would have had if as warranted.
 - b) Incidental damages. UCC § 2-715(1). Damages directly and immediately resulting from seller's breach pertaining to the goods themselves (e.g. inspection, transportation). These are the direct costs to the buyer of the breach - like the cost of transportation of the goods, or their inspection
 - c) Consequential damages. UCC § 2-715(2). Damages resulting less directly and less immediately from the breach and generally pertaining to the buyer's circumstances. These are the damages that flow only from the consequences of the goods not being acceptable such as lost deliveries due to the failure to deliver a working delivery truck, etc.
 - d) Punitive damages. General rule, punitive damages are unavailable. May be available if the conduct is egregious enough to amount to an independent tort (i.e. willful, wanton, and malicious disregard for the rights of buyers).
 - e) Liquidated damages. May be included as a term of the contract, whether or not there is a readily available means to measure the damages in some more exact fashion. Liquidated damages must be reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. § 2-718.
 - f) Other remedies agreed to by the contracting parties. § 2-719.
 - g) Attorney's fees. Not recoverable as a general rule absent contractual or statutory authority.
4. Seller's possible defenses to a breach of warranty.

- a) Buyer's conduct as to cause of damage or misuse of product.
- b) Non-compliance with any conditions precedent to warranty coverage.
- c) Expiration of the express warranty period.

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

A. Applicability of the Magnuson-Moss Warranty Act.

1. Purpose.

- a) To regulate, simplify, and standardize warranties given by manufacturers.
- b) The Act does not mandate warranties or warranty duration.
- c) The Act does mandate certain disclosures if the seller gives a warranty.
- d) The Act provides for damages if warranties given are breached.

2. The act applies to consumer products manufactured after 4 July 1975.

- a) Consumer products are those "normally" used for personal, family, or household purposes. They do NOT have to be used exclusively for that purpose. 16 C.F.R. § 700.1. The Act applies to new and used products. Consumer products include any tangible personal property which is distributed in commerce.

(1) Goods are "normally" used for consumer purposes if that use is "not uncommon."

(2) "Normally" does not mean that consumer use is the predominant use, just that this use is not atypical.

- (3) Ambiguities are resolved in favor of coverage.
 - (4) Whether a product is normally used for personal, family or household good purposes is a question of fact. An airplane, for example, may be a consumer product. See *Waypoint Aviation Services, Inc. v. Sandel Avionics*, 469 F.3d 1071 (7th Cir. 2006). Cf. *Bristow v. Lycoming Engines*, 2007 WL 1006098 (E.D. Cal 2007).
- b) Must be *tangible* property. The Act does not apply to goods supplied incident to a service contract, i.e. the doors, lights, carpet, etc. provided incident to a remodeling contract. This is an element to a claim, not a jurisdictional requirement. See *Miller v. Herman*, 600 F.3d 726 (7th Cir. 2010).
 - c) Must be *personal*, not real property.
 - (1) Some things that may become fixtures are still personal (e.g., air conditioners, insulation, siding, dropped ceilings, etc.).
 - (2) If the item is integrated into a structure at the time of purchase, however, it is not a consumer product (e.g., beams, wallboard, wiring, plumbing, etc.)
 - (3) Mobile homes are personal property.
 - d) Does NOT apply to services unless it covers both the parts and the labor (e.g. rebuilding an engine and parts).
 - e) Leases. The Act has also been interpreted to include leases of consumer products such as automobiles on the rationale that a lessee is a consumer to whom the vehicle has been transferred, regardless of whether a sale has occurred. See, e.g., *Cohen v. AM Gen. Corp.*, 264 F. Supp. 2d 616 (N.D. Ill. 2003).

B. Parties Liable Under The Act

- 1. Any supplier. "Supplier" is any person engaged in the business

of making a consumer product directly or indirectly available to consumers. All entities in the chain of production and distribution of a consumer product including the manufacturer, component supplier, distributor, wholesaler, and retailer.

2. Any warrantor. A “warrantor” is any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty (such as a dealer who provides a written warranty, but if a dealer only passes on a manufacturer’s warranty the dealer is not liable for a breach of that warranty, depends on factual investigation of dealer’s involvement).
3. Any service contract provider.
4. “Other Person.”
 - a) No privity of contract required.
 - b) Third party warrantors (like Good Housekeeping) who do not sell products but who offer warranties are covered.

C. Enforcing Implied and Written Warranties and Service Agreements.

1. The Act prohibits breaches of warranties
 - a) Implied warranty – Any warranty arising under state law in connection with the sale of a consumer product.
 - (1) Even if no written warranty is given!
 - (2) Applies to any warrantor, not just suppliers.
 - (3) Existence of the warranty is a matter of state law.
 - (4) Once warranty exists, however, the Act provides a federal remedy for breach of that warranty.
 - b) Written warranty.

- (1) Provides a specific statutory remedy for breach of warranties.
- (2) Provides a federal cause of action for damages and attorney's fees.
- (3) State law privity requirements do not apply (see below).

c) Service contracts.

- (1) 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).
- (2) The 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) Act provides a federal cause of action for breaching requirements under the service contract.

2. Prohibitions on disclaimers and modifications of implied warranties.

- a) The Act prohibits a supplier from disclaiming or modifying an implied warranty when the supplier has given a written warranty or a service contract within 90 days of the sale. Even if the seller gives a highly restrictive service contract or written warranty, the implied warranties cannot be disclaimed.
- b) If the seller/supplier provides an express limited warranty, then the implied warranties may also be limited in duration to a period no less than the duration of the express written warranty.

3. Impact on privity of contract requirements.
 - a) Horizontal privity – Someone other than the retail buyer (someone who receives the product as a gift, subsequent purchases) seeks to sue the seller.
 - (1) Act protects any “consumer” damaged by a violation of the Act or by failure to comply with a written warranty, implied warranty or service contract. In this context, the word consumer includes the following:
 - (a) Buyers.
 - (b) Any person to whom the goods are transferred during the duration of the implied or written warranty or service contract.
 - (c) Any other person protected under the terms of the warranty.
 - (2) Thus, horizontal privity requirements imposed under state law are ineffective as to all owners of the product.
 - (3) Suppliers/warrantors may limit express warranties to the original owner by saying “for as long as you own your car.” In this case look to implied warranties.
 - (4) “Limited” warranty providers may limit implied warranties to the original owner if a notice of this provision is prominently disclosed in the warranty.
 - b) Vertical Privity – Can the buyer sue someone up the distribution chain with whom the buyer did not actually enter a transaction?
 - (1) Written warranties. Magnuson-Moss virtually eliminates vertical privity requirements through the broad definitions of supplier, warrantor,

and service contract provider.

- (2) Implied warranties. State law MAY require vertical privity for implied warranty claims. Courts are mixed as to whether Magnuson-Moss supersedes these requirements. (AL, CT, FL, GA, IN, NY, OR all require vertical privity.) One approach is to establish that the dealer is the manufacturer's sales agent.
- (3) A number of court decisions and commentators agree with the view that, when a manufacturer or other indirect party gives a written warranty, the Act abolishes vertical privity requirements for implied warranty claims under the Act.⁴ A consumer should be able to seek "damages and other legal and equitable relief" under the Act against a remote manufacturer for breach of implied warranties.⁵
- (4) Nevertheless, the Second and Seventh Circuits and a number of other courts take the opposite view: that the Act follows state law, and if state law requires vertical privity, then vertical privity is required for a Magnuson-Moss claim based on the breach of implied warranties.
- (5) The rationale for a state's conclusion that implied warranties cannot be enforced under the UCC against a manufacturer not in privity with the consumer may affect the Magnuson-Moss

⁴ *Mednick v. Bayer*, 2014 WL 6474915 (N.D. Ill. Nov. 13, 2014); *Cohen v. AM Gen. Corp.*, 264 F. Supp. 2d 616 (N.D. Ill. 2003); *Mydlach v. DaimlerChrysler Corp.*, 875 N.E.2d 1047 (Ill. 2007) (when manufacturer provides written warranty, consumer may bring suit under Magnuson-Moss Warranty Act against remote manufacturer for money damages but not for revocation of acceptance); *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028 (Ill. 1988); *Szajna v. Gen. Motors Corp.*, 503 N.E.2d 760 (Ill. 1986); *Mattuck v. DaimlerChrysler Corp.*, 852 N.E.2d 485 (Ill. App. Ct. 2006), vacated and remanded, 877 N.E.2d 1 (Ill. 2007) (remanding for reconsideration in light of Mydlach); *Razor v. Hyundai Motor Am.*, 813 N.E.2d 247 (Ill. App. Ct. 2004) (following Szajna), aff'd in part, rev'd in part on other grounds, 854 N.E.2d 607 (Ill. 2006); *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 807 N.E.2d 1165 (Ill. App. Ct. 2004) (following Szajna); *Dekelaita v. Nissan Motor Corp.*, 799 N.E.2d 367 (Ill. App. Ct. 2003) (following Szajna); *Ventura v. Ford Motor Co.*, 433 A.2d 801 (N.J. Super. Ct. App. Div. 1981); *Hyde v. Gen. Motors Corp.*, 1981 WL 11468 (N.Y. Sup. Ct. Oct. 16, 1981). See also *Herndon, Consumer Class Actions and the Effect of Magnuson-Moss*, 15 Forum 914, 919 (1980); Note, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code*, 62 Cornell L. Rev. 738, 756 (1977); Note, *The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act: Should the Consumer Rejoice?*, 15 Fam. L.J. 77, 101 (1976–1977).

⁵ 15 U.S.C. § 2310(d)(1).

analysis. If the state courts agree that a remote manufacturer is a “merchant” under UCC § 2-314, so that the implied warranty of merchantability arises as to the manufacturer, but hold that UCC § 2-318 prevents that warranty from being enforced without privity, then the argument that the Act abolishes vertical privity is stronger. The warranty exists, and the Act removes the barrier that privity erects to prevent the consumer from suing the obligated party. The argument is harder if a state’s courts hold that implied warranties do not arise at all against a remote manufacturer.

D. Restrictions on written warranties (full and limited).

1. Many provisions of the Act apply only if there is a written warranty.
 - a) A written warranty is:
 - (1) A written affirmation that the product is defect free or will meet a specified level of performance for a specified period, OR
 - (2) A written undertaking to refund, repair, replace, or remedy a product **IF** it fails to meet specifications.
 - (3) 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.
 - b) A certificate of quality assurance stating that a mobile home has been carefully inspected to ensure quality was a written warranty. See *Horton Homes, Inc. v. Brooks*, 832 So.2d 44 (Ala. 2001).
 - c) Whether the written warranty remains in effect is the most difficult question for used products.
2. Tie-ins are generally prohibited. The Act prohibits a warrantor tying the performance of warranty obligations

to the buyer's use of a particular product or service.

- a) This provision provides that sellers/warrantors:
 - (1) Cannot condition warranty applicability on using a particular part or certified product.
 - (2) Cannot limit to factory servicing.
 - (3) Cannot mandate a specific brand name.
 - (4) CAN mandate a particular grade of product. For example, cannot say Quaker State Motor Oil, but CAN say 10W-40 motor oil.

 - b) There are only two exceptions:
 - (1) The manufacturer provides a product or service that is free of charge, OR
 - (2) The FTC approves a waiver in the public interest.

 - c) In 2010, the United States District Court for the District of New Jersey held that the anti-tying provision applies only when the warrantor's prerogative to designate who performs its obligations under the warranty can be severed from the consumer's prerogative to choose what products or services to use in order to receive the benefit of the warranty. See *McGarvey v. Penske Auto Group, Inc.*, 2010 WL 1379967 (D.N.J. Mar. 29, 2010) (vacating grant of partial summary judgment).
3. The warrantor cannot be the final arbiter of warranty disputes. A warrantor cannot grant itself the sole authority to determine whether a defect or nonconformity within the scope of the written warranty exists or to have the final or binding decision in a dispute.
4. Warranty registration cards.
- a) Full Warranty coverage MAY NOT be conditioned on the consumer returning a completed warranty card.

- b) Limited Warranty coverage MAY be conditioned on the return of the card so long as that fact is disclosed in the warranty.
- c) Implied Warranties – the act is silent on this, but requiring the return of a warranty card should be considered an invalid limitation on an implied warranty.

E. Requirements applicable to only “full” warranties.

1. The Act requires that every warranty be labeled as “full” or “limited.”
2. To be labeled “full,” the warranty must comply with the following:
 - a) It cannot restrict the rights of subsequent owners during the warranty period.
 - b) It must promise to remedy defects within a reasonable time and without charge.
 - c) It cannot limit the duration of any implied warranty.
 - d) It cannot limit consequential damages unless the limit is conspicuously present on the face of the warranty.
 - e) It MUST permit the consumer to elect a refund or replacement after a reasonable number of attempts by the manufacturer to fix the problem; AND
 - f) It must require no duty of the consumer other than notice of the defect, unless the duty is “reasonable.” For example, to use product in a reasonable manner and perform any necessary maintenance.
3. Any warranty that does not meet the requirements above must be labeled “limited.”

F. Disclosure Provisions.

1. Although the Magnuson-Moss Warranty Act does not require that any consumer product be warranted, it does provide for certain

disclosures if the manufacturer of a product chooses to give a written warranty:

2. If the product costs more than \$10, the warrantor must properly designate the warranty as a "full" or "limited" warranty (in compliance with federal minimum warranty standards.)
 - a) The designation must be a caption or prominent title, clearly separated from the warranty text.
 - b) For a Full Warranty ONLY, there must be a reference in the caption/designation to the duration of the warranty.
 - c) Examples of PROPER designations: "full one-year warranty;" "limited warranty;" "limited 60-day warranty;" "limited warranty for as long as you own your car."
 - d) Note that a warrantor can give BOTH a full and a limited warranty on the same product as long as it is properly differentiated (clear and conspicuous). For example, full three-year warranty against mechanical defects, limited rust-through warranty on same car.

3. General disclosure principles.
 - a) The disclosures must be in a single document.
 - b) The language must be "simple and readily understood."
 - c) The disclosure must be made clearly and conspicuously.
 - d) Consumer reading the warranty should be able to see exactly what is and is not covered by the warranty.
 - e) Must include the specific duration of the warranty.
 - f) The warranty must be made available to the consumer before the decision to buy is made. The seller may comply by:
 - (1) Providing a copy with every product; OR

- (2) Clearly and conspicuously displaying the text of the warranty "in close conjunction to" the warranted product, and/or
 - (3) Maintaining readily available binders containing copies of the warranties for the products sold in each department of the seller's store, and/or
 - (a) not unusual in certain business locations such to look on the wall and you will see the sign that says the warranty is available for inspection.
 - (4) 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
 - (5) Placing a notice containing the text of the warranty in close proximity to the warranted consumer product, in a manner that clearly indicates to prospective buyers the product to which it applies.
- g) Special rules for mail order or catalog sales. These sellers must disclose the warranty:
- (1) On the same page as the product; OR
 - (2) On the page facing that page; OR
 - (3) In a clearly referenced information section; OR
 - (4) By disclosing the address where the consumer can get a copy free of charge.
4. Specific disclosure requirements. All written warranties, full or limited, on consumer products costing more than \$15 are required to disclose the following:
- a) *Parties who can enforce the warranty:* The identity of the parties to whom the warranty is extended, including any limitations (such as to the original purchaser of the product).

- b) *Warranty Coverage*: A clear description and identification of products, parts, characteristics, components, or properties covered by the warranty.
- c) *Warrantor's Performance Obligations*: A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform to the written warranty.
- d) *Warranty Duration*: The point at which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration.
- e) *Consumer's Duties to Exercise the Warranty*: A step-by-step explanation of the procedure that the consumer should follow to obtain performance of any warranty obligation.
- f) *Registration Cards*: Whether the return of any registration is required (if allowed).
- g) *Informal Dispute Resolution*: Information about the availability of any "informal dispute settlement mechanism" elected by the warrantor.
- h) *Duration Limitation on Implied Warranties*: Any limitations on the duration of implied warranties.
- i) *Any exclusions of or limitations* on relief available to the consumer, such as incidental or consequential damages.
- j) The following statement: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state."

G. Relationship Between Various Warranty Protections.

1. Nothing in the Act "shall invalidate or restrict any right or remedy of the consumer under State or federal law." 15 U.S.C. § 2311(b)(1). The Act does not preempt the UCC or state UDAP statutes.

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 Act 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." 16 C.F.R. § 701.3(a)(8).

H. Who can sue?

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.

I. Remedies.

1. The U.S. Attorney General and the FTC have authority to pursue preliminary and permanent injunctions, as well as cease and desist orders, restitution, and civil penalties.
2. Private civil relief under the Magnuson-Moss Warranty Act.

- a) Negotiation and/or mediation through an informal dispute settlement mechanism. Domestic manufacturers and importers may include an informal dispute resolution mechanism as a precondition to suit. 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. For example, it must be:
 - (a) Free of charge;
 - (b) Sufficiently funded & competently staffed;
 - (c) Provide quick and fair resolution; and
 - (d) Have no undue influence by warrantor.
 - (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. See 16 C.F.R. Part 703 for more details.
- b) Industry complaint bureaus.
- c) Consumers can sue for damages and other legal and equitable relief in either state or federal court. State court is the predominant jurisdiction.
- d) The amount in controversy for suit in federal court must exceed \$50,000 for both individual and class actions. This is a lower threshold than federal diversity jurisdiction, which requires an amount in controversy of \$75,000.
- 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 certain of the Act's substantive provisions.

f) Punitive damages may be recovered in suits brought under the Act if available under state law.

g) Damages for emotional distress can be recovered under the Act if they are available in breach of warranty actions under state law.

h) Attorneys' fees and court costs are allowable if the consumer prevails in the action.

SPECIFIC PROTECTIONS FOR AUTOMOBILES

NEW CARS

V. STATUTORY WARRANTIES IN AUTO SALES: "LEMON LAWS"

A. Introduction. A common warranty problem for a new car owner is that, shortly after purchase, the car displays certain defects that persist despite dealer repair attempts. Such cars are colloquially termed "lemons." State lemon laws offer targeted remedies for owners of such cars. All 50 states and the District of Columbia have some form of "lemon law." See Appendix B.

B. "Lemon law" is a generic term. These statutes typically require the buyer of a new motor vehicle to give notice of a problem to the manufacturer. If the manufacturer then fails to conform the vehicle to the applicable warranties after a reasonable number of repair attempts, the manufacturer must replace the motor vehicle with a comparable motor vehicle, or return the buyer's purchase price, less a reasonable allowance for use.

C. Impact of typical state "lemon" law.

1. Creates a new statutory warranty that modifies every

manufacturer's warranty. Lemon laws were enacted to overcome the inadequacies of the warranty provisions of the UCC.⁶

2. Sets standards for consumers and manufacturers in determining when a seller must refund the buyer's money and take back the vehicle ("buy-back") must be awarded.
3. 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.
4. Common provisions. Although there is a great deal of variety among the various "lemon" laws, many include the following common provisions.
 - a) Most lemon laws apply only to new cars, although some also apply to used cars, motorcycles, off road vehicles, mobile homes, and leased cars. See, e.g., N.Y. Gen. Bus. Law § 198-b (2004) (Many used cars with up to 100,000 miles must be sold with a warranty.). Some states may apply these laws to leased vehicles.
 - b) Many statutes provide that the manufacturer must allow the consumer to return the car for a full refund or a replacement vehicle if the following conditions are met:
 - (1) 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.
 - (2) A substantial defect in a new automobile cannot be repaired in a reasonable number of attempts.

⁶ *Mocek v. Alfa Leisure, Inc.*, 7 Cal. Rptr. 3d 546 (Cal. Ct. App. 2004) (Song-Beverly Consumer Warranty Act was intended to broaden the remedies available under the U.C.C.); *Genetti v. Caterpillar, Inc.*, 621 N.W.2d 529 (Neb. 2001); *Reddin v. Toyota Motor Distributors, Inc.*, 1991 WL 21522 (Ohio Ct. App. Feb. 22, 1991); *Dutchmen Mfg., Inc. v. Texas Dep't of Transp.*, 383 S.W.3d 217 (Tex. App. 2012); *Marquez v. Mercedes-Benz USA, L.L.C.*, 815 N.W.2d 314, 321–322 (Wis. 2012); *Dieter v. Chrysler Corp.*, 610 N.W.2d 832 (Wis. 2000); *Herzberg v. Ford Motor Co.*, 626 N.W.2d 67 (Wis. Ct. App. 2001). See also *DaimlerChrysler Corp. v. Smelser*, 289 S.W.3d 466 (Ark. 2008) (construing lemon law's provision for reimbursement of costs broadly; legislature intended to address the hardship a defective vehicle creates for consumer); *DaimlerChrysler Corp. v. Law*, 2006 WL 3200112 (Conn. Super. Ct. Oct. 25, 2006) (reciting legislative history), *aff'd on other grounds*, 937 A.2d 675 (Conn. 2007).

- (a) Three or four attempts to correct the same or substantially the same defect is normally "reasonable."
- (b) Some statutes allow the consumer the benefit of the statute if the car is out of use for 30 or more days. Some use calendar and others use business days.
- c) All state lemon laws contain an explicit "savings clause" that preserves consumers' rights under all other laws.
- d) The buyer need not show that the defect causes a safety hazard. A safety hazard, however, may accelerate a consumer's ability to seek seller repurchase of the vehicle. *See Mooberry v. Magnum Mfg., Inc.*, 32 P.3d 302 (Wash. Ct. App. 2001).
- e) 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.*, 571 A.2d 609 (Vt. 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). How many repair attempts are required depends on state law. Fewer attempts may be required if the defect presents a safety hazard. *See WASH. REV. CODE 19.118.041(2)* (2007).
- f) 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.
- g) 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.

- h) Manufacturers are seldom held liable for defects resulting from the consumer's abuse, neglect, or unauthorized modifications. The abuse should be abnormal, unforeseeable conduct and not conduct that merely puts the warranty to the intended test.
- i) Under all lemon laws, the consumer must give notice of the defect, but the notice provisions vary greatly.
 - (1) Most allow notice to the manufacturer, its agent, or an authorized dealer.
 - (2) However, it is wise to provide written notice to the manufacturer by certified mail.
- j) 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.
- k) Most lemon laws permit the dealer an affirmative defense if:
 - (1) The defect or nonconformity does not substantially impair the value or use of the vehicle.
 - (2) The consumer's abuse, neglect, or unauthorized modifications or alterations cause the defect.
- l) Offsets. Almost all state laws provide that the consumer will pay the dealer an offset:
 - (1) This is usually a reasonable allowance for use of the vehicle.
 - (2) An example is a formula used in several states which is $(\# \text{ of miles driven})/100,000 \times (\text{the cost of the vehicle})$.

5. Remedies available under lemon laws.

- a) 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.
 - (1) 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."
 - (2) States vary as to which programs they find consistent with FTC guidelines, and the court may ultimately make this determination.
- b) Some states provide state-organized and funded IDSM mechanisms. See e.g., N.Y. Gen. Bus. Law § 198-a(g).
- c) 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.
- d) 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.
- e) Attorneys' fees and court costs may be made available for consumers who successfully sue to obtain lemon law remedies.
- f) 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.
- g) Some lemon laws permit consequential and incidental damages.
- h) Under a few statutes, manufacturers who are sued in bad

faith or without substantial justification are entitled to recover legal expenses from the consumer.

VI. LATENT DEFECTS (After Lemon Law Period Expires)

- A. Discovery During the Written Warranty Period. (See Warranty Law Above.)
 - 1. Use the Magnuson-Moss Act to bring a suit for damages for breach of the warranty.
 - 2. Revoke acceptance under the UCC.
- B. Discovery After the Warranty Period Expires.
 - 1. Secret Warranties: A strategy where the manufacturer pays for repair of defects after the warranty period, but only for those consumers who complain.
 - a) These policies are “secret” because they are normally passed only to regional offices and never to buyers.
 - b) Secret warranties cover certain components, or systems that malfunction or defects which the manufacturers have found occurring in a wide spread pattern.
 - c) These are tough to find and document. The only strategy is to complain long and loud. Legal assistance attorneys may be able to help in dealing with the manufacturer’s regional office.
 - d) An important resource here is The Center for Auto Safety, 2001 S Street, NW, suite 410, Washington, DC 20009, (202) 328-7700.
<https://www.autosafety.org/lemon-laws/> They have information on secret warranty programs for specific model cars.
 - 2. UDAP Violations. Failure to disclose a latent defect when the manufacturer knows about it should almost certainly be a UDAP violation.

USED CARS

VII. AVOIDING “AS IS” SALES

- A. Express Warranties (See also Warranty Law Above): express warranties cannot be disclaimed.
1. Manufacturer’s warranties. Written warranties apply to subsequent purchasers unless expressly limited to first purchaser. Note that certain parts (drive train, emission control, etc.) may be covered even if the entire vehicle is not.
 2. Dealer’s warranties.
 - a) Descriptions of the make, model, year, options, odometer reading, etc. in sales agreement.
 - b) Oral representations by sales personnel. Note that dealers often try to avoid these by merger clauses in the sales agreement. These types of waivers are often ineffective. See *McGregor v. Dimou*, 422 N.Y.S. 2d 806 (Civ Ct. 1979) (in very good condition and had not been in an accident)
 - c) Advertising about vehicle.
 - d) Dealers may argue that the FTC Used Car Rule (see below) Buyer’s Guide supersedes these warranties when it says, “As Is.” The FTC Rule only requires disclosure of certain listed types of warranties so this argument should not be effective.
- B. Implied Warranties.
1. Disclaimer limitations. Implied warranties cannot be disclaimed if the dealer gives a written warranty or “enters into” a service contract. When a dealer sells a service contract along with the vehicle, the FTC Used Car Rule requires that the dealer check the box marked “WARRANTY” on the buyer’s guide and also a box stating that implied warranties may give buyer additional rights.
 - a) May be an issue about whether dealers “enter into” a

service contract if they do not provide the service themselves, but simply offer a third-party service contract.

b) The Magnuson-Moss Act has limited applicability if the state regulates service contracts.

2. State Law limitations. A significant number of states restrict the disclaimer of implied warranties. Legal Assistance Attorneys should research the applicable state law regarding the disclaimer of implied warranties, as statutory warranties or other applicable laws may make the disclaimer invalid.

C. Adequate Disclosure of “AS IS” Disclaimer.

1. Available to consumer before purchase?
2. Conspicuous – either a larger type size or otherwise set out from the rest of the K.
3. Must make plain that implied warranties are disclaimed.

D. Non-Warranty Claims.

1. UDAP – See Chapter 3. Deception, misrepresentation or the like.
2. Traditional legal theories: fraud, tort liability (negligence, strict liability).

VIII. CAR’S TRUE HISTORY NOT DISCLOSED

A. The Motor Vehicle Information and Cost Savings Act, commonly referred to as The Federal Odometer Act, concerns inaccurate Odometer Readings.

1. Resources.
 - a) 49 U.S.C. §§ 32701-32711 (2012).
 - b) 49 C.F.R., Part 580.
 - c) NATIONAL CONSUMER LAW CENTER, AUTOMOBILE FRAUD

(7th ed. 2022).).

2. Congressional findings and purposes. (49 U.S.C. § 32701)

a) Findings.

- (1) Buyers of motor vehicles do and are entitled to rely heavily on the odometer reading as an index of the condition and value of a vehicle.
- (2) An accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle.

b) Purposes of the Federal Odometer Act.

- (1) To prohibit tampering with motor vehicle odometers (any vehicle with an odometer); and
- (2) To provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers. Requires that any car transfer include an odometer disclosure statement.

c) Who must comply with the Act.

- (1) Any person or business that violates any section of that act may be liable, including private individuals who sell a car to another consumer. Disclosure statement requirements are more limited in scope.

3. Definitions (49 U.S.C. § 32702).

- a) "Dealer" means a person that sold at least 5 motor vehicles during the prior 12 months to buyers that in good faith bought the vehicles other than for resale.
- b) "Leased motor vehicle" means a motor vehicle leased to a person for at least 4 months by a lessor that leased at least 5 vehicles during the prior 12 months.
- c) "Odometer" means an instrument for measuring and

recording the distance a motor vehicle is driven, but does not include an auxiliary instrument designed to be reset by the operator of the vehicle to record mileage of a trip.

- d) "Transfer" means to change ownership by sale, gift, or any other means.

4. Primary protections of the odometer act.

- a) Prohibition on odometer tampering (49 U.S.C. § 32703). A person may not--
 - (1) advertise for sale, sell, use, install, or have installed, a device that makes an odometer of a motor vehicle register a mileage different from the mileage the vehicle was driven, as registered by the odometer within the designed tolerance of the manufacturer of the odometer;
 - (2) disconnect, reset, alter, or have disconnected, reset, or altered, an odometer of a motor vehicle intending to change the mileage registered by the odometer;
 - (3) with intent to defraud, operate a motor vehicle on a street, road, or highway if the person knows that the odometer of the vehicle is disconnected or not operating; or
 - (4) conspire to violate this section.
- b) Disclosure requirements (49 C.F.R. § 580.5).
 - (1) Each title, at the time it is issued to the transferee, must contain the mileage disclosed by the transferor when ownership of the vehicle was transferred and contain a space to provide odometer disclosures at the time of future transfer.
 - (2) Any documents that are used to reassign a title shall contain a space for the required odometer disclosures at the time of transfer of ownership.

- (3) Written disclosure.
- (a) Made on the title or on the document used to transfer ownership. Transferors must sign this written disclosure and include their printed name. In addition, the written disclosure must contain the following information:
- (i) The odometer reading at the time of transfer (not to include tenths of miles);
 - (ii) The date of transfer;
 - (iii) The transferor's name and current address;
 - (iv) The transferee's name and current address; and
 - (v) The identity of the vehicle, including its make, model, year, and body type, and its vehicle identification number.
- (b) The statement shall refer to the Federal law and shall state that failure to complete or providing false information may result in fines and/or imprisonment. Reference may also be made to applicable State law.
- (c) Certification by the owner that either,
- (i) To the best of his knowledge the odometer reading reflects the actual mileage, or;
 - (ii) If the transferor knows that the odometer reading reflects an amount of mileage in excess of the designed mechanical odometer limit, he shall include a statement to that

effect; or

(iii) If the transferor knows that the odometer reading differs from the mileage and that the difference is greater than that caused by odometer calibration error, he shall include a statement that the odometer reading does not reflect the actual mileage, and should not be relied upon. This statement shall also include a warning notice to alert the transferee that a discrepancy exists between the odometer reading and the actual mileage.

(d) If the vehicle has not been titled, or if the title does not contain a space for the information required, the written disclosure shall be executed as a separate document.

c) Other Requirements.

(1) If the odometer must be repaired, serviced, or replaced, the mileage must be set the same as before the service or set to 0 and a notice attached to the left door frame reflecting the prior mileage, date of service, and whether replacement or repair. (49 U.S.C. § 32704)

(2) Act prohibits parties from conspiring to violate any of the act's provisions.

(3) Unlike many consumer statutes that require disclosures be given only to consumers, odometer disclosures are required for any change of title, no matter the nature of the parties involved in the transfer.

(4) Some transfers of vehicles are exempt thus no disclosure necessary, however if they do give a disclosure it cannot be false. The regulation exempts these 5 types of transfers:

- (a) A vehicle that is 10 years old or older.
- (b) A new vehicle before its first transfer for a purpose other than resale.
- (c) Vehicles with gross weight over 16,000 pounds.
- (d) A vehicle that is not self-propelled.
- (e) New vehicles sold directly to a U.S. agency.

5. Penalties and enforcement (49 U.S.C. § 32709).

- a) **Civil penalty.** A person who violates these provisions is liable to the United States Government for a civil penalty of not more than \$10,000 for each violation. A separate violation occurs for each motor vehicle or device involved in the violation. The maximum penalty under this subsection for a related series of violations is \$1,000,000. In determining the amount of a civil penalty under this subsection, the Secretary shall consider--
 - (1) the nature, circumstances, extent, and gravity of the violation;
 - (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue doing business; and
 - (3) other matters that justice requires.
- b) **Criminal penalty.** A person who knowingly and willfully violates this chapter or a regulation prescribed or order issued under this chapter shall be fined under title 18 (up to \$50,000), imprisoned for not more than 3 years, or both.
- c) **Civil actions by Attorney General.** The Attorney General may bring a civil action to enjoin a violation of this chapter or a regulation prescribed or order issued

under this chapter.

- d) **Civil actions by States.** The chief law enforcement officer of the State in which the violation occurs may bring a civil action--
 - (1) to enjoin the violation; or
 - (2) to recover amounts for which the person is liable under section 32710 of this title for each person on whose behalf the action is brought.

6. Civil actions by private persons (49 U.S.C. § 32710).

- a) Violation and amount of damages.
 - (1) Violates with intent to defraud.
 - (2) Liable for 3 times the actual damages or \$10,000; whichever is greater.
 - (3) The court shall award costs and reasonable attorney's fees to prevailing consumers.
- b) **Statute of Limitations.** The action must be brought not later than 2 years after the claim accrues. The claim “accrues” when the particular plaintiff (and not prior purchasers) has reason to know of the violation. *John Watson Chevrolet, Inc. v. Willis*, 890 F. Supp. 1004 (D. Utah 1995). See also *Ferris v. Haymore*, 967 F.2d 946 (4th Cir. 1992). *Gordon v. Stickney*, 2000 WL 970717 (Del. Super. Ct. May 11, 2000).

B. Lemon Laundering.

- 1. Defined: “the practice of manufacturers reselling cars returned to them as lemons, without informing the ultimate consumer buyer about the car’s repair history.” NCLC, CONSUMER WARRANTY LAW, § 15.7.3.1 (6th ed. 2021.).
- 2. Even if the manufacturer has repaired the defects, the cars will sell for more if the defect history is not disclosed.

3. Lemon Laundering is being conducted by manufacturers on a wholesale basis. More recently manufacturers will sell cars to a dealer or wholesaler and disclose the defect and state the defect has been corrected. However, there are risks that the defect was not permanently fixed or could lead to other defects. There could also be several defects and the manufacturer only discloses one defect although their records have evidence of all the defects.
 4. Dealers also buy back the vehicle before it is required under their state law and call this a “goodwill” buy back, and thus they never disclose the lemon history to the dealer.
 5. State statutory protection. Most states have statutes governing this practice.
 6. Statutes require disclosure of the prior history on the title or other sale documents. Some states mandate a warranty.
 7. Under Magnuson Moss Warranty Act, subsequent buyers can generally enforce the original warranty despite the lack of horizontal privity.
 8. Examining a vehicle’s title history can help uncover lemon laundering. A car returned to a manufacturer particularly during its first 12,000 miles is usually a lemon (unless short-term lease) or if sold back to the original dealer in its first years. Try to locate original consumer if you are filing a suit.
 9. If there is no lemon history on title, it is an expressed warranty that it is not a lemon buy back.
- C. Salvage Vehicles. Similar to Lemon Laundering, selling rebuilt cars or vehicles assembled from salvaged parts, without disclosures, will often violate a specific state statute, the more general state UDAP statute, or amount to common law fraud.

IX. THE FTC USED CAR RULE

- A. The FTC issued a trade practice rule, effective 9 May 1985 (amended 16 Nov. 2016), in an attempt to reduce oral misrepresentations, particularly with respect to warranty coverage. 16 C.F.R. Part 455.
- B. 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. The disclosure that the Buyer's Guide is incorporated into the contract must be conspicuously displayed and it is a violation of the rule if it is only included in the fine print boiler plate of the contract. The Guide MUST disclose:

1. Make, model, year, and VIN
2. Name & address of dealer (or other party who will accept complaints)
3. A warning that all promises from dealer should be in writing because spoken promises are hard to prove.
4. A statement that directs consumers to obtain a vehicle history report and to check for open recalls;
5. A statement, in Spanish, to the English-language Buyers Guide, advising Spanish-speaking consumers to ask for the Buyers Guide in Spanish if the dealer is conducting the sale in Spanish; and Provides a Spanish translation of the statement that dealers may use to obtain a consumer's acknowledgement of receipt of the Buyers Guide.
6. The meaning of the term "As Is"
7. Clear Disclosure of Warranty Coverage. Either:
 - a) AS-IS – NO WARRANTY
 - b) WARRANTY
 - c) IMPLIED WARRANTIES ONLY (If dealer chooses not to disclaim them or state law prohibits them from doing so.)
8. Availability of Service Contracts
9. A suggestion to the consumer to ask the dealer whether a pre-purchase independent inspection is permitted.

10. Places boxes on the face of the Buyers Guide that dealers can check to indicate whether a vehicle is covered by a third-party warranty and whether a service contract may be available;
11. Provides a box that dealers can check to indicate that an unexpired manufacturer's warranty applies;
12. On the back, a list of the major mechanical and safety systems of a car and a partial list of defects likely to occur within those systems in used cars, including air bags and catalytic converters.

C. Deceptive acts and practices.

1. 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.
2. 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.

3. 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, 772 S.W.2d 309 (Ar. 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.

X. STATE USED CAR “LEMON LAWS”

- A. Some states have passed used car lemon laws. Check your own state. Some examples:
 1. Hawaii (Haw. Rev. Stat. §§ 481J-1 to 7).
 2. New York (N.Y. Gen. Bus. Law § 198-b).
 3. Rhode Island (R.I. Gen. Laws § 31-5.4).
 4. Massachusetts (Mass. Gen. Laws. Ann. Ch. 90 § 7N¼).
 5. Minnesota (Minn. Stat. Ann. § 325F.662).
 6. New Jersey (N.J. Rev. Stat. Ann. § 56:8-67 to 80).
- B. Most state lemon laws, although designed primarily to protect new car owners, also cover subsequent purchasers of warranted vehicles during the warranty period.
- C. Most used car lemon laws only apply to “dealers.”
 1. A dealer is usually defined as one who has sold or offered to sell at least three vehicles in the prior twelve months.

2. This will usually include even unlicensed “backyard” dealers.

D. Basic Protections.

1. States that have a lemon law mandate certain warranty protections and specify the duration of the protection.

2. The duration is normally tied to the number of miles on the car at purchase.

3. Remedies. If the warranty is breached during the period the statutes provide that:

a) If the dealer is notified of the defect, AND

b) Fails to remedy the problem in a reasonable number of attempts; AND

c) The defect substantially impairs the value of the car; THEN

d) The dealer will accept return of the car and, at the consumer’s option,

(1) replace it with a comparably priced vehicle OR

(2) Refund the purchase price less certain adjustment.

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CHAPTER E

PROTECTIONS BASED UPON THE TYPE OF PAYMENT

(FEDERAL CONSUMER CREDIT PROTECTIONS)

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September 2022

I. TRUTH IN LENDING ACT (TILA).

A. References.

1. Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (1968).
2. Regulation Z, 12 C.F.R. Part 1026.
3. NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (10th ed. 2019).
4. Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009, 15 U.S.C. § 1601 (expanding the TILA).
5. Electronic Fund Transfer Act, 15 U.S.C. 1693 (1978).
6. Regulation E, 12 C.F.R. Part 1005.
7. Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654 (2008).
8. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 53, *et seq.*, Pub. L. No. 111-203 [Dodd-Frank Act] (2010).
9. Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (May 20, 2009).

B. Purpose.

1. Economic stabilization and competition is strengthened by informed use of credit by consumers.
 - a) TILA requires "meaningful disclosure of credit terms."
 - b) TILA also designed to protect consumer against inaccurate and unfair credit billing and credit card practices.
2. TILA is to be liberally construed in favor of consumers, with creditors who fail to comply with TILA in any respect becoming liable to the consumer regardless of the nature of violation or the creditor's intent.
3. Congress enacted TILA to ensure that consumers receive accurate information from creditors in a precise and uniform manner that allows them to compare the cost of credit. And to discourage unfair competition that places

responsible lenders at a disadvantage.

4. The Act is in Title I of the Consumer Credit Protection Act and is implemented by the Consumer Financial Protection Bureau (CFPB). 12 C.F.R. Part 1026.

C. Method of Analysis.

1. Collect all documents related to the extension of credit.
 - a) Note or contract.
 - b) TIL disclosure statement.
 - c) Itemization of amount financed or HUD-1 statement.
 - d) Notice of right to rescind, if applicable. Note, if applicable, two copies must be given to the consumer.
2. Evaluate the accuracy of the numerical disclosures on their face.
3. Determine if the numerical disclosures were made IAW TILA.
4. Evaluate the adequacy of the non-numerical disclosures under TILA.
5. Determine if there is applicable state law and whether its provisions have been complied with.

D. Scope.

1. TILA applies to:
 - a) Each individual or business that offers or extends credit when four conditions are met:
 - (1) Credit offered or extended to consumers,
 - (2) Done "regularly" - extends credit more than 25 times (or more than 5 times for transactions secured by dwelling) per year,
 - (a) For example – If a person extends credit 26 times in 2002, he is a creditor for at least the 26th extension of credit in 2002 and for all of 2003.

- (3) Subject to a finance charge or is payable by written agreement in more than 4 installments, and
- (4) Primarily for personal, family, or household purposes.
 - (a) A person in whose name a credit card is issued is a customer under TILA even if the card was issued to an imposter.
- b) If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge, is not payable by agreement in more than 4 installments, or if the credit card is used for business purposes. Also, certain requirements apply to persons who are not creditors but who provide applications for home equity plans to consumers.
- c) The Mortgage Disclosure Improvement Act of 2008 (a part of the Housing and Economic Recovery Act of 2008) was enacted to include non-purchase money transactions (refinances). Related amendments to Regulation Z require:
 - (1) Early TILA disclosures for any extension of credit secured by a dwelling of a consumer, including home refinance and home equity loans (not, however, Home Equity Lines of Credit);
 - (2) Early TILA disclosures for loans secured by a dwelling even when it is not the consumer's principal dwelling;
 - (3) Disclosure to consumers that they are not obligated to complete the transaction simply because disclosures were provided or because they applied for a loan;
 - (4) No imposition or collection of fees prior to the consumer receiving early disclosures other than a bona fide or reasonable fee for obtaining consumer's credit report;
 - (5) Disclosure of Good Faith Estimate of costs must be made no later than three days after date of application. When mailed, the consumer is deemed to have received early disclosures three days after they are mailed;
 - (6) If the Annual Percentage Rate (APR) changes beyond the specified tolerance accuracy, a disclosure must be *received* by the consumer on or before the third day prior to

consummation;

- (7) Consummation can only occur on or after seven days after the early disclosures; and
- (8) The consumer can expedite consummation for a bona fide personal emergency.

2. TILA is inapplicable to:

- a) Creditors who extend credit primarily for business, commercial, agricultural, or organizational purposes or other purposes that are otherwise regulated, such as securities brokers. TILA specifically exempts credit granted to “organizations.” See *Prifti v. PNC Bank*, 2001 WL 1198653 (E.D. Pa. Oct. 9, 2001) (corporations and organizations cannot be considered consumers regardless of the purposes for which credit was used)
- b) The inclusion of the Holder in Due Course language required by the FTC is not sufficient, by itself, to subject an assignee to liability. Pursuant to § 1641(a), assignees can be liable only for violations that are “apparent on the face of the disclosure statement.”
- c) Student Loan Programs made, insured, or guaranteed by the United States or a state guaranty agency. TILA does apply to private student loans of any amount. Other disclosure provisions are applicable to student loans not covered by TILA.
- d) Credit transactions over a specified dollar amount that (now) adjusts with inflation. At the time of Regulation Z’s enactment, the amount was \$25,000.00. 12 C.F.R. § 226.3(b). Effective January 1, 2022, the threshold amount is \$61,000. The two exceptions are if the credit transactions over the threshold are for (1) private student loans, or (2) those involving a security interest in real property, or in personal property used or expected to be used as the principal dwelling of the consumer.

E. Electronic Disclosures.

1. The Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464, effective October 1, 2000, was enacted to validate electronic signatures, documents, and disclosures.
If the consumer consents under the act, it overrides TILA’s requirement that disclosures be made in writing.
2. There is a potential for abuse in open-end transactions because there are

ongoing disclosure requirements, for example periodic statements, change of terms of notices, annual billing statements. The creditor may want to get the consumer's approval to give these disclosures electronically in the hope that the consumer will not see them or will just ignore them.

F. Material Disclosures Required.

1. Required disclosures must be made clearly and conspicuously, in meaningful sequence, in writing, and in a form the consumer may keep.
2. CFPB promulgates model disclosure forms, but where they would be misleading, lenders should provide tailored notice consistent with TILA.
3. States also regulate credit disclosure:
 - a) Check cashing companies.
 - (1) *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 cash 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).
 - (2) *Turner v. E-Z Check Cashing*, 35 F. Supp. 2d 1042 (M.D. Tenn. 1999) for a description of the mechanics of a check advancement loan; *White v. Check Holders, Inc.*, 996 S.W. 2d 496 (Ky. 1999)(holding check advancement transactions are loans for purposes of state usury laws); *Smith v. The Cash Store Management, Inc.*, 195 F. 3d 325 (7th Cir. 1999)(applying TILA to check advancement loans).
 - (3) The CFPB commentary to Regulation Z makes it clear that TILA applies to cash advance in exchange for personal check, where parties agree either that the check will not be cashed or that the customer's deposit account will not be debited until a later date.
 - (4) Attempts to get around TILA. Sometimes check cashing companies disguise their fees as payment for useless gift certificates or for advertisements. See *Henry v. Cash Today Inc.*, 199 F.R.D. 566 (S.D. Tex 2000). Check cashing companies also disguise their fees as payment for useless

internet access and very expensive phone cards.

b) Bounce protection plans.

- (1) Banks promote aggressively and tell consumers they can pay back at their discretion, skirting the Truth in Lending Act because the transaction does not meet the requirement of requiring payment in more than 4 installments.
- (2) Cover overdrafts up to certain limit.
- (3) Charge bounced check fee \$20-\$35 each.
- (4) Charge \$2 to \$5 a day until positive balance.
- (5) Prior to the November 17, 2009, amendment to Regulation E, 12 C.F.R. Part 205, many consumers did not affirmatively agree to enrollment in these programs. Banks would impose coverage on all account holders as a "courtesy."
- (6) For accounts opened as of 1 July 2010, consumers must affirmatively opt into an overdraft protection program. For older accounts, financial institutions may not assess overdraft fees as of August 15, 2010, unless the consumer has opted in. Unless the account holder has opted in, cards connected to an account with insufficient funds will be declined. See Regulation E, 12 C.F.R. Part 1005 (2010).
- (7) Not given TILA disclosures which can be over 500% APR.
- (8) Send consumer thank you notes for using the service.
- (9) Bank computers are programmed to clear the largest checks first, a bank is able to bounce a larger number of smaller checks than it would if the smallest checks were cleared first.

c) Large ticket items.

- (1) The deceptive use of open-end credit to finance large ticket items (such as satellite dishes) can be attacked under UDAP and fraud theories. See *Carlisle v. Whirlpool Fin. Nat'l Bank, Clearinghouse*, No. 52,516, Civil Action No. CV 97-068 (Circuit Court, Hale County, Ala., Post Trial Order, Aug. 25, 1999). A

jury awarded \$580 million, finding that the evidence revealed a malicious sale practice designed to target and take advantage of the poor, uneducated, elderly, and African-American citizens. The lender structured the loans as open-ended making the payments last 8 years, instead of 36 months at \$34 each, which the consumers thought was the arrangement.

d) Tax refund anticipation loans.

- (1) *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 potentially high cost of refund loan.
- (2) 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)].
- (3) *Cades v. H. & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 515 U.S. 1103 (1995); *Zawikowski v. Beneficial National Bank*, 1999 WL 35304 (N.D. Ill. 1999)(applying TILA to refund anticipation loan); *Affatato v. Beneficial Corp.*, 1998 WL 472404 (E.D.N.Y. 1998)(discussing timing of refund anticipation loan disclosures); *Basile v. H & R Black, Inc.*, 897 F. Supp. 194 (E.D. Pa. 1995). *State ex. Rel. Salazar v. The Cash Now Store*, 31 P. 3d. 161 (Colo. 2001) (rejecting lender's argument that a tax refund is not a loan).
- (4) *But see Cullen v. Bragg*, 350 S.E.2d 798 (Ga. App. Ct. 1986) (holding TILA inapplicable to refund anticipation transactions because the consumer had no obligation to repay).

e) Pawn transactions / auto pawn

- (1) *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261 (9th Cir. 1993) (decision extensively discusses factors considered, including, e.g., fact that 75% of customers "repurchased" the goods; parties' intent; title to property did not pass until end of repurchase option period, which could be extended for a fee,

which court held analogous to charging interest; “sales” prices related to amount customer needed, rather than fair market value of goods).

(2) For a good example of a disguised credit sale, see *Pendleton v. American Title Brokers, Inc.*, 754 F. Supp. 860 (S.D. Ala. 1991) (where the ad read, “Pawn your title, keep your car;” the borrower signed a “pawn ticket/loan” contract, repayable with interest in weekly installments and executed a leaseback of the automobile, to run concurrently with the loan repayment, for a weekly rental amount equal to 10% of the loan; also included a provision granting the creditor the right of repossession in the event of default. This was a credit transaction, therefore TILA applied and since the proper disclosures were not made, TILA was violated). See also *Bumpus v. Vandeford*, Clearinghouse No. 54, 570, Civil Action No. 1:99 CV070-5AA (N.D. Miss. Mar. 27, 2002) (Loan was structured as a conditional sale with a right to rescind the sale upon payment of weekly “extension fees,” weekly fees were 10% of loan amount.)

G. Open-end Credit Transactions.

1. Definition: Open-end credit includes bank and gas company credit cards, stores' revolving charge accounts, telephone credit cards, and cash-advance checking accounts.
 - a) Typical features: (12 C.F.R. § 1026.2(a)(20)).
 - (1) Creditors reasonably expect the consumer to make repeated transactions.
 - (2) Creditors may impose finance charges on the unpaid balance.
 - (3) As the consumer pays the outstanding balance, the amount of credit is once again available to the consumer.
 - b) Required disclosures.
 - (1) Annual percentage rate including applicable variable-rate disclosures,
 - (a) Creditors must disclose each periodic rate that may be used to compute the finance charge on an outstanding

balances, for cash advances, or balance transfer in 16-point type. When they use teaser rates or introductory rates, they must disclose regular rate in at least 16 point type;

- (2) Method of determining finance charge and balance upon which finance charge imposed, as explained in 12 C.F.R. § 1026.6;
 - (3) Amount or method of determining any membership or participation fees. Penalty rate, and what triggers the penalty rate (for example, 22% if more than 60 days late);
 - (4) Grace period for purchases to avoid any finance charge if the consumer pays the debt before the grace period ends;
 - (5) Methods of computing the balance on which finance charges will be calculated to the purchases of goods and services;
 - (6) Any balance transfer fees;
 - (7) Security interests if applicable to transaction, and
 - (a) Most cards are unsecured but typically 3 ways to take collateral.
 - (i) Items purchased with card
 - (ii) Secured by a bank deposit
 - (iii) Home equity loan
 - (8) Statement of billing rights.
- c) Other requirements include furnishing consumer with a periodic statement of the account.
- (1) 12 C.F.R. § 1026.12 details special credit card provisions, including liability of cardholder and assertion of claims and defenses against card issuer (see Fair Credit Billing Act outline).
 - (2) 12 C.F.R. § 1026.13 details billing error resolution (see Fair Credit Billing Act outline).
- d) Format of Disclosures.

- (1) Must be clear and conspicuous. Must be in a reasonably understandable form. Convuluted legalese does not comply with the requirement. Misleading disclosures are not clear.
- (2) Tabular Format. Certain disclosures must be in tabular format. Prior to July 2010, only credit card applications and disclosures were required to be in a tabular format, and had font size requirements. Now, additional disclosures must be in tabular format, and are subject to certain requirements. In total, the locations in which disclosures are required to be made in tabular format include:
 - (a) Credit and charge card applications and solicitations;
 - (b) Account opening disclosures;
 - (c) Convenience check disclosures;
 - (d) Change-in-terms notices; and
 - (e) Notice of penalty rate imposition.

Disclosures made in tabular format must be readily noticeable, and made using at least 10-point font. Disclosures of any purchase APR in the tabular format for credit card application/solicitation and account-opening disclosures must be made in sixteen-point type, except for penalty APRs.

- (3) Open-end creditors must disclose the following in the form of a table at account opening;
 - (a) Each APR for purchases, cash advances, and balance transfers, including;
 - Variable rate information;
 - Introductory rates;
 - Premium initial rates; and
 - Penalty Rates

- (b) Fees for issuance or availability of credit;
- (c) Any fixed finance charge or minimum interest charge;
- (d) Transaction charges;
- (e) Grace period;
- (f) Cash advance fees and balance transfer fees;
- (g) Late payment fees, over-the-limit fees, and returned payment fees;
- (h) Required insurance, debt cancellation, or debt suspension coverage; and
- (i) If fees for issuance or availability of credit exceed certain thresholds, the amount of available credit after such fees are charged to the account.
 - (i) Disclosures directly beneath the table include:
 - Balance computation method;
 - Loss of an introductory rate;
 - Statement about billing error rights.
 - (ii) All other disclosures may be presented with the account agreement or account-opening disclosures, but may not be in the table.

H. Closed-end Credit Transactions.

1. Definition: “other than open-end credit.” Credit is advanced for a specific time period and, the amount financed, finance charge, and schedule of payments are “agreed upon” by the creditor and the consumer. (See 12 C.F.R. § 226.2(a)(10)).
2. Required 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, and,
- 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.

3. Clear and Conspicuous. Disclosures must be made clearly and conspicuously. Models for all open-end credit transactions can be found in Appendix G of Regulation Z. The models for closed-end credit are in Appendix H of Regulation Z. Courts typically judge whether a disclosure is clear and conspicuous by using an objective standard, that of the “ordinary” consumer. If the ordinary consumer would be confused or misled by the disclosures, they are not clear and conspicuous.

I. Violations of TILA.

- 1. Creditors are liable for violation of the disclosure requirements, regardless of whether the consumer was harmed by the nondisclosure, **UNLESS**:
 - a) Good faith conformity with CFPB rulings and interpretations;
 - b) Use of model forms;
 - c) Use of a faulty calculation tool;

- d) The creditor corrects the error within 60 days of discovery and prior to written suit or written notice from the consumer, or,
- e) The error is the result of bona fide error. The creditor bears the burden of proving by a preponderance of the evidence that:
 - (1) The violation was unintentional.
 - (2) The error occurred notwithstanding compliance with procedures reasonably adapted to avoid such error (error of legal judgment with respect to creditor's TILA obligations not a bona fide error).

2. Civil remedies for failure to comply with TILA requirements:

- a) Action in any U.S. district court or in any other competent court within one year from the date on which the violation occurred. This limitation does not apply when TILA violations are asserted as a defense, set-off, or counterclaim, except as otherwise provided by state law.
- b) Private remedies - applicable to violations of provisions regarding credit transactions, credit billing, and consumer leases.
 - (1) Actual damages in all cases.
 - (2) Attorneys' fees and court costs for successful enforcement and rescission actions.
 - (3) Statutory damages.
 - (a) Individual actions – for most cases, double the correctly calculated finance charge. For closed-end transactions secured by real property – not less than \$400 or more than \$4,000. For open-end credit not secured by real estate or a dwelling – not less than \$500 or more than \$5,000. For closed-end credit not secured by real property or a dwelling, and for open-end credit secured by real estate or a dwelling, not less than \$200 or more than \$2,000. These amounts have and will change, so check the applicable law based on the case.
 - (b) Class actions - an amount allowed by the court with no required minimum recovery per class member to a maximum of \$1,000,000 or 1% of the creditor's net worth, whichever is less.

- (c) 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.
- c) Enforcement by administrative agencies.
 - (1) Who:
 - (a) Banks - Federal Reserve Board, the Federal Deposit Insurance Corporation, and other prudential regulators and agencies. The Consumer Financial Protection Bureau will enforce TILA against banks, thrifts, and credit unions with over \$10 billion in assets.
 - (b) Others not subject to the authority of any specific enforcement agency – Consumer Financial Protection Bureau or Federal Trade Commission.
 - (c) Many agencies currently have enforcement responsibilities. Legal Assistance Attorneys with TILA-related issues should contact the Consumer Financial Protection Bureau with any questions on the appropriate enforcement agency.
 - (2) What enforcement agencies can do:
 - (a) Issue cease and desist orders or hold hearings pursuant to which creditors are required to:
 - (i) 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
 - (ii) the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.
 - (b) If the FTC or CFPB 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.

3. Criminal penalties - Willful and knowing violations of TILA permit imposition of a fine of \$5,000, imprisonment for up to 1 year, or both.
4. Rescind the contract (see below).

J. Truth In Lending Act Rescission Rights.

1. 3-Day right of rescission (15 U.S.C. § 1635; 12 C.F.R. § 226.15).
2. General. In addition to remedies described above, consumers who enter into certain home equity loans may also have rescission rights as described below.
 - a) 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 (excludes Sunday and most Federal holidays) if all TILA disclosure requirements are met, or
 - (2) During an extended statutory period for TILA disclosure violations:
 - (a) Failure to give adequate notice of right to rescind, clearly and conspicuously in a form the consumer may keep.
 - (b) Failure to give adequate TILA credit term disclosures.
 - b) Rescission voids the security interest in the principal dwelling.
 - c) 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.
 - d) TILA rescission rights do not apply to business credit transactions, even if secured by consumer's principal dwelling.
3. Scope of Rescission Rights (WHAT).
 - a) Applies to loan involving a non-purchase money security interest in consumer's principal residence (i.e., home equity loans/lines of credit/home improvement loans, etc.).
 - b) A consumer can have only one principal dwelling at a time. A vacation or other second home is not a principal dwelling. A transaction secured by a second home cannot be rescinded even if the consumer plans to

reside there in the future.

4. Time to Exercise Right to Rescind.

a) Right to rescind until midnight of third business day following the later of:

(1) Consummation of transaction,

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

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

(i) Opening the plan,

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

(iii) Increasing the credit limit,

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

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

(2) Delivery of the required rescission right notice, or

(3) Delivery of all material disclosures.

5. Extended right to rescind.

a) Continuing right to rescind if required disclosures not made or made incorrectly, BUT

b) Statutory cut-off of extended right to rescind at 3 years after consummation.

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

6. Violations Giving Rise to An Extended 3-Year Right to Rescind.
 - a) Failure to give proper rescission notice.
 - b) Creditors are required to deliver two copies of the right to rescind to each consumer entitled to rescind.
 - c) Notice must disclose the following:
 - (1) The retention or acquisition of a security interest in the consumer's principal dwelling,
 - (2) The consumer's right to rescind,
 - (3) How to exercise the right to rescind, with a form for that purpose, setting forth the creditor's business address,
 - (4) The effects of rescission, and
 - (5) The date the rescission period expires. Sometimes there is an error with failure to fill in expiration date or if the closing is postponed and seller does not change notice.
 - d) Proof of Delivery. Because there are such serious consequences for not giving proper disclosures, disputes arise over whether they were given. If debtor testifies that disclosures were not given then the creditor has the burden to produce some positive evidence (testimonial or documentary) that the disclosures were provided.
7. Running of the 3-year time period for rescission extinguishes the right. *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998).
 - a) “Three-year period for rescinding loan agreement under Truth-in-Lending Act (TILA) clearly precluded right of action after specified time; accordingly, it [3-yr time to rescind] was not a statute of limitation, and mortgagors could not assert right to rescind as recoupment defense in foreclosure action brought by mortgagee more than three years after consummation of loan transaction.”
 - b) “[T]he filing of a lawsuit can be sufficient written notice of rescission under TILA so long as the complaint seeks rescission.” *Jones v. Saxon Mortgage Incorporated*, 537 F.3d 320, (4th Cir. 1998).

- c) “[W]e hold that § 1635(f) is an absolute time limit and cannot be tolled to allow a party to rescind after a foreclosure sale.” *Id.*
 - (1) Home Improvement Application. Consumer had a three-year extended right to rescind a home improvement contract where notices required by the TILA were not properly given by the third party financing company and where the work began prior to the completion of the rescission period. *Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96 (5th Cir. 1996).
- d) Resolving a prior circuit split, the Supreme Court held that TILA only requires a consumer to notify their creditor of their intention to seek rescission within the three year time period; TILA does not require the consumer to file suit within that period. *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. 259 (2015).

8. Waiver of the Right to Rescind:

- a) Consumers may modify or waive the right to rescind the credit transaction if extension of credit is needed to meet a bona fide personal financial emergency before the end of the rescission period. Waiver must be knowing and voluntary. See *Wiggins v. Avco Fin. Servs.*, 62 F. Supp. 2d 90 (D.D.C. 1999) (use of preprinted form to waive the right to rescind was a violation of the TILA).
- b) Consumers may modify or waive the right to rescind the credit transaction if extension of credit is needed to meet a bona fide personal financial emergency before the end of the rescission period. Waiver must be knowing and voluntary. See *Wiggins v. Avco Fin. Servs.*, 62 F. Supp. 2d 90 (D.D.C. 1999) (use of preprinted form to waive the right to rescind was a violation of the TILA).
 - (1) Consumer must provide creditor with dated written statement describing emergency.
 - (2) Specifically modifying or waiving right, and
 - (3) Signed by all consumers entitled to rescind.

9. Delay of Performance.

- a) 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,
 - (1) Disburse advances to the consumer or others,

- (2) Begin performing services for the consumer, or
 - (3) Deliver materials to the consumer.
- b) During the delay period, a creditor may:
- (1) Prepare cash advance check (or loan check in the case of open-end credit),
 - (2) Perfect the security interest, and/or
 - (3) Accrue finance charges,
 - (4) In the case of open-end credit, prepare to discount or assign the contract to a third party.
- c) Delay beyond rescission period.
- (1) Creditor must wait until reasonably satisfied consumer has not rescinded.
 - (2) May do this by:
 - (a) Waiting reasonable time after expiration of period to allow for mail delivery, or
 - (b) Obtaining written statement from all eligible consumers that right not exercised.

10. Mechanics of Rescission Process.

- a) Consumer sends or delivers written notice to creditor.
- b) When consumer rescinds, the security interest becomes void and consumer is not liable for any amount, including finance charges.
 - (1) Within 20 calendar days after receiving notice of rescission, creditor must:
 - (a) Return any property or money given to anyone in connection with the transaction,
 - (b) Take whatever steps necessary to reflect termination of the security interest.
 - (2) When creditor meets its obligations, consumer must tender the

money or property to creditor, or if tender not practicable, its reasonable value.

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

11. 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.
- b) See *Family Financial Services v. Spencer*, 677 A.2d 479 (Conn. App. 1996) (creditor's failure to honor the rescission nullified the security interest, barring foreclosure, and the consumer was not required to tender back the proceeds).
- c) See *Reynolds v. D & N Bank*, 792 F. Supp. 1035 (E.D. Mich. 1992). Consumer canceled 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 rescission, 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).

12. Particular Types of Transactions.

- a) Refinancing and Consolidation.
 - (1) Rescission rights **do not** apply to refinancing or consolidation by same creditor of an extension of credit already secured by consumer's principal dwelling.
 - (2) Rescission rights do apply to extent new amount that exceeds unpaid balance, any earned unpaid finance charges on existing debt, and amounts attributed solely to costs of refinancing or consolidation.
- b) Open-end line of credit secured by home used to pay off loan **not** originally secured by home requires complete rescission rights.
- c) Door-to-door sales.
 - (1) 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.

- (2) When consumer offers to obtain their own financing independent of assistance or referral from seller, sale and financing are separate transactions.
- (3) When there are separate transactions,
 - (a) FTC Rule (Cooling Off Period for Door-to-Door Sales) applies.
 - (b) TILA requires 3-day rescission period (unless extended for TILA violation).
 - (c) Seller bound by consumer's timely cancellation regardless of which party receives notice of cancellation.
- (4) 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.
 - (a) When seller finances or arranges financing with second mortgage, this is considered a single transaction.
 - (b) When there is a single transaction, TILA rescission rights apply, but not FTC Rule 3-day cooling off period.
 - (i) FTC Rule does not apply to transactions in which there is a TILA right to rescind (i.e., second home mortgage transactions).
 - (ii) Therefore, consumer has only TILA right to rescind and not the 3-day cooling off period rights under FTC Rule.
 - (c) But, state cooling off periods may apply even when TILA rescission rights are available. If there is a state statute that is not inconsistent with TILA, both must be complied with.

13. Post-consummation events do not trigger additional TILA disclosure requirements.

- a) *Begala v. PNC Bank, Ohio, National Association*, 163 F.3d 948 (6th Cir., 1998). "[U]nder TILA, a creditor's principal disclosure obligations arise before the credit transaction is consummated. In closed-end transactions . . . , the required disclosures under TILA are to be made as of the time that credit is extended, 15U.S.C. § 1638(b), and it is as of that time that the adequacy and accuracy of the disclosures are measured (emphasis original)."

14. Statute of Limitations.

- a) The Dodd-Frank Act significantly changed the previous 1-year statute of limitations provision
 - (1) The TILA 1-year statute of limitations for filing civil actions is NOT jurisdictional. Therefore it is subject to equitable tolling.
 - (2) The Dodd-Frank Act extended the statute of limitations to 3 years for violations of the TILA high-cost mortgage provisions and other various provisions.
 - (3) The statute of limitations may also be inapplicable when TILA violations are used in defense to a foreclosure action.
- b) The statute of limitations may also be inapplicable when TILA violations are used in defense to a foreclosure action.

15. Legal Assistance Attorneys must continually research the statute of limitations in these cases, as they are frequently changing and found in numerous sources. CFPB Attorney consultation is almost always a prudent course of action.

- a) *Ramadan v. The Chase Manhattan Corporation*, 156 F.3d 499 (3d Cir. 1998). "The purpose underlying TILA is 'to assure meaningful disclosure of credit terms ... and to protect the consumer against inaccurate and unfair' practices. 15 U.S.C. § 1601. Thus Congress enacted TILA to guard against the danger of unscrupulous lenders taking advantage of consumers through fraudulent or otherwise confusing practices. As the *Burnett* Court noted, the main inquiry is whether allowing tolling of the statute of limitations is consistent with this policy. We believe that it is."
- b) *Ellis v. General Motors Acceptance Corporation*, 160 F.3d 703 (11th Cir. 1998). "Equitable tolling" is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances. The issue of whether TILA is subject to equitable tolling is one of first impression in this circuit. Every other circuit that has considered the issue has held that TILA is subject to equitable tolling. In this case, we examine TILA, a

consumer protection statute which . . . is remedial in nature and therefore must be construed liberally in order to best serve Congress' intent. [W]e apply the general rule that equitable tolling applies to all federal statutes unless the statute states otherwise. We therefore agree with the Third, Sixth, and Ninth Circuits that the statute of limitations in TILA is subject to equitable tolling.

K. Reverse Mortgages. 15 U.S.C. § 1648, 12 C.F.R. § 1026.33.

1. Consumer agrees to mortgage property to bank in return for payments from lender. At death, transfer, or the consumer ceasing to occupy the property as a principal dwelling, the lender assumes full ownership in fee of the property.
2. Reverse mortgage loans are becoming more widely targeted at elders so they can tap home equity in their property without a repayment requirement while they continue to live in the home
3. Regulation under the TILA.
 - a) Disclosure to the consumer of the following information:
 - (1) Calculate the APR using three different appreciation models for three different credit models. The credit models include a conventional short-term mortgage, a mortgage with a term equal to the actuarial life expectancy of the mortgagor, and a third method determined by the Federal Reserve Board.
 - (2) That the consumer is granting a security interest in the home.
 - (3) A number of other specific disclosures
 - b) All disclosures must be made no less than 3 days before the loan closing.
4. On June 28, 2012, the CFPB completed its initial, statutorily-required study on reverse mortgages. The CFPB found a lack of understanding of the complexities of reverse mortgages. It also found that the borrowers are now younger, and many are taking out lump-sum payments. Some consumers are victims of deceptive marketing.
5. Reverse Mortgages can be very complicated, and improper advice can lead to severe adverse consequences. Legal Assistance Attorneys are encouraged to contact the CFPB for assistance to ensure that clients with reverse mortgages are advised properly.

6. Don't Forget Preventive Law to Your Retiree Population.

L. High Cost Mortgages under TILA Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. § 1639, 12 C.F.R. § 1026.32.

1. Applicability: According to amendments in the Dodd Frank Act, § 1431, the act applies to a closed end credit transaction secured by the consumer's principal residence if:
 - a) In the case of a credit transaction secured --
 - (1) [B]y a first mortgage on the consumer's principal dwelling, the annual percentage rate at consummation of the transaction will exceed by more than 6.5 percentage points (8.5 percentage points, if the dwelling is personal property and the transaction is for less than \$50,000) the average prime offer rate, as defined in section 129C(b)(2)(B), for a comparable transaction; or
 - (2) "By a subordinate or junior mortgage on the consumer's principal dwelling, the annual percentage rate at consummation of the transaction will exceed by more than 8.5 percentage points the average prime offer rate, as defined in section 129C(b)(2)(B), for a comparable transaction;
 - b) The total points and fees payable in connection with the transaction, other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator, exceed—
 - (1) In the case of a transaction for \$20,000 or more, 5 percent of the total transaction amount; or
 - (2) In the case of a transaction for less than \$20,000, the lesser of 8 percent of the total transaction amount or \$1,000 (or such other dollar amount as the Board shall prescribe by regulation); or
 - c) The credit transaction documents permit the creditor to charge or collect prepayment fees or penalties more than 36 months after the transaction closing or such fees or penalties exceed, in the aggregate, more than 2 percent of the amount prepaid.
2. See Dodd Frank Act § 1431 for further definitions.
3. Does NOT apply to:

- d) Reverse mortgages as defined above
- e) Open-end credit

2. The Section Mandates Certain Disclosures.

- a) The CFR mandates a verbatim statement in the notices:

“You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.”

- b) Must be given three days before closing.
- c) Must be in a conspicuous type size. 15 U.S.C. § 1639(a)(1).

3. Restrictions.

- a) No negative amortization. A situation where the amount financed actually increases over time because each monthly payment is less than the interest, which accrued each month.
- b) Limits the inclusion of a prepayment penalty in the loan terms.
- c) May not include a term, which increases the interest rate in the event of default.
- d) Lender may not engage in lending without regard to the borrower's ability to pay.
- e) Home Improvement Contracts are limited.

M. Home Equity Lines of Credit (HELOCs).

- 1. Home Equity Loan Consumer Protection Act, passed in 1988, amended TILA to require disclosure of certain information earlier than is required for most open-ended credit transactions. The Act applies to HELOC plans entered into after 7 November 1989. Pub. L. No. 100-709, 102 Stat. 4725, codified in relevant part at 15 U.S.C. §§ 1637, 1647, and 1665b.
- 2. HELOC rules apply to open-end credit plans secured by the consumer's “principal dwelling.” The definition of “principal dwelling” under HELOC is

more expansive than under TILA. Under HELOC, the rules apply to consumer's second or vacation home, as well.

- a) Disclosures required at time of application.
 - b) Disclosures.
 - (1) Consumer should keep a copy of the disclosures.
 - (2) Right to obtain a refund of fees if terms change and they decide not to enter into the contract.
 - (3) They risk the loss of the dwelling in the event of default.
 - (4) Creditor may terminate a plan or suspend future advances under certain circumstances.
 - c) Disclosures required at plan opening. 12 C.F.R. 1026.40
 - (1) Conditions under which the creditor may terminate the plan or change its terms.
 - (2) Payment terms of the plan.
 - (3) Negative amortization.
 - (4) Transaction requirements.
 - (5) Tax implications.
 - (6) Fact that APR does not include costs other than interest.
 - (7) Example showing how long it would take to repay a hypothetical balance of \$10,000 if only making minimum payments.
 - (8) Variable-rate disclosures, including the "worst case" scenario.
3. In addition to disclosure mandates, there are substantive limitations that apply to the draw period of a HELOC, the repayment period, and any renewal or modification of the HELOC agreement.
- a) Creditors may not terminate a HELOC and accelerate payment of the outstanding balance before the scheduled expiration of the HELOC

plan, unless:

- (1) Consumer fraud or material misrepresentation in connection with the plan.
- (2) Consumer has failed to meet the repayment terms of the agreement.
- (3) Consumer action or inaction that adversely affects the creditor's security for the HELOC.

4. A creditor may not unilaterally change the terms of a HELOC plan after the account has been opened, unless:
 - a) The contract contained the change contemplated on the occurrence of an event, or
 - b) Consumer expressly agrees in writing to the change.
 - c) In a variable-rate HELOC, the index and margin used under the plan may be changed if the original index becomes unavailable, or
 - d) The change unequivocally benefits the consumer or is insignificant.
5. Remedies. TILA remedies are available for most violations of HELOC.

N. Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009

1. On 22 May 2009, the President signed H.R. 627, the "Credit Card Accountability, Responsibility, and Disclosure Act of 2009," otherwise known by the clever acronym the "CARD Act." This Act has now been codified as Public Law 111-24 and amends parts of TILA.
2. This Act is designed to curb some of the more controversial business practices used by many of the major credit card companies in the United States.
3. Application. The vast majority of CARD Act provisions specifically apply to "credit cards under an open-end (not home-secured) consumer credit plan." Two specific kinds of credit cards that are not covered are:
 - a) Credit cards that access most home-equity lines of credit; and
 - b) An overdraft line of credit accessed by debit card.

4. Some of the most significant changes and additional protections include:
 - a) Prohibits certain interest-rate increases. Absent an exemption, there shall be no interest rate increases during the first year of an account, and thereafter, issuers must give 45 days' notice before a rate increase.
 - (1) An issuer cannot increase the APR or certain fees and charges on outstanding balances unless one of the following applies:
 - (a) Promotional APRs where the increase is disclosed ahead of time and is based on a set, disclosed period of time;
 - (b) Where the APR is a variable one;
 - (c) If the consumer makes a payment over 60 days late;
 - (d) If the consumer has completed or failed to comply with a workout or temporary hardship agreement; or
 - (e) If an APR has been decreased pursuant to the Servicemembers Civil Relief Act (SCRA), and the protections of the Act no longer apply (found in Regulation Z).
 - b) Universal default limitations. Universal default is where a lender considers a default to another unrelated creditor or unrelated account as a default against the lender. Universal default is prohibited to outstanding balances and during the first year of an account.
 - c) Restricts additional fees charged by credit card companies. Penalty fees must be "reasonable and proportional." Regulation Z provides safe harbors, but banks are not required to follow them. Penalty fees covered by the rule include:
 - (1) Late fees;
 - (2) Returned payment fees;
 - (3) Over-the-limit fees;

- (4) Fees for declining a credit access check, declined transaction fees;
 - (5) Any fee based on the closure or termination of an account.
- d) Fees not covered by the rule include:
- (1) Balance transfer fees;
 - (2) Cash advance fees;
 - (3) Foreign transaction fees;
 - (4) Expedited payment fees;
 - (5) Optional services fees;
 - (6) Lost or stolen card fees.
- e) The following fees are no longer allowed:
- (1) Declined transaction fees;
 - (2) Account inactivity fees; and
 - (3) Closure or termination of account fees.
- f) Prohibits double-cycle billing. Double-cycle billing is where issuers impose finance charges as a result of the loss of a grace period based on balances from a previous billing cycle.
- g) Creates additional rules on the payment of credit-card debts;
- h) Issuers must establish and maintain reasonable policies and procedures to consider a consumer's ability to pay.
- i) Restricts the opening of credit accounts to consumers under 21 by requiring a parent or guardian as a co-signer, or requiring the minor applicant to show an independent source of income, to repay his/her credit obligations.
- j) Prohibits the provision of tangible items (such as t-shirts, magazines, etc.) to college students at or near colleges or college-related events.

- k) Payment Protections. Some protections include:
 - (1) No cut-off time for payments prior to 5pm;
 - (2) Same due date each month;
 - (3) Weekend and holiday due date protections;
 - (4) Payment address disclosure requirement;
 - (5) Payment Allocation Order protections. Payments in excess of minimum are allocated first to the highest interest-rate balances, and then to the lowest.

 - l) Subprime Credit Card Protections.
 - (1) Subprime Cards have very high interest and fees, and are targeted at consumers with impaired credit histories and low credit scores
 - (2) Fees during the first year may not exceed 25% of the account credit limit.

 - m) Billing error protections.

 - n) Mandates that merchant gift cards be valid for a period of at least 5 years from the date of purchase, and sharply restricts the use of inactivity fees by requiring notice and a minimum dormancy period of one year.
5. For a complete discussion of the CARD Act, see NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (10th ed. 2019), ch. 7.1.2.

II. FAIR CREDIT BILLING ACT (FCBA) & ELECTRONIC FUNDS

A. References

1. Fair Credit Billing Act, 15 U.S.C. § 1601 et. seq. (1974).
2. 15 U.S.C. § 1666
3. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, [hereinafter Dodd-Frank Act] §§ 1084, 1087 (2010).

4. 12 C.F.R. § 1026.13
 5. Electronic Funds Transfer Act, 15 U.S.C. § 1693 (1978).
 6. 12 C.F.R. Part 1005.
 7. NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (10th ed. 2019), updated at www.nclc.org/library)
 8. NATIONAL CONSUMER LAW CENTER, CONSUMER BANKING AND PAYMENT LAWS (6th ed. 2018), updated at www.nclc.org/library.)
- B. Introduction. The two referenced acts provide similar types of protections to different types of transactions. Consequently, we will look at them side-by-side in the table below.
- C. The Basics.

	Fair Credit Billing Act	Electronic Fund Transfer Act
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<p>Applicability</p>	<ul style="list-style-type: none"> ✓ Open-end consumer credit transactions (i.e., credit cards, store charge accounts, telephone charge cards). 	<ul style="list-style-type: none"> ✓ 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. ✓ The term includes, but is not limited to: <ul style="list-style-type: none"> ❑ Point of sale transfers, ❑ ATM transfers, ❑ Direct deposit or withdrawal of funds, and ❑ Transfers initiated by telephone. ❑ The term includes all transfers resulting from debit card transactions. ❑ Applies to direct deposit ❑ A simple telephone call may be covered ✓ The Act does not apply to the following: <ul style="list-style-type: none"> ❑ Check guarantee or authorization services that do not result directly in a debit or credit to consumer's account. ❑ Wire transfers used primarily for transfers between financial institutions or businesses. ❑ Certain automatic transfers, ❑ Between consumer's accounts within the institution, ❑ Into a consumer's account by the institution, such as the crediting of interest, ❑ From a consumer's account to an account of a family member whose account is within the same institution. ❑ Certain telephone-initiated transfers that are, <ul style="list-style-type: none"> ▪ Initiated by telephone conversation between consumer and employee of
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	Fair Credit Billing Act	Electronic Fund Transfer Act
		institution, and <ul style="list-style-type: none"> ▪ Are not under a telephone bill-paying or other prearranged plan or agreement in which periodic transfers are contemplated. □ Transactions with a stock brokerage (Institutions regulated by the Securities and Exchange Commission Act).
Billing Errors (Defined)	<ul style="list-style-type: none"> ✓ Bills for transactions that never occurred. ✓ Transactions by unauthorized people. ✓ Bills for erroneous amounts. ✓ Bills for goods/services that were not delivered or were not accepted. ✓ Failure to credit account properly. ✓ Computation errors. ✓ 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. 	<ul style="list-style-type: none"> ✓ An unauthorized electronic fund transfer, ✓ An incorrect electronic fund transfer to or from consumer's account, ✓ Omission from a periodic statement of an electronic fund transfer to or from consumer's account that should have been included, ✓ Computational or bookkeeping error made by financial institution relating to an electronic transfer, ✓ Consumer's receipt of an incorrect amount of money from an electronic terminal, ✓ An electronic fund transfer not identified in accordance with regulations, or, ✓ A consumer's request for any documentation required to be given by the financial institution, or additional
Billing Error Procedure (Consumer)	<ul style="list-style-type: none"> ✓ Consumer notifies card issuer IN WRITING w/in 60 calendar days of transmittal of periodic statement to the consumer. <ul style="list-style-type: none"> □ 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. □ If the error is failure to credit a payment, 60 days begins to run when the credit should have appeared on the statement. ✓ The consumer's billing error notice must include: <ul style="list-style-type: none"> □ Sufficient information to enable the creditor to identify the consumer and his/her account number and, □ To understand the nature of the complaint. ✓ 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 	<ul style="list-style-type: none"> ✓ 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: <ul style="list-style-type: none"> □ Consumer's name and account number. □ Consumer's belief that an error exists and the amount of the error. □ The reasons for the consumer's belief. □ Consumer must also allege unauthorized use. Can not just say it is loss or stolen (This is according to an FRB official staff interpretation and seems to be unsupported by the act.)

	Fair Credit Billing Act	Electronic Fund Transfer Act
	<ul style="list-style-type: none"> ✓ After the consumer gives notice, he/she may withhold payment of the disputed amount or pay the amount without waiving billing error rights. <ul style="list-style-type: none"> □ However, paying the disputed amount does waive assertion of claims and defenses against a 	
Billing Error Procedure (Card/Access Device Issuer)	<ul style="list-style-type: none"> ✓ Creditor must conduct a reasonable investigation, unless creditor corrects the account as requested or the consumer withdraws the complaint. ✓ Creditor shall mail or deliver written acknowledgment 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. ✓ 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. ✓ If creditor determines that error has occurred, creditor shall, within the time limits above: <ul style="list-style-type: none"> □ Correct the error and credit the consumer's account with any disputed amount and associated finance charges, and, □ Mail or deliver a correction notice to consumer. □ Report to resolution to each credit agency notified of the delinquency. ✓ 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: <ul style="list-style-type: none"> □ Mail or deliver to consumer an explanation setting forth reasons creditor believes alleged error is incorrect in whole or part. □ Furnish copies of documentary evidence of consumer's indebtedness, if consumer so requests. ✓ If a different billing error occurred, correct the error and credit the consumer's account. ✓ Until the billing error is resolved under the FCBA procedures, creditors may 	<ul style="list-style-type: none"> ✓ Upon notification: <ul style="list-style-type: none"> □ 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. □ 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. ✓ Following completion of the investigation, the institution shall: <ul style="list-style-type: none"> □ Correct any errors within 1 business day. □ If no errors are found, so notify the consumer within 3 business days of end of investigation and forward copies of all documents relied upon if requested by the consumer. □ If there was no error discovered, and upon debiting a provisionally recredited amount, the financial institution 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 3d parties and preauthorized transfers from consumer's account for 5 business days after transmittal of notice. □ Institution need only honor items that it would have paid if the provisionally recredited funds had not been debited.

	Fair Credit Billing Act	Electronic Fund Transfer Act
	<p>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.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Restrict or close the account in issue based on the debtor's failure to pay the disputed amount. <input type="checkbox"/> Report or threaten to report adversely on the debtor's credit rating based on the disputed amount. <p>✓ Creditor may</p> <ul style="list-style-type: none"> <input type="checkbox"/> seek collection of unpaid, undisputed amounts. <input type="checkbox"/> decrease credit limit by amount in dispute. <p>✓ 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:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Creditor also reports that the amount is in dispute. <input type="checkbox"/> Mails or delivers to consumer the name and address of each person to whom creditor made the report, and, <input type="checkbox"/> Promptly reports any subsequent resolution of reported delinquency to all persons to whom creditor made the report. 	
<p>Unauthorized Use (Definition)</p>	<p>Use with no actual, implied, or apparent authority from the cardholder. (Question of State Law)</p> <p>✓ Not Unauthorized Use:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Attempt to orally limit spending. See, e.g., <i>Martin v. American Express, Inc.</i>, 361 So.2d 597 (Ala. Civ. App. 1978). <input type="checkbox"/> Use of card by authorized person for unauthorized purpose. <i>Master Card v. Town of Newport</i>, 396 N.W. 2d 345 (Wis. 1986). <ul style="list-style-type: none"> ▪ Letter to credit card issuer to limit credit limit did not shield cardholder from liability for 	<ul style="list-style-type: none"> ✓ 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. ✓ Does not include: <ul style="list-style-type: none"> <input type="checkbox"/> 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. <input type="checkbox"/> Transfers initiated with fraudulent intent by the consumer or a person acting in concert

	Fair Credit Billing Act	Electronic Fund Transfer Act
	<ul style="list-style-type: none"> ▪ State law imposes no duty on issuer to mitigate despite cardholder notification that an authorized user is making unauthorized charges. <i>American Express v. Web</i>, 405 S.E.2d 652 (Ga. 1991). ▪ <i>But see Standard Oil Co. v. Steel</i>, 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. □ <i>Society National Bank v. Kienzle</i>, 463 N.E.2d 1261 (OH App. 1983). The Court held that a husband's liability for his estranged wife's use of his credit card was limited by the FCBA to \$50. The wife was never an authorized cardholder on the account and had apparently stolen the card. □ <i>See also Universal Bank v. McCafferty</i>, 624 N.E.2d 358 (Ct. App. Oh. 1993). Cardholder had issuer send card to friend's address so his wife would not find out about card. Friend kept card and used it. 	<p>with the consumer.</p> <ul style="list-style-type: none"> □ Transfers initiated by the financial institution or its employees.
<p>Unauthorized Use (Conditions for Liability)</p>	<ul style="list-style-type: none"> ✓ A cardholder is liable for unauthorized use only if: <ul style="list-style-type: none"> □ The card is an accepted credit card (by the consumer), □ The liability is not in excess of \$50.00, □ The card issuer gives the cardholder: <ul style="list-style-type: none"> ▪ adequate notice of the potential liability, ▪ a description of the means to notify the card issuer of the loss or theft of the card, ▪ a method whereby the user of the card can be identified as the person authorized to use it. □ The unauthorized use occurs before the consumer notifies the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise. ✓ Except as provided above, the cardholder 	<ul style="list-style-type: none"> ✓ A consumer is liable for any unauthorized electronic fund transfer only if: <ul style="list-style-type: none"> □ The card or other means of access utilized for such transfer was an accepted card or other means of access, and □ if the issuer of such card, code, or other means of access has provided a means whereby the user of such card, code, or other means of access can be identified as the person authorized to use it, such as by signature, photograph, or fingerprint or by electronic or mechanical confirmation. ✓ Restriction on liability. <ul style="list-style-type: none"> □ The EFTA imposes no liability upon a consumer for an unauthorized electronic fund transfer in excess of his liability for such a transfer under other applicable law or under any agreement with the consumer's financial institution. □ Except as provided in the EFTA, a

	Fair Credit Billing Act	Electronic Fund Transfer Act
	incurs no liability from the unauthorized use of a credit card.	
Liability for Unauthorized Use	<ul style="list-style-type: none"> ✓ \$50 maximum ✓ In action to enforce liability, the burden of proof is upon the card issuer to show: <ul style="list-style-type: none"> □ that the use was authorized or, □ if the use was not authorized, then issuer must show the conditions of liability have been met. 	<ul style="list-style-type: none"> ✓ Three-Tiered Liability <ul style="list-style-type: none"> □ Maximum liability of \$50 if the consumer reports the loss or theft of the debit card within 2 business days of discovering the loss/theft. □ 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. □ If consumer fails to report within 60 calendar days of transmittal of the periodic statement and institution can show it could have stopped the unauthorized use if it had been notified, consumer is liable for: <ul style="list-style-type: none"> • Up to \$500 for the period between the discovery of the loss and 60 calendar days (like #2 above) to be calculated as follows: <ul style="list-style-type: none"> ➢ \$50 maximum for transactions made during the first 2 business days, PLUS ➢ The amount of unauthorized transfers made between 2 business days and 60 calendar days from transmittal of the periodic statement up to the \$500 maximum. (For example, if the consumer was liable for \$50 of a \$100 dollar transfer on business day 1, liability would be limited to \$450 for the transfers after day 2 and out to the 60th day from transmittal of the statement.) • PLUS Unlimited liability for all unauthorized transfers made more than 60 calendar days following the transmittal of the periodic statement. ✓ The consumer cannot waive these limitations or any other protections provided by the Act. ✓ Financial institutions cannot attempt to circumvent the Act's protections by adding "fault" language in ATM
Other	<ul style="list-style-type: none"> ✓ Some claims & defenses that you have against the merchant may be asserted 	<ul style="list-style-type: none"> ✓ Issuance of Access Devices.

	Fair Credit Billing Act	Electronic Fund Transfer Act
Provisions	<p>credit card issuer IF:</p> <ul style="list-style-type: none"> ❑ The consumer has made a good faith effort to resolve the problem with the merchant honoring the card; ❑ The merchant is not controlled by or the same as the card issuer (e.g. Sears or J.C. Penney - store card) ❑ The contract is entered into w/i 100 miles or within the same state as billing address, and ❑ The contract is for >\$50 <p>✓ Claims and defenses may include:</p> <ul style="list-style-type: none"> ❑ Unauthorized use of the card, ❑ Dispute as to quality of merchandise. ❑ Nondelivery of goods, ❑ Claims that can be asserted under the billing error resolution procedures. <p>✓ Location of transaction</p> <ul style="list-style-type: none"> ❑ A matter of state law; states differ on whether mail or telephone order occurred at consumer's home or seller's place of business. ❑ <i>See Lincoln First Bank v. Carlson</i>, 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). <p>✓ 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 any finance charges attributable thereto.</p> <p>✓ Payment of the disputed amount waives right to assert claims or defense as to the card issuer.</p> <p>✓ 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.</p> <p>✓ Relationship to Billing Error Resolution procedures.</p> <ul style="list-style-type: none"> ❑ Even though certain merchandise disputes, such as nondelivery of goods, may also constitute "billing errors," the protections operate 	<ul style="list-style-type: none"> ❑ "Access device" means a card, code, or other means of access to a consumer's account. ❑ Financial institutions may only issue access devices to consumers, <ul style="list-style-type: none"> • In response to an oral or written request or application, or • As a renewal of, or substitute for, an accepted access device. ❑ Except, may distribute access device to consumer on unsolicited basis if: <ul style="list-style-type: none"> • Access device is not validated, • Distribution is accompanied by <ul style="list-style-type: none"> ➢ A complete disclosure of consumer's rights and liabilities that will apply if device is validated, ➢ A clear explanation that access device is not validated and how consumer may dispose of it if validation not desired, and ➢ 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 photo, fingerprints, personal visit, or signature comparison. <p>✓ Access device considered validated when financial institution has performed all procedures necessary to enable consumer to use it to initiate an electronic transfer.</p> <p>✓ Pre-Authorized Transfers From Consumer's Account - Consumer's Right To Stop Payment.</p> <ul style="list-style-type: none"> ❑ Consumer must notify financial institution orally or in writing at any time up to 3 business days before the scheduled day of transfer. ❑ 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.

	Fair Credit Billing Act	Electronic Fund Transfer Act
	<p>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.</p> <ul style="list-style-type: none"> ▪ 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. <p>✓ 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.</p>	
Remedies	<p>✓ 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.</p> <p>✓ In addition to the remedies available for TILA violations, if the creditor violates the billing error resolution procedures, the consumer recovers from creditor the disputed amount and any finance charges thereon up to \$50. 15 U.S.C. § 1666(e).</p> <p>✓ Also, consider UDAP action.</p>	<p>✓ Actual damages.</p> <p>✓ Statutory damages of \$100 to \$1,000.</p> <p>✓ Court costs and reasonable attorney's fees.</p> <p>✓ Criminal penalties of up to 1 year's imprisonment and a \$5,000 fine for knowing and willful noncompliance.</p> <p>✓ Criminal penalties of up to 10 years' imprisonment and a \$10,000 fine for violations affecting interstate or foreign commerce.</p> <p>✓ Treble damages (3 times the consumer's actual damages) if:</p> <ul style="list-style-type: none"> ❑ The account is not properly provisionally recredited. ❑ The institution fails to conduct a good faith investigation. ❑ The institution knowingly and willfully concludes that no error exists contrary to the available evidence.

D. Fair Credit Billing Act Cases.

1. Cardholders cannot ignore their statements! *Minskoff v. American Express Travel Related Services Company, Inc.*, 98 F.3d 703 (2d Cir. 1996). (1) [Company] president was not accountable for assistant's initial possession of fraudulently obtained corporate credit cards, but (2) president was liable for purchases assistant made after credit card statements were issued.

2. Credit Card Issuer May Have to 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).
 - a) Consent order said that Citicorp should have known about fraud by merchant 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.
 - b) 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.
 - c) NCLC 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."

E. Rulemaking and Enforcement.

1. The CFPB and FTC both possess enforcement and rulemaking authority depending on the type of issue or case. For example, the FTC typically handles issues with automobile dealers because of the automobile dealer exemption in Dodd-Frank.
2. Legal Assistance Attorneys should strongly consider consulting with a CFPB attorney if a client needs to enforce his or her rights under the FCBA or EFTA.

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CHAPTER F

THE DOWNSTREAM CONSEQUENCES OF USING CONSUMER CREDIT

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CHAPTER F

THE DOWNSTREAM CONSEQUENCES OF USING CONSUMER CREDIT

I. FAIR DEBT COLLECTION PRACTICES ACT.

A. References

1. Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 (2006), as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1089 (2010).
2. Regulation F, 12 C.F.R. 1006, implementing the FDCPA (11/30/2021).
3. Consumer Financial Protection Bureau (CFPB) reports
 - a) The Consumer Credit Card Market (Dec. 2015).
 - b) The Consumer Credit Card Market (Dec. 2017).
 - c) The Consumer Credit Market (Dec. 2021).
 - d) Survey of third-party debt collection operations (July 2016).
4. CFPB Advisory Opinions, Guidance, and Interagency Guidance (CFPB) bulletins.
5. Federal Trade Commission (FTC) Advisory Opinions.
6. State Debt Collection Statutes. See Appendix B.
7. NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION (10th ed. 2022).

B. Overview of the Debt Collection Process.

1. Some creditors, like credit card issuers, hire “first-party” collectors, which the CFPB defines as “outside collectors who work under the name and direction of the creditor when collecting on delinquent debt.”¹

¹ CFPB, The Consumer Credit Card Market 131 (Sept. 2021).

2. Creditors (those to whom the debt is owed, either the original creditor or others by assignment or transfer) begin collection efforts with a series of form letters, phone calls, or personal visits,² then to repossession or referral to a collection agency or lawyer for suit.
 - a) Initial contacts usually consist of friendly "reminder" letters.
 - b) Subsequent letters request the consumer call to discuss the problem and suggest that nonpayment is serious.
 - (1) Phone calls may serve the legitimate purposes of determining why payments are late and resolving misunderstandings and disputes.
 - (2) Calls may be used illegally to harass the consumer in attempts to collect debt.
3. At any stage of the process, the creditor may forgive the debt - either because the debt is obviously not collectible or because the creditor has internal rules that limit collection efforts in favor of favorable tax treatment.
4. "Charge off" is the term used to show the account is not collectible. Charge off occurs after 180 days of nonpayment.
5. Debts that are canceled, forgiven, or discharged are reportable as gross income for tax purposes and included on the individual tax return for the year the cancellation occurs.³ The creditor, who may be a downstream debt collector, must issue a 1099-C for debt cancellation above \$600. Cancelled debt is included in gross income, unless an exception applies. IRS Form 982 Form 982 is used to determine the amount of discharged indebtedness that can be excluded from gross income.
6. The creditor may turn the account over to its in-house debt collectors, third-party debt collectors (includes lawyers), or

² See, "In-Person Collection of Consumer Debt" (CFPB Bulletin 2015-07), warning First-party and third-party debt collectors may run a heightened risk of committing unfair acts or practices in violation of the Dodd-Frank Act when they conduct inperson deb collection visits, including to a consumer's workplace or home."

³ IRS Tax Topic No. 431 "Canceled Debt – Is It Taxable or Not?" (<https://www.irs.gov/taxtopics/tc431>.) Last visited 8/9/2022).

sell the debt.

- a) A 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%).
- b) Collection Agency may be retained for flat fee or retainer.
 - (1) Many times, 50% contingency.
 - (2) Seldom do collection agencies bother to get all necessary documents related to debt from creditor - rather, they get name, address of consumer, and amount of debt.
 - (3) Collection agencies must comply with the Fair Debt Collection Practices Act.

C. Fair Debt Collection Practices Act (FDCPA).

- 1. Purpose. Congress passed the FDCPA in 1977 in response to the abusive practices of debt collectors. The purposes of the statute are:
 - a) To eliminate abusive debt collection practices;
 - b) To ensure that those collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and,
 - c) To promote consistent state action to protect consumers against debt collection abuses.
- 2. The FDCPA is found in Title VIII of the Consumer Credit Protection Act. The CFPB implements the FDCPA through Regulation F.
- 3. Definitions.
 - a) 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.

- (1) A corporate debt collector was liable for the misconduct of its attorney and its employees. See *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Campion v. Credit Bureau Services, Inc.*, 2000 U.S. Dist. LEXIS 20233 (E.D. Wash. 2000)
- (2) Includes a party based in the U.S. who collects debts owed by consumers residing outside the U.S. The residence of the consumer is irrelevant.
- (3) Repossessors are **usually not** debt collectors under the FDCPA; but, see below for exceptions. *Nadalin v. Automobile Recovery Bureau, Inc.*, 169 F.3d 1084 (7th Cir. 1999).
 - (a) The FDCPA regulates “debt collectors,” a term that is defined as excluding reposseors and other enforcers of security interests. 15 U.S.C. § 1692a(6).
 - (b) A reposseor may not take or threaten to take, however, nonjudicial action to dispossess a person of property if “there is no present right to possession of the property claimed as collateral through an enforceable security interest.” 15 U.S.C. § 1692f(6)(A).
 - (c) Reposseors withheld personal property from owner of repossessed vehicle in order to collect their \$25 bailment fee. These reposseors “did not seize the plaintiff’s personal property for the purpose or with the likely effect of using it to satisfy the plaintiff’s debt to [the reposseor]’s principal. The seizure was not a method of enforcing a debt owed to the lender. It was not an effort to claim and seize additional collateral for the loan. We can find no evidence that Congress in the debt

collection statute meant to extinguish reposseors' common law rights and remedies, whatever they may be, as bailees, provided the reposseor is not seizing property as collateral for the lender's loan to the owner." *Nadalin v. Automobile Recovery Bureau, Inc.*, 169 F.3d 1084 (7th Cir. 1999).

- (d) Reposseors could be debt collectors if regularly demanded storage fees owed to the creditor bank as a condition of returning the vehicle. *See Purkett v. Key Bank USA, N.A.*, 2001 U.S. Dist. LEXIS 6126 (N.D. Ill. 2001).
- (4) Delivery services CAN be indirect debt collectors subject to FDCPA liability. *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142 (9th Cir. 1998).
- (a) "We conclude, however that Western Union's activities go beyond mere information gathering or message delivery, and are of the type that the FDCPA was designed to deter. The purpose of the FDCPA is to limit harassing, misleading, and fraudulent contacts and communications with or about consumer debtors."
 - (b) "The stated purpose of the Act is to "protect consumers from a host of unfair, harassing, and deceptive debt collection practices...." Most of the "collection abuses" outlined in the legislative history involve improper contacts with consumer debtors. In conjunction with its role in contacting debtors and obtaining and forwarding telephone numbers, another significant element is Western Union's advertised role in catalyzing debt collection by conveying a sense of urgency through the use of Western Union telegrams."
- (5) Attorneys may meet the definition of "debt

collector." 15 U.S.C. § 1692(a)(6)(F).

- (a) U.S. Supreme Court resolved all debate about whether attorneys are covered under the Act in *Heintz v. Jenkins*, 514 U.S. 291(1995) (The FDCPA applies "to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation."); *but see Chapman v. Fisher*, 2001 U.S. Dist. LEXIS 18499 (N.D. Ill. 2001) (the court held that the FDCPA does not apply to attorneys engaged in litigation activity.)
 - (b) *See also 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 FDCPA). *Cf. 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 allegedly owed to him as commercial creditor by consumer as result of consumer transaction).
- (6) Persons Specifically Excluded from the Term "Debt Collector:
- (a) Creditors' employees. Officers or employees of a creditor collecting debts for that creditor unless the creditor is using another name implying that a third party is the collector. *See Thomasson v. Bank One, N.A.*, 137 F. Supp. 2d 721 (E.D. La. 2001).
 - (i) A "creditor" is a person or organization to whom or to which a debt is owed. Generally, a creditor is not included within the definition of "debt collector" when collecting

its own debts using its own name.

- (ii) States may have statutes which limit conduct of creditors as well as debt collectors
- (b) A commonly owned or affiliated corporate collector collecting only for its affiliates.
- (c) State or federal officials performing their duties. Any officer or employee of the U.S. or any state to the extent collecting or attempting to collect is in performance of his/her duty. This means that a LAA would arguably not be considered a debt collector when contacting others in reference to debts owed to a client. It also means that AAFES is not a debt collector when trying to collect from soldiers. See *Hilman v. Secretary of the Treasury*, 2000 U.S. Dist LEXIS 4544 (W.D. Mich. 2000) (pro se litigant FDCPA case dismissed because the IRS was not subject to FDCPA).
- (d) Process servers. Any person while serving or attempting to serve legal process in connection with judicial enforcement of a debt.
- (e) Non-profit consumer credit counseling services.
- (f) Persons collecting debts as part of bona fide fiduciary or escrow arrangements.
- (g) Extender of credit collecting on behalf of another a debt it originally extended, for example mortgages and student loans. A retailer may assign a debt to a bank, but retains responsibility to collect delinquent accounts
- (h) Persons collecting debts not in default

when obtained. Any person collecting any debt owed another to the extent such activity...

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

- (ii) concerns a debt that is not yet in default at the time that the person obtained it. *See Barber v. National Bank*, 815 P.2d 857 (Alaska 1991) (mortgage service co. that obtained debt before default exempted from FDCPA coverage (not a debt collector)).
 - (a) Mortgage servicer who is collecting under a forbearance agreement that was not in default when acquired is NOT a debt collector under the FDCPA. *Bailey v. Security National Servicing Corporation*, 154 F.3d 384 (7th Cir. 1998).

 - (b) [D]ebtors [in these situations] end up with two agreements (the original one and the superseding forbearance agreement), making it important which one a creditor or his mortgage servicer seeks to collect. If he seeks to collect on the original note technically remaining in default -- meaning it's revived because the debtor defaulted again under the new agreement -- then he is a "debt collector" under the Act so long as the debt was in default at the time he obtained or purchased it.

- (c) If, on the other hand, he seeks to collect on payments currently due under the new superseding agreement, then he is not a "debt collector" under the Act (but more akin to a credit card company sending out monthly statements to its customers) because the debtor is not in default under that agreement.
 - (iii) Enforcer of a security interest in an account as collateral for a commercial loan. Retailers and lenders sometimes use consumer accounts receivable as collateral for their own commercial financing. Upon default the secured parties may collect the amounts due on the consumer accounts.
- b) 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).
 - (1) Ultimatums about **unpaid rent** fall under the Fair Debt Collection Practices Act. *Romea v. Heiberger & Associates*, 163 F.3d 111 (2nd Cir. 1998).
 - (2) **Bad checks** are debts under the FDCPA. *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997); *Charles v. Lundgren & Associates, P.C.*, 119 F.3d 739 (9th Cir. 1997).
 - (3) Personal, family, household purposes: If the purpose for acquiring the goods or services changes, then the original purpose is determinative. See *Miller v. McCalla, Raymer,*

Padrick, Cobb, Nicholas, & Clark, L.L.C., 214 F.3d. 872 (7th Cir. 2000) (The debt for a house purchased as the buyer's residence and then rented was a consumer debt originally, the subsequent use of the collateral would not alter the applicability of the FDCPA.)

4. Validation Notices, Disputes and Verification

a) The FDPA and Regulation F require debt collectors to provide specific information to consumers, inform them of their right to dispute the alleged debt and their right to request verification in writing.⁴

b) Validation information requirements imposed by Regulation F. 12 C.F.R. § 1006.34(c):

(1) Within 5 days after initial communication⁵ with a consumer in connection with collection of a debt, the debt collector must send the consumer a written notice containing the following:

(a) The debt collector communication disclosure required by Reg. F § 1006.18(e);

(b) The debt collector's name and the mailing address at which the debt collector accepts disputes and requests for original-creditor information;

(c) The consumer's name and mailing address;

If the debt collector is collecting a debt related to a consumer financial product or service as defined in Reg. F § 1006.2(f), the name of the creditor to whom the debt was owed on the itemization date;

⁴ Another federal statute, the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §2601 *et seq.*, provides even greater rights to consumers to determine charges and payments on their mortgages. The Fair Credit Billing Act addresses credit card billing error dispute rights, 12 C.F.R. § 1026.13.

⁵ The FDCPA allows the validation notice to be sent separately within 5 days of the initial collection communication. 12 C.F.R. §1006.34(a)(1)(i)(B).

- (d) The account number or a truncated number associated with the debt on the itemization date;
- (e) The name of the creditor to whom the debt currently is owed;
- (f) Except for certain residential mortgages, the itemization date;
- (g) Except for certain residential mortgages, the amount of the debt on the itemization date, including any fees, interest, or other charges owed as of that date;
- (h) Except for certain residential mortgages, an itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date;
- (i) The current amount of the debt;
- (j) The end date of the validation period and consumer rights upon disputing the debt prior to that end date;
- (k) The end date of the validation period and consumer rights upon requesting the name and address of the original creditor prior to that end date;
- (l) The end date of the validation period and the consequences of failing to dispute the debt by that end date;
- (m) If the debt collector is collecting a debt related to a consumer financial product or service as defined in Reg. F § 1006.2(f), a statement that additional information regarding consumer protections in debt collection is available on the CFPB website at www.cfpb.gov/debt-collection;
- (n) For electronic validation notices:

- (i) a statement explaining how a consumer can electronically dispute the debt or request original-creditor information; and
 - (ii) Prompts facilitating the consumer disputing the debt and requesting original creditor information, with addresses to send the consumer response to the debt collector.
- (2) “Validation period” means the period starting on the date that a debt collector provides the validation information and ending 30 days after the consumer receives or is assumed to receive the validation information. For purposes of determining the end of the validation period, the debt collector may assume that a consumer receives the validation information on any date that is at least five days (excluding legal public holidays identified in 5 U.S.C. 6103(a), Saturdays, and Sundays) after the debt collector provides it. 12 C.F.R. §1006.34(b)(5).
- c) The failure of a consumer to dispute the validity of an alleged debt does not constitute a legal admission of liability by the consumer. 12 C.F.R. § 1006.38(d)(1).
- d) Upon receipt of a dispute submitted by the consumer in writing or electronically (where the collector accepts such electronic communication from consumers) and within the validation period, a debt collector must cease collection of the debt, or any disputed portion of the debt. The collector must cease such collection until it sends to the consumer, in writing or electronically in the proper manner, a copy either of verification of the debt or of a judgment. 12 C.F.R. § 1006.38(d)(2).
- e) The FDCPA does not preempt state laws that do not allow the FDCPA validation notice to be included in the summons when it is the first collection communication.
- f) During the validation period, a debt collector must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer’s rights to dispute the debt and to

request the name and address of the original creditor. 12 C.F.R. § 1006.38(b)(1). “When a notice contains language that ‘overshadows or contradicts’ other language informing a consumer of her rights, it violates the Act.’ . . . [T]he juxtaposition of two inconsistent statements renders the notice invalid under § 1692g.’ . . . A debt collection notice is overshadowing or contradictory if it fails to convey the validation information clearly and effectively and thereby makes the least sophisticated consumer uncertain as to her rights.” *Savino v. Computer Credit, Inc.*, 164 F.3d 81 (2d Cir. 1998).

5. The FDCPA provides several means by which a consumer can stop the debt collector’s communication attempts⁶:

- (1) Consumer notifies the debt collector in writing
 - (a) Refuse to pay, or
 - (b) Wish no further contact
 - (c) Represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain such attorney’s name and address unless the attorney fails to communicate within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer. (Best to tell the debt collector you are the attorney for all debts concerning your client).
- (2) Debt collector must cease contact, except one additional notification to the consumer that the debt collector intends to invoke specific remedies.

6. Other consumer protections provided by the FDCPA.

- (1) Restricts contact with the debtor at unusual or inconvenient times or

⁶ 15 U.S.C. § 1692c(c)

places.

- (a) Know or should have known as inconvenient to consumer.
 - (b) There is a presumption that any communication received between 0800 and 2100 hours was made at an unusual or inconvenient time. 15 U.S.C. §1692c(a)(1).
 - (c) Inconvenient places include funeral homes, a neighbor's house, a hospital, or the workplace.
- (2) Restricts contacts by debt collectors with third parties. Without prior consent of the consumer given directly to the debt collector or the express permission of a court or competent jurisdiction, a debt collector may not communicate with a third party⁷ (15 U.S.C. § 1692c).
- (3) Debt collectors may contact third parties to acquire information about consumer's location, but must
- (i) Identify self, state he/she is trying to confirm or correct location information about consumer, and only if expressly asked, identify his/her employer,
 - (ii) Refrain from referring to the debt,
 - (iii) Usually make only a single contact with each third party,
 - (iv) Not communicate by postcard,
 - (v) Not indicate the collection nature of his/her business purpose in any

⁷ The FDCPA expressly permits third-party communication with the consumer's spouse, parent if consumer is a minor, guardian, executor, or administrator. See, 15 U.S.C. § 1692c(d), redefining the term "consumer" for the purposes of that section.

written communication.

- (4) Debt collectors may contact a credit reporting agency, if otherwise permitted by law.
- (5) Limit communications to the consumer's attorney, where collector knows of the attorney, unless the attorney fails to respond.
 - (a) If the debt collector knows the consumer is represented by an attorney and knows or can readily ascertain the attorney's name and address. The attorney MUST notify the debt collector that they represent the individual for the subject debt and any future debts that come into collection. *See Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991) (overruled on other grounds) (Collector did not violate Act by continuing 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.)
- (6) Prohibits communications at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits consumer from receiving such communication. Include language regarding this prohibition in your letter to the debt collector.
- (7) 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.
- (8) 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.

- (9) 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.
 - (a) 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 FDCPA).
 - (b) 15 U.S.C. § 1692e(8) defines the failure of a debt collector to disclose the disputed status of a debt as a "false, deceptive, or misleading representation." Debt collectors must report debts as disputed, whether or not the consumer disputes the debt in writing. *Brady v. The Credit Recovery Company*, 160 F.3d 64 (1st Cir. 1998).
 - (c) Falsely implying government affiliation.
- (10) A debt collector may not use unfair or unconscionable means to collect any debt. 15 U.S.C. § 1692f.
- (11) A debt collector may not solicit post-dated checks in lieu of pursuing a lawsuit and may not deposit any post-dated checks accepted prior to the date written on the check.

7. Legal Action Prohibitions for Debt Collectors.

- a) Debt collector must sue consumer only in the judicial district where the consumer resides or signed the contract sued upon, (See *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. banc 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); see also *Action Professional Service v. Kiggins*, 458 N.W.2d 365 (S.D. 1990) (interprets "judicial district" as meaning in the appropriate state (vice federal) court

"judicial district.")).

- b) Except that an action to enforce a security interest in real property must be brought where the property is located.
- c) Contradictory notices as to the timing of a lawsuit were misleading, even when one of the options was the statutorily mandated notices. *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997).
- d) The Act prohibits explicit and veiled threats of unintended legal actions. Legal actions are unlikely if:
 - (1) The proper court is far away from the collector or creditor.
 - (2) The debt is relatively small (less than \$150).
 - (3) The debt is disputed.
 - (4) The creditor in the past has shown a policy or tendency not to take legal action.
 - (5) Collector lacks authority to sue under law or under collector's agreement with creditor.

D. Remedies.

1. Violation of FDCPA is deemed an unfair and deceptive act or practice in violation of the Federal Trade Commission Act. Consequently, the FTC could possibly pursue action. Additionally, amendments to the Dodd-Frank Act authorizes the CFPB to take action. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1089. Legal Assistance Attorneys should contact the CFPB's Office of Enforcement with any questions or concerns.
2. The Act also creates a private cause of action for the consumer. Consumers can also assert violations of the FDCPA as a counter-claim in a suit to collect the debt, or as an independent action in federal court.

3. Standing to sue.

- a) Standing is a basic element of any civil action and it goes to subject matter jurisdiction, so standing can be challenged at any time, including an appellate raising it sua sponte upon review, even if it was not raised in the lower court.
- b) The Supreme Court issued two significant decisions on Article III standing under federal consumer protection statutes: *Spokeo v. Robinson, L.L.C.*, 578 U.S. 330 (2016) and *TransUnion L.L.C. v. Ramirez*, 594 U.S. ____ (2021). Consumer plaintiffs must allege a concrete injury to have standing, not merely a procedural violation of a law.
 - (1) Three types of injury should still be sufficient under *Spokeo/Ramirez*:
 - (a) First, a defendant caused physical or monetary injury to the plaintiff.
 - (b) Second, *Ramirez* lists several types of intangible harms that are concrete because they were actionable under common law for analogous wrongs: reputational harms, disclosure of private information, and intrusion upon seclusion. This holding is of great importance for cases involving unwanted debt collection contacts, false reports to credit reporting agencies, and contacts with or disclosures about the debt to third parties.
 - (c) Third, infringement of rights afforded by the Constitution may be concrete
- c) Standing under the FDCPA, who can bring an FDCPA action:
 - (1) "Any debt collector who fails to comply with any provision ... with respect to any person is liable to such person..." The Act does not define terms "with respect to any person."
 - (2) *Wright v. Finance Service of Norwalk, Inc.*, 22

F.3d 647 (6th Cir. 1994) (“the phrase ‘with respect to any person’ [in 15 U.S. C. § 1692e] includes more than just the addressee of the offending letters. We conclude that the phrase, at a minimum, includes those persons, such as Wright, 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.” Plaintiff Wright, was the executrix of the debtor.)

4. Civil liability for failure to comply with FDCPA includes (15 U.S.C. § 1692k):
 - a) Actual damages, including damages for personal humiliation, embarrassment, mental anguish, or emotional distress;
 - b) Additional statutory damages allowed by the court up to \$1,000 per action.
 - (1) In determining the amount of damages, the court shall consider, among other factors:
 - (a) frequency and persistence of noncompliance by the debt collector;
 - (b) nature of the noncompliance; and
 - (c) the extent to which the noncompliance was intentional.
 - c) Attorney's fees and court costs if the consumer prevails. “Where a plaintiff prevails, whether or not he is entitled to an award of actual or statutory damages, he should be awarded costs and reasonable attorney’s fees in amounts to be fixed in the discretion of the court.” *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997).
5. 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. 15 U.S.C. § 1692k(c).

6. 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 the violation occurs. 15 U.S.C. § 1692k(d).
- E. Processing Requests for Debt Collection Assistance by the Military.
1. Additional References.
 - a) 32 C.F.R. Parts 112-113, Indebtedness of Military Personnel (1992).
 - b) DOD Instruction 1344.09, Indebtedness of Military Personnel (February 1, 2022).
<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/134409p.pdf>
 - c) Army: AR 600-15 *Indebtedness of Military Personnel* has been rescinded.
 - d) Air Force: AFI 36-2906, Personal Financial Responsibility (13 May 2021). https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-2906/dafi36-2906.pdf
 - e) MILPERSMAN 7000-020, Indebtedness and Financial Responsibility of Members, 4 April 2006.
<https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/7000/7000-020.pdf?ver=ji1vO9r1XIDHK-fFBizP2g%3D%3D>
 - f) MCO P5800.16A, Marine Corps Manual for Legal Administration, (1 May 2018).
https://ppr-miramar.libguides.com/ld.php?content_id=58668690
 - g) United States Coast Guard Pay Manual, COMDTINST M7220.29D, Ch. 11, (Nov. 2019).
https://media.defense.gov/2019/Nov/15/2002211440/1/-1/0/CIM_7220_29D.PDF
 2. **STEP 1:** Determine whether the requester can contact third parties directly. Is this person a "debt collector" subject to the FDCPA or a "creditor" who may be limited by state law?

- a) Requests from debt collectors. Debt collectors may contact third parties seeking debt collection assistance only if:
 - (1) The debtor has consented to such contact,
 - (2) The debt collector has obtained a court order permitting such contact, or
 - (3) Communication necessary to effectuate post-judgment judicial remedy.

- b) Requests from creditors.
 - (1) A "creditor" is a person or organization to whom or to which a debt is owed.
 - (2) Creditors are entitled to contact third parties for assistance unless state law precludes such contact. If the state forbids contact, the creditor will not be assisted. The CFPB has held creditors to the same restrictions as debt collectors under the CFPA for federal law purposes. Contact the CFPB's Office of Enforcement for more information.

3. **STEP 2:** Know Service Policy on Debts.

- a) Department of Defense Directive 1344.9.
 - (1) DOD Definitions.
 - (a) Just Financial Obligations. A legal debt acknowledged by the Service 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 (SCRA), if applicable. (32 C.F.R. § 112.3).
 - (b) Debt Collector. An agency or agent engaged in the collection of debts

described under Pub. L. 95-109 (FDCPA). (32 C.F.R. § 112.3).

- (2) General Policies.
 - (a) Service members are expected to pay their just financial obligations in a proper and timely manner.
 - (b) A Service member's failure to pay a just financial obligation may result in a claim or an appropriate disciplinary action in accordance with the Uniform Code of Military Justice.
 - (c) Involuntary allotments pursuant to Section 5520a(k) of Title 5, U.S.C., will be established in accordance with this DoDD 1344.9.
 - (3) Processing debt complaints will NOT be extended to those Creditors who are in violation of the law. Commanders may advise creditors that this rule has been established because it is the general policy of the Military Departments to comply with State, Washington, D.C., Commonwealth, and U.S. territory law when that law does not infringe upon significant military interests.
 - (4) Processing of involuntary allotments. Pursuant to Section 5520a(k) of Title 5, U.S.C., in cases where the indebtedness of a Service member has been reduced to a judgment, an application for an involuntary allotment from the Service member's pay may be made under procedures prescribed by the USD(C)/CFO in Volume 7a of DoD 7000.14-R. Such procedures, which include an appeals process if applicable, will provide the exclusive remedy available
- b) Service regulations implement DOD Directive 1344.9.

II. FAIR CREDIT REPORTING ACT (FCRA)

A. References.

1. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u (1978, revised September 2020).
2. Consumer Credit Reporting Reform Act of 1996, contained in the Omnibus Consolidated Appropriations Bill, 110 Stat. 3009; 104 Pub. Law 208 (Sept. 30, 1996).
3. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING (10th ed. 2022).
4. The Federal Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159 (Dec. 4, 2003).
5. Analysis of the Fair Credit Transactions Act of 2003, National Consumer Law center, available online at: https://www.nclc.org/images/pdf/credit_reports/archive/analysis-facta.pdf.

B. Introduction.

1. The Federal Fair Credit Transactions Act of 2003 made significant changes and additions to the FCRA. The Act provides for free annual credit reports, increases standards of accuracy of information, strengthens adverse action notices and creates the right to get credit score from the credit reporting agencies for a fee, adds rights for identity theft victims and for active duty service members. Further, consumers can prevent sharing of information by affiliates for marketing purposes. The act significantly limits States' abilities to regulate much of the FCRA's subject matter and conduct requirements, except in the area of identity theft.
2. The Omnibus Appropriations Act referenced above contained, among other consumer protection legislation, the Consumer Credit Reporting Act of 1996, which made changes to the Fair Credit Reporting Act.
3. The Consumer Financial Protection Bureau (CFPB) is taking an active role on many credit report and credit score issues, to include monitoring the issues, enforcing the FCRA in court, and prescribing certain regulations. For example, the CFPB was statutorily mandated to "conduct a study on the nature, range,

and size of variations between the credit scores sold to creditors and those sold to consumers by consumer reporting agencies....” Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1078 (2010). See the Report, *Analysis of Differences between Consumer- and Creditor-Purchased Credit Scores (September 2012)*.
https://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf.

4. Legal Assistance Attorneys should contact the CFPB’s Office of Enforcement to obtain updates and to ask any questions and concerns.

C. Purpose and Scope of FCRA.

1. FCRA applies to Credit Reporting Agencies (CRAs) those furnishing information to the agencies (furnishers) and Users of Credit Reports (Users).
2. The act applies to situations in which a person collects information on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and mode of living.
3. Purpose of FCRA: Requires CRAs to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information. The information must be:
 - a) Accurate, relevant, up-to-date, and
 - b) Furnished only for certain permissible purposes.
4. CRAs must use procedures that:
 - a) Are fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy, and proper use of the information, and,
 - b) Place various obligations on persons who use or disseminate credit information about consumers.

D. Definitions.

1. Consumer Reporting Agencies are:
 - a) Those "who for monetary fees, dues, or on a cooperative nonprofit basis, regularly engage in... 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).
 - b) Agencies or persons may become consumer reporting agencies if they regularly furnish information beyond their own transactions to others for use in consumer transactions. (FTC Commentary, 16 C.F.R. Part 600, May 4, 1991).
 - c) **NOTE:** Creditors that report information about their own experiences with consumers are not credit reporting agencies, nor are they issuing a "consumer report." **BUT**, 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."
 - d) **CRA "that compiles and maintains files on consumers on a nationwide basis."** (e.g., Experian, Trans Union Credit Corporation, Equifax). That term includes any CRA that regularly engages in the practice of assembling, evaluating, and maintaining, for the purpose of issuing consumer reports, EACH of the following things regarding consumers nationwide:
 - (1) Public record information
 - (2) Credit account information from persons who furnish that info regularly and in the ordinary course of business.
 - e) Specialty consumer reporting agencies exist in addition to the nationwide agencies. The CFPB publishes a list each year, identifying the agency and how to request a copy of your report. The 38-page document for 2022 can be found here:
https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2022-01.pdf.

2. **Users:** Not defined separately in the statute, but means those receiving the "consumer report" information and applying it to a consumer. (Refer to definition of consumer report).
3. **Consumer Credit Reports** are:
 - a) Any written, oral or other communication of information
 - b) Collected by a CRA bearing on:
 - (1) The consumer's credit worthiness,
 - (2) Credit standing, or,
 - (3) General reputation, personal characteristics, or mode of living,
 - (a) Virtually any information about a consumer satisfies the definition of a consumer report.
 - (b) The report must bear on the consumer's characteristic, not a business or corporation.
 - c) Which is used or expected to be used in establishing the consumer's eligibility for:
 - (1) Credit or insurance to be used primarily for personal, family, or household purposes,
 - (2) Employment purposes other than those listed below, or
 - (3) Other purposes authorized by the Act. See § E below.
 - d) The Term does NOT include:
 - (1) The reporting of information based solely on the experiences between the consumer and the person making the report.

- (2) Communication of the information above between persons related by common ownership or corporate control.
 - (3) Communication of any other information between persons related by common ownership or corporate control, PROVIDED that the consumer is given clear and conspicuous notice that this may happen and given the opportunity before it does happen to direct that the information not be shared.
- e) Any authorization or approval of a specific extension of credit by the issuer of a credit card or similar device.
- f) Courts have also limited the applicability in the way they apply the definition to products issued by CRAs.
- (1) *Arcidiacono v. American Express Company*, 1993 WL 94327 (D.N.J. 1993) - Lists sold by American Express were not consumer reports even though they categorized consumers with descriptive labels such as "low-end, value-oriented, fashion conscious, Fifth Avenue sophisticated, Rodeo Drive chic."
 - (2) *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996). Mailing lists were not consumer reports even though placement on the list required having two credit accounts. This "implicit" credit info did not have anything to do with PERFORMANCE and therefore did not satisfy the definition.
 - (3) An Inquiry Activity Report is a consumer report for purposes of the FCRA. *Yang v. Government Employees Insurance Company (GEICO)*, 146 F.3d 1320 (11th Cir. 1998).
 - (4) Consumer's "file under review" is a consumer report. *Thompson v. Equifax Credit Inf. Servs.*, 2001 U.S. Dist LEXIS 22666 (M.D. Ala. Nov. 14, 2001).

- (5) A Check Cashing list is a consumer report for purposes of the FCRA. *Greenway v. Information Dynamics, Ltd.*, 524 F.2d. 1145 (9th Cir. 1975). List including previous issuance of an unpayable check bears directly on a consumer's credit worthiness and credit standing.

4. **Investigative Consumer Reports:**

- a) Sometimes a user, usually an insurance company or a prospective employer wants more detail on a consumer so they request an investigative consumer report.
- b) Consumer report or portion thereof which contains information on consumer's character, living style, and reputation obtained through personal interviews (subjective evaluations).
- c) An investigator will question neighbors, co-workers, and others concerning their knowledge and opinion on the consumer. The report contains more detailed information than a regular consumer report, may include information on individual's marital or sex life, drinking habits, friends, and behavior.
- d) Some consumer reporting agencies specialize in investigative reports (Equifax) which are a subcategory of consumer reports.
- e) Because a report like this could damage a person's reputation in the community there are extra added protections.
 - (1) CRAs must verify information and re-verify information over 3 months old.
 - (2) 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.

5. **Furnishers**

- a) Persons who regularly and in the ordinary course of business furnish information to the CRA.

6. **Adverse Action** means:

- a) The same as the term means under the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d)(6). That section provides that:
 - (1) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.
 - (2) The term is also given specific additional meaning within the definition section of the FCRA. an action taken or determination that is--
 - (a) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, and
 - (b) adverse to the interests of the consumer.
 - (3) Credit Adverse actions:

- (a) Refusal to grant credit in substantially the amount or terms as requested
 - (b) Termination of an account or an unfavorable change in its terms
 - (c) Refusal to increase line of credit
- (4) Employment Adverse Actions
- (a) Employment is denied
 - (b) Any employment decision adversely affects a current or prospective employee
- (5) Insurance Adverse Actions
- (a) Denial or cancellation of insurance coverage
 - (b) An increase in any charge for insurance
 - (c) Any reduction or other adverse or unfavorable change in the terms of coverage or amount of any insurance, existing or applied for.
- (6) Government License and Benefits Adverse actions
- (a) Denial or cancellation of Government Benefits or Licenses
 - (b) An increase in any charge of Government benefits or Licenses
 - (c) Any other unfavorable or adverse change in terms of Government benefits or licenses

7. Pre-screening Services:

- a) Mailing lists compiled by consumer reporting agencies using criteria specified by the user. (Example: The

credit card solicitations received in the mail)

- b) User must certify it is considering and will offer to enter into a credit relationship with each consumer on the pre-screened list. If not, the release of the report is impermissible.
- c) Consumers can elect to be excluded from prescreening lists, CRAs must maintain a system by which consumers can elect to have names omitted from lists. (1 888-5-OPT-OUT). <https://www.optoutprescreen.com/?rf=t>. Consumer calls number and is excluded off lists **for five years** (change from 2- 5 years under FACTA). Can request a form from CRA to be excluded permanently.
- d) Consumers can now opt out of affiliate marketing notices. The opt-out is for five years and consumers may extend for additional five years.

E. Permissible Uses of a Consumer Report. (15 U.S.C. § 1681b).

- 1. In response to a **court order or subpoena** issued in connection with proceedings before federal grand jury. Law enforcement cannot request
- 2. With the consent of the consumer to whom the report relates, written instructions to the reporting agency or permission to provide a report to the user, just need a dated written authorization that designates who is to send and who is to receive the credit report, do not need a Power of Attorney.
- 3. Identifying information furnished to the Government, only name, address, former addresses, places of employment, or former places of employment.
- 4. To a person who the CRA "has reason to believe" intends to use the report:
 - a) in connection with **a credit transaction involving** the consumer,
 - (1) Collection of Credit accounts
 - (2) Credit extension for personal family, or

household purpose (not for business extension of credit)

- b) for **employment** purposes
 - (1) evaluating a person for employment, promotion, reassignment or retention as an employee
 - (2) The business must give special employment related disclosures
 - (3) Employers' investigations of their employees now excluded from the FCRA under FACTA. Cannot be for investigating consumer's creditworthiness. Must concern investigation of the following:
 - (a) Suspected misconduct
 - (b) Compliance with federal state or local laws
 - (c) Compliance with rules of a self-regulatory organization, or
 - (d) Compliance with the preexisting written policies of the employer
- c) in connection with the **consumer's insurance**, or
- d) in connection with the consumer's eligibility for a license or other benefit conferred by the government, or
- e) as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or
- f) Otherwise has a **legitimate business need** for the information--
 - (1) The legitimate business need must be in connection with a business transaction that is

initiated by the consumer; or

- (2) To review an account to determine whether the consumer continues to meet the terms of the account.
 - (3) *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.
 - (4) What constitutes a “legitimate business need” has gotten more restrictive, both in the statute and the courts.
 - (a) Litigation is NOT a “legitimate business need” under the FCRA. *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998); *Bakker v. McKinnon*, 152 F3d 1007 (8th Cir. 1998).
 - (b) The mere existence of the landlord-tenant relationship does NOT justify accessing a tenant’s credit report. *Ali v. Vikar Management Ltd.*, 994 F.Supp. 492 (S.D.N.Y. 1998).
 - (c) The FTC’s interpretation of the new restrictions on legitimate business need releases is very strict. See Consumer Law Note, *Federal Trade Commission Staff Issues Informal Interpretation of FCRA Changes*, ARMY LAW., June 1998, at 9.
5. Preconditions of Release. Must be met before a Consumer Credit Report may be issued for the following permissible purposes:
- a) Employment purposes (except the areas noted above):
 - (1) The User must certify to the CRA that they have:
 - (a) Given a clear and conspicuous written

disclosure to the consumer, in a document that consisted solely of the disclosure, that a consumer report may be obtained for employment purposes and the consumer has given the User written authorization to procure the report; AND

- (b) That they will comply with the obligations of a User who takes adverse action based upon a consumer credit report; AND
 - (c) Information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation.
- (2) The CRA must provide a summary of the consumer's rights under the FCRA with the report.
- b) Credit or insurance transactions not initiated by the consumer. The CRA may issue the report only if:
- (1) The consumer authorizes the agency to provide the report to such person; OR
 - (2) The transaction consists of a "firm offer of credit or insurance" (defined in the statute) and
 - (a) The CRA has complied with any election made by the consumer regarding exclusion from lists, and
 - (b) The information consists solely of
 - (i) The name and address of a consumer;
 - (ii) An identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and
 - (iii) Other information pertaining to a

consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

- c) Reports containing medical information. A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction or a direct marketing transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.
 - (1) Consumer's consent must be in writing, specific, and must describe the use for which the agency will furnish the information.
 - (2) Users may not re-disclose the reports.
 - (3) Agencies may not identify the medical information furnishers in reports.
 - (4) Creditors may not obtain or use medical information in connection with any determination of the consumer's eligibility for credit.

F. Obligations of Consumer Reporting Agencies.

1. Duties when the consumer disputes the accuracy of the report.

- a) 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.

- (1) When a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy. 15 U.S.C. § 1681e(b).

- (a) West Headnote: "Technical accuracy of

consumer report may be insufficient to satisfy requirement of Fair Credit Reporting Act (FCRA) that report be maximally accurate with respect to individual who is subject of report.” 15 U.S.C. § 1681e(b).

(2) An entry on a credit report that is incomplete, but not misleading satisfies the “maximally accurate” requirement. *Sepulvado v. CSC Credit Services, Inc.*, 158 F.3d 890 (5th Cir. 1998).

b) If the investigation does not resolve the dispute,

(1) The consumer may file a statement of not more than 100 words, and

(2) In future reports, the CRA must note that the consumer disputes the entry and provide the consumer's statement.

c) If the investigation reveals that the disputed entry is inaccurate or can no longer be verified, the CRA must delete the information and inform the other CRAs.

d) 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:

(1) Within the past 2 years for employment purposes.

(2) Within the past 6 months for other purposes.

2. Procedures for handling disputed information.

a) REINVESTIGATION: If the completeness or accuracy of any item of information contained in a consumer's file at a CRA is disputed by the consumer and the consumer notifies the agency directly of such dispute, the CRA

SHALL:

- (1) Reinvestigate free of charge and record the current status of the disputed information, OR
 - (2) Delete the item from the file within 30 days of the CRA receiving notice of the dispute from the consumer. (This period may be extended not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30 day period that is relevant to the reinvestigation. However, NO extension may be used if the CRA finds during the 30 days that the information is inaccurate, incomplete, or cannot be verified.)
 - (3) The Agency's reinvestigation must be reasonable
- b) Determination that dispute is frivolous or irrelevant.
- (1) A CRA may terminate a reinvestigation of information disputed by a consumer if it reasonably determines that the dispute by the consumer is frivolous or irrelevant. This includes a failure by the consumer to provide sufficient information to investigate the disputed information.
 - (2) Upon making this determination, the CRA shall notify the consumer of their determination not later than 5 **business** days after making the determination, by mail or, if authorized by the consumer for that purpose, by any other means.
 - (3) The notice shall include:
 - (a) The reasons for the determination; AND
 - (b) Identification of any information required to investigate the disputed information.
- c) Notice to provider of information.
- (1) Within 5 **business** days of receipt of the

consumer's notice, the CRA SHALL

- (a) Provide notification of the dispute to any person who provided any item of information that is disputed.
 - (b) The notice shall include all relevant information regarding the dispute that the agency has received from the consumer.
- (2) Promptly after the initial 5 business day notice, but before the end of the 30-day period for investigation, the CRA must provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer.
- d) Results of the reinvestigation.
- (1) Inaccurate or unverifiable information. Any item of the information found to be inaccurate or incomplete or which cannot be verified SHALL be promptly deleted from the consumer's file or modified, as appropriate, based on the results of the reinvestigation.
 - (2) Notice of results.
 - (a) The CRA must provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.
 - (b) The notice must contain:
 - (i) A statement that the reinvestigation is completed;
 - (ii) A consumer report that is based upon the information in the consumer's file reflecting any changes made as a

result of the reinvestigation;

- (iii) If requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information, including the business name and address of any furnisher of information contacted and the telephone number if reasonably available;
 - (iv) A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and
 - (v) A notice that the consumer has the right to request that the CRA notify the following persons of any notation regarding disputed information provided that the consumer specifically designate this person to receive notice.
 - (a) A user who received a consumer report for employment purposes within the prior two years.
 - (b) A user who received a consumer report for any other purpose within the last six months.
- e) Automated reinvestigation system. Any **CRA that compiles and maintains files on consumers on a nationwide basis** (See definitions above) shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

3. Reinsertion of previously deleted material. Before reinserting material, the following must occur:
 - a) The person who furnishes the information must certify that the information is complete and accurate.
 - b) The CRA must notify the consumer of the reinsertion in writing not later than 5 **business** days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.
 - c) The CRA must provide with the notice above (in writing not later than 5 business days after the date of the reinsertion) the following:
 - (1) A statement that the disputed information has been reinserted;
 - (2) The business name and address of:
 - (a) Any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or
 - (b) Any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and
 - (c) A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.
4. Procedures to prevent reappearance.--A CRA shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to the dispute procedure (other than information that is reinserted in accordance with the above rules).
5. Expedited dispute resolution. If a dispute regarding an item of information in a consumer's file at a consumer reporting agency

is resolved by the deletion of the disputed information by not later than 3 **business** days after the date on which the agency receives notice of the dispute from the consumer, then the CRA does not have to:

- a) Notify the furnisher of the information;
- b) Formally notify the consumer of the results; or
- c) Provide a description of the reinvestigation procedure.
- d) However, it **MUST** still provide:
 - (1) Prompt notice of the deletion to the consumer by telephone;
 - (2) In the notice a statement of the consumer's right to request that the CRA notify the following persons of any notation regarding disputed information provided that the consumer specifically designate this person to receive notice.
 - (a) A user who received a consumer report for employment purposes within the prior two years.
 - (b) A user who received a consumer report for any other purpose within the last six months.
 - (3) Written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 **business** days after making the deletion.

6. Duties regarding obsolete information.

- a) Reporting of obsolete adverse action is prohibited under FCRA
- b) 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 more than 10 years old.
- (2) Other categories for 7 years. Included are:
 - (a) Paid tax liens,
 - (b) Accounts placed for collection or charged to profit and loss,
 - (c) 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; and
 - (d) Any other adverse item of information that antedates the consumer report by more than 7 years.
- (3) Records of criminal arrest, indictment, which, from the date of disposition, release, or parole, antedate the consumer report by more than 7 years, or the expiration of the statute of limitations, whichever is longer (note criminal convictions are NEVER obsolete)
- (4) The 10-year time period for bankruptcies begins to run on the date of filing. For other transactions it is the date of the occurrence of the event, not the date acquired by the credit reporting agency.
- (5) The 7-year period shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency.

- c) 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 \$150,000 or more. (e.g. a home mortgage)
 - (2) Issuance of life insurance coverage on the consumer of \$150,000 or more.
 - (3) Employment of the consumer at an annual salary of \$75,000 or more.
- d) In order to ensure that the obsolete information is provided only for the three above circumstances the CRA must maintain procedures which require that prospective users of information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purposes.

G. Obligations of users.

- 1. Adverse actions. If the user takes "adverse action" based upon a consumer credit report, the following requirements apply.
- 2. The user **MUST**:
 - a) Provide oral, written, or electronic notice of the adverse action to the consumer; **AND**
 - b) Provide to the consumer orally, in writing, or electronically--
 - (1) The name, address, and telephone number of the CRA (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; **AND**
 - (2) A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the

specific reasons why the adverse action was taken; AND

- (3) Provide to the consumer an oral, written, or electronic notice of the consumer's right--
 - (a) To obtain a FREE copy of a consumer report from the CRA, including notice that the request must be made with 60 days; AND
 - (b) To dispute the accuracy or completeness of any information in the consumer report.

3. Special Rule for Adverse Action in Employment Situations. **Before taking any adverse action** based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

- a) A copy of the report; AND
- b) A description in writing of the rights of the consumer under the FCRA.

4. Users must provide consumers with a risk-based pricing notice.

- a) Whenever creditor extends terms "materially less favorable than the most favorable terms available to substantial proportion of the consumers" it requires creditor to notify consumer when the offered terms are not as good as those offered to other consumers.
 - (1) Thus, a car dealer who only discusses with the consumer a high interest loan, and the consumer may just be happy with getting a loan, now must be told that other consumers get 0% rate loans.
 - (2) Also, a car dealer which takes a 4% yield spread must provide the risk-based pricing notice to the consumer.
- b) Must be given at time of application or at the time of communication of approval.

- c) May be given orally, in writing, or electronically

H. Obligations of Furnishers of Information to CRAs

1. Consumers may dispute furnished information directly with the furnisher. (change under FACTA)
 - a) The furnisher must investigate the dispute and report the results back to the consumer, if reinvestigation, responsibility cannot be initiated by notice from a credit repair organization
 - b) Practice note: Consumers should send own disputes to furnishers instead of directly from lawyers.
2. Requirements to provide accurate information.
 - a) Prohibitions
 - (1) Furnishers shall not report information if they ***know or have reasonable cause to believe is inaccurate***. The standard until 2004 was *know or consciously avoid knowing that the information is inaccurate*.
 - (a) However, they can avoid this requirement by providing an address for consumers to notify them of errors.
 - (b) They are NOT required to provide such address, but if they do, they fall under paragraph 2 below.
 - (2) The furnisher must take action to block unverifiable information to prevent it from re-reporting the inaccurate information.
 - (3) A person shall not report information if
 - (a) the consumer has notified them (at the address the person has specified for this

purpose) that specific information is not accurate; AND

- (b) The information is *in fact* not accurate.
- (c) May not make adverse reports relating to creditworthiness resulting from a consumer's application to reduce financial obligations as permitted by the SCRA (e.g. reduce interest rate or delay repossessions, foreclosures, or lawsuits).

b) Duties to correct and update information

- (1) Applies ONLY to persons who “regularly and in the ordinary course of business” furnish information to CRAs AND who have reported information that they determine is not complete or accurate.
- (2) Such persons MUST
 - (a) Notify the CRA.
 - (b) Provide the CRA with necessary corrections or additional information.
 - (c) NOT provide the inaccurate information thereafter.

c) Duties to provide CRAs with certain notices.

- (1) Any person who provided information to CRAs must provide notice that the accuracy of the information is disputed if the person providing the information is notified of the dispute.
- (2) Any person who regularly and in the ordinary course of business notifies CRAs of information regarding a consumer who has a credit account with that person SHALL notify the CRA if the consumer voluntarily closes the account.

- (3) Any person who notifies a CRA that a delinquent account is being placed in collection MUST, with 90 days, notify the CRA of the month and year of the delinquency that immediately preceded the action.

3. Duties When Notified of a Dispute. After receiving proper notice of a dispute, the person providing the information SHALL:

- a) Conduct an investigation with respect to the disputed information;
- b) Review all relevant information provided by the CRA pursuant to the dispute procedure in the FCRA;
- c) Report the results of the investigation to the CRA; and
- d) If the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis.
- e) The person MUST complete all investigations, reviews, and reports required within 30 days from the receipt of notice of the dispute.

I. Consumer Rights.

1. FTC must actively publicize and post on internet site "Summary of Rights" to obtain and dispute information in consumer reports and to obtain credit scores (<https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>).
- a) The right of the consumer to obtain a copy of a consumer report.
- b) The frequency and circumstances under which the consumer can receive a free consumer report.
- c) The right of the consumer to dispute information in their file.

- d) The right of the consumer to obtain a credit score, and how to obtain a credit score.
 - e) The methods to contact and obtain the consumer reports.
2. Consumer reporting agency must provide consumers with the above “Summary of Rights” and the below additional “Summary of Rights” every time a consumer receives a written report from a CRA. The requirement includes:
- a) A brief description of the FCRA
 - b) A summary of all the consumer rights under the act including right to dispute information and obtain credit scores
 - c) An explanation on how the consumer can exercise those rights
 - d) A toll-free number, which is staffed 24 hours a day
 - e) A statement that the agency is not required to remove accurate information that is not obsolete
 - f) A list of all Federal enforcement agencies
 - g) A reminder that the consumer may have additional rights under State law.
3. Access to Credit File
- a) Upon request, consumers can obtain (15 U.S.C. § 1681g):
 - (1) ALL information in their file.
 - (2) Credit scores – the scores generally fall from low of 300 to high of 850, a borrower with a score of 660 or greater is generally considered to be less of a risk to a lender.
 - (3) The source of the information.

- (4) 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.
 - (5) Websites and phone numbers to order reports from "The Big Three"
 - (a) www.experian.com 1-(888) 397-3742
 - (b) www.transunion.com 1-(800) 916-8800
 - (c) www.equifax.com 1-(800) 997-2493
- b) Consumer Copy of the Credit Report
- (1) Each of the Nationwide Agencies must provide consumers a free annual credit report. The request must be made through a FTC established centralized source and the agency has 15 days to send the report. Free annual reports may be obtained online at www.annualcreditreport.com or by calling (877) 322-8228.
 - (2) If the consumer wants additional reports other than for adverse actions the CRA may charge a reasonable fee for the disclosures to the consumer.
 - (3) The reasonable fee is adjusted by the FTC each January 1 based upon the CPI. The fee shall be disclosed to the consumer prior to issuing the information.
 - (4) If an adverse action has been taken or the consumer is a victim of fraud, they are is entitled to a free copy of the credit report, in addition to the free annual reports consumers may obtain.
 - (a) Free reports will also be given during

any 12-month period to anyone:

- (i) Who is unemployed and intends to apply for employment within the next 60-day period (certified by consumer)
- (ii) Is receiving welfare;

(5) Credit Scores

- (a) A credit score is a number compiled from a consumer's file at a consumer reporting agency (CRA), sometimes in conjunction with information obtained from a credit application or other sources. Credit scores are used as a factor, sometimes the sole factor, in determining whether to grant credit to a consumer. The credit score may be the single most influential, critical piece of information associated with a consumer's file at a CRA. Despite their importance, the FCRA specifically exempted credit scores from disclosure until the passage of the Fair and Accurate Credit Transactions Act of 2003 (FACTA) amendments to the FCRA.⁸
- (b) Upon the request of the consumer, the FCRA requires that agencies disclose to the consumer:
 - (i) A statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender and a notice which shall include:
 - (a) their credit score or the most recent score for the consumer calculated by the agency for a purpose related to an extension of credit

⁸ NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING, 16.1.

- (ii) the range of possible scores under the scoring model used
- (iii) the key factors that adversely affected the score in the model used
- (iv) the date the credit score was created
- (v) the name of the person or entity that created the credit score or credit file upon which the credit score was created.

- (c) The agencies can charge a reasonable fee.
- (d) Mortgage lenders must disclose credit scores and key factors to the consumer.

4. Dispute/Correct the Information

5. Statement of dispute (100-WORD STATEMENT.) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute. The CRA must include the statement in every report that contains the disputed entry.

J. Fraud Alerts

1. Types of Fraud Alerts

- a) Initial fraud alerts good for 90 days. The consumer only needs to contact one consumer reporting agency. The agency then must alert the other nationwide agencies and all must include a fraud alert in the consumer's file and provide the alert each time they generate the consumer's credit score. Agency must provide file to consumer within 3 days.

- b) Extended Fraud alerts. The consumer can add an extended fraud alert that lasts for as long as 7 years. The agency must exclude the consumer from any lists generated to sell to users for 5 years and must notify consumer of right to 2 free credit reports within 12 months of request.
 - c) Active Military Duty Alerts. Consumers on active duty including reservists (other than their normal place of duty) can add an alert of status to their files. The alert is in effect for 12 months; however, the military consumer is excluded from any list generated to sell to users for 2 years. The active duty alert does not extend to spouses or other family members.
2. Substance of alerts and users' responsibilities to verify identity
- a) The alerts must state that the consumer does not authorize new credit, an additional card on existing account, or increase in credit limit.
 - b) Users may not proceed with a credit transaction unless the user "utilizes reasonable policies and procedures to form a reasonable belief that the user knows the identity of the person making the request."
 - c) Consumers can provide a phone number for the User to call, however if it is an initial fraud report or an active duty alert that user can "take reasonable steps" other than calling.

K. Remedies.

1. Civil liability for willful noncompliance (15 U.S.C. § 1681n) - actual damages, not less than \$100, not more than \$1,000, punitive damages, and court costs and reasonable attorney's fees if the consumer prevails.
2. Civil liability for negligent noncompliance (15 U.S.C. § 1681o) - actual damages plus court costs and reasonable attorney's fees if the consumer prevails.
3. If the consumer disputes the information and the agency

does not properly respond to the consumer's dispute, the agency can be held liable.

- a) No strict liability for all inaccuracies.
 - b) Defense: Agencies escape liability by proving the reinvestigation was reasonable to determine whether the disputed information is accurate.
4. Statute of Limitations (15 U.S.C. § 1681p). 2 years from date that consumer discovers violation. Consumer must bring action within 5 years of the date of the violation regardless of discovery.
 5. Consumer has burden to prove inaccurate credit report has causal connection to denial of credit or employment or other consumer benefit. *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151 (11th Cir. 1991).
 6. Criminal penalties - obtaining information under false pretenses (15 U.S.C. § 1681q) – or if an agent for a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive the information. Fine pursuant to title 18, United States Code, or imprisonment for not more than 2 years, or both.
 7. Civil Action by the CFPB or FTC to seek civil penalties. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1088 (2010).
 8. Administrative enforcement (FTC or CFPB depending on the case).
 9. State enforcement limited
- L. Child Support Enforcement.
1. CRAs will include in consumer reports furnished by the agency any information on the failure of consumer to pay overdue support which 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
- c) Antedates the report by 7 years or less.

M. Security Freeze

1. A security freeze is a restriction that prohibits a consumer reporting agency from disclosing the contents of a consumer report to anyone.
2. As a result of the Equifax data breach, in May 2018 Congress added subsection 1681-c1(i) to the FCRA which requires nationwide consumer reporting agencies to provide free security freezes.
3. Time limits
 - a) Must place a freeze within one day if requested by phone or electronically; three days if requested via mail.
 - b) Agency has five business days to send confirmation of the freeze's placement to the consumer and must inform the consumer of the process to remove the freeze.
4. A freeze may be placed on behalf of a "protected consumer" (under age 16 or under a guardianship/conservatorship) by the consumer's representative. The freeze is placed and lifted in the same manner as for other consumers.
5. Nationwide agencies must establish webpages that allow consumers to request a security freeze, initial or extended fraud alert, or to opt out of prescreening. The FTC must establish a single webpage that links to each of these pages at www.identitytheft.gov.
6. Many States have their own statutes pertaining to freezes. The federal law is a floor not a ceiling and state can offer greater protections. So be sure to consult state law.

III. IDENTITY THEFT

A. References

1. Identity Theft and Assumption Deterrence Act, Public

Law 105-318, 112 Stat. 3007, 18 U.S.C. §§ 928(b)(1), 1028, 1028a (2006).

2. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING (10th ed. 2022).
3. <https://www.consumer.ftc.gov/features/feature-0014-identity-theft>.
4. The Federal Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159 (Dec. 4, 2003).

B. Nature

1. Impostor's use of key items of another person's identity, such as name, social security number, credit card number, or PIN to obtain funds, credit, goods, services, or benefits.
2. Thief finds social security number in stolen wallet, stolen documents, stolen mail, and over the internet and uses the social security number to apply for credit cards, checking accounts, loans, utility service, obtain employment and government benefits.
3. One of the fastest growing financial crimes, the FTC reported 3 million complaints from consumers in 2018 resulting in consumer losses of over \$1.48 billion to fraud for that year.
4. The fraud does not come to light until the victim is denied a loan or some other kind of credit or, in the worst case scenario, is arrested for writing bad checks. The average time according to the FTC to discover the fraud is a little over 12 months. 87% of the victims had no connection with the thief and 80% of the victims were unaware of what might explain the theft, such as loss of their wallet.

C. Identity Theft and Assumption Deterrence Act

1. Under the act one who transfers or uses another's identification with the intent to commit, or aid or abet a violation of federal law or a felony under state law commits a federal crime.
2. The Act requires the FTC to set up a centralized complaint department to receive reports from identity theft victims,

provide informational materials to the victims, and refer the complaints to appropriate entities.

3. The Act requires law enforcement to classify the one from whom the identify was stolen as the victims of the crime, instead of the banks or credit card companies who are out the money.
4. The Act does not regulate the crediting reporting agencies, and a consumer has to rely on the FCRA to try to clean up their credit record.
5. The Act also does not require creditors to exercise care in extending credit.
6. There are individual state statutes on identity theft and many of them give more protections than the federal statute, so try that route.

D. Coping actions for victims of identity theft:

1. Contact fraud units of one of the Credit Reporting Agencies (Experian, Equifax, TransUnion) and ask that a fraud alert be added to their file and that the agency delete the fraudulent information. The consumer must provide the CRA with proof of identity, a copy of an identity theft report either to law enforcement or another government agency, and a statement that the disputed information is a result of the identity theft and not the actions of the consumer.
2. Within four days, the CRA must block the disputed information and notify the creditor, who must conduct a reinvestigation. Once the creditor receives notice of the fraud, the creditor is prohibited from selling or transferring the debt to a collection agency.
3. The agency then must alert the other nationwide agencies and all must include a fraud alert in the consumer's file and provide the alert each time they generate the consumer's credit score. The agency must provide file to consumer within 3 days.
4. The fraud alert is only good for 90 days unless the consumer adds an extended fraud alert that lasts for as long as 7 years. The agency must exclude the consumer from any lists

generated to sell to users for 5 years and must notify consumer of their right to 2 free credit reports within 12 months of request.

- a) Fraud numbers (only need to contact one):
 - (1) Equifax: (888) 378-4329
 - (2) TransUnion: (888) 909-8872
 - (3) Experian: (888) 397-3742
 - b) To determine if the identity thief has been writing bad checks in the consumer's name, call SCAN at (800) 262-7771.
 - c) To inform retail businesses to stop accepting checks drawn on a fraudulent account in the consumer's name contact Telecheck (800-710-9898 or 800-927-0188) and Certegy (800-437-5120).
5. File report with each law enforcement agency with jurisdiction and get copy of the report. If additional accounts are discovered, file a new police report. A police report can help tremendously in dealing with credit card companies and other businesses.
 6. Ask CRA for names/numbers of fraudulent accounts.
 7. Ask CRA to remove inquiries generated due to fraudulent access.
 8. Contact all creditors who have granted credit on fraudulent accounts by telephone and in writing, notify of fraud, and close those accounts. The victim should get new account numbers and cards for misused accounts and ask that all others be processed as "account closed at consumer's request." Also, ask them for copies of the fraudulent credit application, bills on the accounts, and copies of information they sent to credit reporting agency.
 9. Victim should contact all creditors for which a credit report has been released but no accounts have been opened yet and tell them not to open accounts.

10. If social security number has been used, notify the Social Security Administration, and if Driver's license number has been used, contact the relevant state department of motor vehicles.
11. Go to the FTC website listed in the resource paragraph above for more detailed information on how to combat Identity theft.
12. Continue to monitor credit report by requesting a new credit report from one of the big three reporting agencies on a rotating basis every four months

E. Agencies', Furnishers', and Creditors' Actions

1. Must block identity theft information under FACTA within 4 days of receiving:
 - a) proof of the consumer's identity
 - b) copy of ID theft report
 - c) consumer's identification of fraudulent information
 - d) consumer's statement that the information does not relate to any transaction they initiated
2. The agencies must notify furnishers of the block.
3. The furnishers must implement procedures to keep from re-furnishing the information.
 - a) The consumer can notify the furnisher directly
 - b) Furnishers may not sell or place for collection the identity theft-related information
4. If agency rescinds block, must notify consumer within 5 business days with specific reason for rescission.
5. Financial institutions and creditors must establish and maintain reasonable policies and procedures for implementing "red flag" guidelines regarding identity theft.

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CHAPTER G

CREDIT REPAIR

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CHAPTER G

CREDIT REPAIR

I. REFERENCES.

- A. The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 – 1681u (1970).
- B. The Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679 – 1679j (1996).
- C. Telemarketing Sales Rule, 16 C.F.R. § 310.
- D. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING (10th ed. 2022, Chapter 17).

II. INTRODUCTION.

Credit has taken on increasing importance in the daily lives of U.S. citizens. As a result, credit reporting is also increasingly important. Many consumers worry about problems in their credit history that may affect their access to credit in the future. This worry leaves them open to businesses that prey on these insecurities and offer credit repair services. Congress, concerned about unscrupulous businesses in this field, passed the Credit Repair Organizations Act in 1996.

III. PURPOSE OF CREDIT REPAIR ORGANIZATION ACT (15 U.S.C. § 1679).

- A. Congress found that:
 - 1. “Consumers have a vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair organizations which offer to improve the credit standing of such consumers.”
 - 2. “Certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means

and who are inexperienced in credit matters.”

B. Purpose of the Act.

1. To ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services; and
2. To protect the public from unfair or deceptive advertising and business practices by credit repair organizations.

**IV. SCOPE – WHO IS A “CREDIT REPAIR ORGANIZATION?”
(15 U.S.C. § 1679a)**

A. The Credit Repair Organizations Act contains an exceptionally broad definition of “credit repair organization.”

1. A credit repair organization means any person who performs or offers to perform any service, “in return for the payment of money or other valuable consideration, for the express or implied purpose of—
 - a) improving any consumer’s credit record, credit history, or credit rating; or
 - b) providing advice and assistance to any consumer with regard to any activity or service described in clause (i).
2. The definition also requires that the organization use an instrumentality of interstate commerce or the mail. Individuals as well as companies can meet the definition.
3. Many courts have held that the definition is broad enough to cover entities beyond traditional credit repair organizations, as long as they perform or offer to perform credit repair services for a fee or other valuable consideration. Thus, courts have held that the definition may apply to:
 - a) Credit counseling agencies or debt settlement companies that promise to improve participants’ credit ratings;
 - b) Debt collectors that offer improvement of the debtor’s credit rating in return for payment on the debt;
 - c) Foreclosure rescue scams that claim that they will not

only save the consumer's home but also improve the consumer's credit rating; and

- d) A company that generated subprime financing leads for car dealers by advertising that it could restore consumers' credit."
4. In addition, some courts have suggested that retail sellers may be credit repair organizations under certain conditions. Depending on the representations made, credit monitoring services offered by credit reporting agencies may also meet the definition of credit repair.
 5. The definition is not limited to organizations that are in a business or that have multiple customers. A single instance of providing credit repair services can constitute the acts of a credit repair organization, if undertaken for a fee. Simply because an organization offers some other service, such as a debt management plan to reduce a consumer's credit rates and payments, does not mean that it cannot meet the definition of "credit repair organization." The definition is not confined to fraudulent agencies, but includes non-fraudulent organizations as well.

B. The term "credit repair organization"--

1. Means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of--
 - a) improving any consumer's credit record, credit history, or credit rating; or
 - b) providing advice or assistance to any consumer with regard to any activity or service described above.
2. The term does not include the following:
 - a) Any nonprofit organization which is exempt from taxation under 26 U.S.C. § 501(c)(3);
 - b) Any creditor (as defined in section 103 of the Truth in

Lending Act) with respect to any consumer, to the extent the creditor is assisting the consumer to restructure any debt owed by the consumer to the creditor; or

- c) Any depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act [12 USCS § 1813]) or any Federal or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act [12 USCS § 1752]), or any affiliate or subsidiary of such a depository institution or credit union.
 - (1) Despite repeated challenges by consumers, courts have consistently found automobile dealers to not be credit repair organizations subjected to the requirements of the Credit Repair Organization Act. See *Sanchez v. Pitre, Inc.*, 938 F.Supp. 2d 1199 (D. N.M. 2013); *Snoody v. Savannah Motors, Inc.*, 2007 WL 9711140 (S.D. Ga. 2007); *Sannes v. Jeff Wyler Chevrolet Inc.*, 1999 U.S. Dist. LEXIS 21748 (S.D. Ohio 1999).
 - (2) Simply advertising or claiming to provide credit repair services is sufficient for coverage. See *Parker v. 1-800 Bar None*, 2002 WL 215530 (N.D. Ill. Feb. 12, 2002) (Company that provided no credit repair services itself but just referred the consumer to another organization, is covered).

V. REQUIREMENTS OF THE ACT.

A. Specific Disclosures (15 U.S.C. § 1679c).

- 1. **Mandatory Disclosure Statement.** Any credit repair organization shall provide any consumer with the written disclosures at Appendix A to this Chapter before any contract or agreement between the consumer and the credit repair organization is executed: Consumer must sign to acknowledge receipt.
- 2. The credit repair company must provide the required written statement as a separate document from any written contract or other agreement between the credit repair organization and the consumer or any other written material provided to the consumer.
- 3. Retention of compliance records.

- a) The credit repair organization must maintain a copy of the statement signed by the consumer acknowledging receipt of the statement.
- b) The copy of any consumer's statement shall be maintained in the organization's files for 2 years after the date on which the statement is signed by the consumer.

B. Protections in the Act

1. Required Terms of Credit Repair Contract (15 U.S.C. § 1679d).

- a) Written contracts required. No services may be provided by any credit repair organization for any consumer unless there is a written and dated contract (for the purchase of such services) which meets the requirements below.
- b) The contract must contain the following terms and conditions.

(1) The terms and conditions of payment, including the total amount of all payments to be made by the consumer to the credit repair organization or to any other person;

(2) A full and detailed description of the services to be performed by the credit repair organization for the consumer, including--

- i. all guarantees of performance; and
- ii. an estimate of the date by which the performance of the services (to be performed by the credit repair organization or any other person) will be complete; or the length of the period necessary to perform such services;

(3) The credit repair organization's name and principal business address; and

(4) A conspicuous statement in bold face type, in immediate proximity to the space reserved for the consumer's signature on the contract, which reads as follows: "You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract. See the attached notice of cancellation form for an explanation of this right."

c) Three Day Waiting Period. Once the written contract is signed, the services cannot be performed before the end of the 3 business day period beginning on the date the contract is signed.

2. Right to cancel contract (15 U.S.C. § 1679e).

a) Any consumer may cancel any contract with any credit repair organization –

(1) Without penalty or obligation

(2) By notifying the credit repair organization of the consumer's intention to do so at any time before midnight of the 3rd business day after the date the contract is signed.

b) The consumer may cancel by providing oral or written notice, although written notice by certified or registered mail is encouraged.

c) Cancellation form. Each contract shall be accompanied by a form, in duplicate, titled "Notice of Cancellation." The form must contain the following statement in bold face type:

"You may cancel this contract, without any penalty or obligation, at any time before midnight of the 3rd day which begins after the date the contract is signed by you.

"To cancel this contract, mail or deliver a signed, dated copy of this cancellation notice, or any other written notice to [name of credit

repair organization] at [address of credit repair organization] before midnight on [date]

"I hereby cancel this transaction,

[date]

[purchaser's signature]."

- d) At the time the contract or other documents are signed, the credit repair organization must provide the consumer a copy of the completed contract, the disclosure statement required under section 1679c, and a copy of any other document the credit repair organization requires the consumer to sign.

C. Prohibited Practices (15 U.S.C. § 1679b).

1. Untrue and Misleading Statements

- a) No person make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading
- b) OR which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading

WITH RESPECT TO any consumer's credit worthiness, credit standing, or credit capacity to--

(1) any consumer reporting agency; or

(2) any person--

- i. who has extended credit to the consumer; or
- ii. to whom the consumer has applied or is applying for an extension of credit;

2. Hiding the Consumer's Accurate Credit History.

(1) No person may make any statement, or counsel or advise any consumer to make any statement, the intended effect of which is to alter the consumer's identification to prevent the display of the consumer's credit record, history, or rating for the purpose of concealing adverse information that is accurate and not obsolete. For example, credit repair services have told clients to use employee identification numbers instead of their social security numbers to repair their credit.

(2) The information may not be hidden from:

- a. any consumer reporting agency;
- b. any person—
 - i. who has extended credit to the consumer; or
 - ii. to whom the consumer has applied or is applying for an extension of credit;

3. Other Misconduct in the Provision of Credit Repair Services.

- a) No person may make or use any untrue or misleading representation of the services of the credit repair organization; OR
- b) No person may engage, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.
- c) No payment in advance! No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.
- d) If the credit repair services are provided by a telemarketer, then no payment may be requested or received until after the seller has provided the consumer

with a consumer credit report demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Telemarketing Sales Rule, 16 C.F.R. § 310.4(a)(2).

VI. EFFECT OF NON COMPLIANCE (15 U.S.C. § 1679F)

A. Waiver of Protections.

1. Consumer waivers are invalid. Any waiver by any consumer of any protection provided by, or any right of the consumer under, this subchapter:
 - a) shall be treated as void; and
 - b) may not be enforced by any Federal or State court or any other person.
2. Attempts to obtain waivers. Any attempt by any person to obtain a waiver from any consumer of any protection provided by the Act is treated as a violation of the Act.

B. Contracts not in compliance.

Any contract for services which does not comply with the Act--

- a) Shall be treated as void; and
- b) May not be enforced by any Federal or State court or any other person.

VII. REMEDIES.

- ### **A. Civil liability (§ 1679g).** Any person who fails to comply with any provision of this Act with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs:

1. Actual damages. The greater of--
 - a) the amount of any actual damage sustained by such person as a result of such failure; or

b) any amount paid by the person to the credit repair organization.

2. Punitive damages.

a) Individual actions. Any additional amount the court may allow.

b) Class actions. The sum of--

(1) The aggregate of the amount which the court may allow for each named plaintiff; and

(2) The aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery.

c) Factors to be considered in awarding punitive damages.

(1) The frequency and persistence of noncompliance by the credit repair organization.

(2) The nature of the noncompliance.

(3) The extent to which such noncompliance was intentional.

(4) In the case of any class action, the number of consumers adversely affected.

3. Attorneys' fees. In any successful action to enforce any liability, the person may recover the costs of the action, together with reasonable attorneys' fees.

B. Administrative enforcement (15 U.S.C. § 1679h).

1. Federal Trade Commission.

a) Enforced under the Federal Trade Commission Act [15 U.S.C. § 41 et seq.] by the Federal Trade Commission.

b) Violation of any requirement or prohibition imposed

under the Act with respect to credit repair organizations shall constitute an unfair or deceptive act or practice in commerce.

- c) All functions and powers of the Federal Trade Commission shall be available to the Commission to enforce compliance with the Act without regard to whether the credit repair organization is engaged in commerce, or meets any other jurisdictional tests in the Federal Trade Commission Act.

2. State action for violations.

- a) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating the Act, the State--

- (1) may bring an action to enjoin such violation;
- (2) may bring an action on behalf of its residents to recover damages for which the person is liable to such residents; and
 - a. in the case of any successful action shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

- b) The State shall serve prior written notice of any civil action upon the Federal Trade Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action.

- c) The Commission shall have the right--

- (1) to intervene in any action referred to in subparagraph (A);
- (2) upon so intervening, to be heard on all matters arising in the action; and

(3) to file petitions for appeal.

d) Whenever the Federal Trade Commission has instituted a civil action for violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission for any violation of this subchapter that is alleged in that complaint.

C. Statute of limitations. (15 U.S.C. § 1679i)

1. 5 years beginning on:

a) the date of the occurrence of the violation involved; or

b) the date of the discovery by the consumer of the misrepresentation in any case in which any credit repair organization has materially and willfully misrepresented any information which--

(1) the credit repair organization is required, by any provision of the Act, to disclose to any consumer; and

(2) is material to the establishment of the credit repair organization's liability to the consumer under this subchapter.

D. Relationship to other protections.

1. FTC Telemarketing Sales Rule. There is no private cause of action unless damages exceed \$50,000, but a violation of the rule may be a per se violation of State UDAP statutes.

2. State UDAP Statutes. These statutes typically provide a private cause of action against the merchant (credit repair organization) authorizing the court to award actual damages, statutory damages, costs, and attorney's fees.

APPENDIX A TO CHAPTER G
MANDATORY DISCLOSURE LANGUAGE
15 U.S.C. § 1679c

**Consumer Credit File Rights Under State and Federal
Law**

You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any 'credit repair' company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.

You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.

Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur.

You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau.

If the credit bureau's reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you.

The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact: The Public Reference Branch, Federal Trade Commission Washington, D.C. 20580.

CHAPTER H

CREDIT DISCRIMINATION

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CHAPTER H

CREDIT DISCRIMINATION

I. REFERENCES.

- A. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 – 1691f (1974).
- B. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, [hereinafter Dodd-Frank Act], tit. X, Subtitle C, §§ 1013(b), 1071, 1085 (2010).
- C. Consumer Financial Protection Bureau, Regulation B (Equal Credit Opportunity), 12 C.F.R. Part 1002.
- D. NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION (8th ed. 2022), [hereinafter “NCLC Discrimination”].

II. INTRODUCTION.

- A. The approach to discrimination can take a number of tacks using a variety of civil rights statutes at the state and federal level. This outline deals only with the Equal Credit Opportunity Act (ECOA) – a critical consumer protection statute regulating access to credit. Unfortunately, credit discrimination is a widespread problem throughout America. Credit discrimination is usually based on race, national origin, sex, marital status, familial status, sexual orientation, disability, age, religion, or receipt of public assistance. A direct consequence of credit discrimination is lost opportunity, such as for homeownership or college education. Situations in which the ECOA may be useful include:
 - 1. Creditors excluding, or “redlining,” the inhabitants of certain neighborhoods because of poor payment experience.
 - 2. Banks discouraging minority applications by not having branches in minority communities.
 - 3. Car dealers or brokers steering minorities to different

creditors or charging them higher prices and fees.

4. Reverse “redlining” by charging higher interest rates in certain minority neighborhoods.
5. Merchants using differing standards when cash up front is required.
6. Merchants using differing standards when collateral, cosigners, or down payments are required.

B. Before bringing an Equal Credit Opportunity Act (ECOA) action, an advocate must consider three preliminary questions. All three of these initial issues must be affirmatively resolved before the advocate can begin to consider specific ECOA violations that may have been committed in the client’s transaction. The questions are:

1. Has there been an extension of “credit” or an application for an extension of credit covered by the ECOA? If so, is the transaction fully subject to the requirements of the ECOA or has the transaction been exempted from certain requirements under the Act or Regulation B?
2. Is the client an “applicant” who can invoke the statute’s protection and recover under its remedy provisions?
3. Is the party being sued a “creditor” under the ECOA definition and therefore subject to the statute’s requirements and liable for damages?

C. The purpose of the ECOA is “to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status.”

D. Rulemaking.

1. The Dodd-Frank Act largely transferred ECOA rulemaking authority from the Federal Reserve Board to the CFPB. See Dodd-Frank Act, §§ 1013, 1085. The CFPB has promulgated Reg B at 12 CFR Part 1002. **Note:** One exception is for automobile dealers. Because automobile dealers are exempted from the CFPB, the Federal Reserve Board of Governors will retain the authority over automobile dealers. Legal Assistance Attorneys with potential ECOA issues should contact the CFPB with

questions or concerns.

2. The Dodd-Frank Act established an Office of Fair Lending and Equal Opportunity within the CFPB. See Dodd-Frank Act at § 1013(c). The CFPB now has the power and authority to oversee and enforce “Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act and Home Mortgage Disclosure Act.” *Id.*

III. APPLICABILITY.

- A. In general, the ECOA prohibits creditors from discriminating against applicants based on race, color, religion, national origin, sex, marital status, age, public assistance income, and exercise of rights under the Consumer Protection Act regarding any aspect of a credit transaction. 12 C.F.R. § 1002.2(z). Whether or not the ECOA applies to a transaction may be determined by answering the threshold questions below.

Note: military status is not a protected class under ECOA.

- B. Has there been an extension of “credit” covered by the ECOA?
 1. 15 U.S.C. § 1691a(d). The term “credit” means “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment thereof.”
 2. The ECOA definition is intentionally broader than the definition under the Truth in Lending Act (TILA) because TILA requires a finance charge or at least 5 installment payments. See 15 U.S.C. § 1602; Official Staff Commentary to 12 C.F.R. § 1002.2(j). The ECOA applies whenever a payment is deferred.
 3. Specific types of transactions. See NCLC DISCRIMINATION § 2.2.2. Does the ECOA apply to:
 - a) Leases?
 - (1) Residential – Probably not, but the Fair Housing Act might apply.

- (2) Personal property leases covered by the Consumer Leasing Act – Probably Yes. See *Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984).
 - (3) Rent-To-Own & Terminable Leases – No, if they are terminable at will without penalty. If you can argue it is really a disguised credit sale then the ECOA applies.
- b) Utility Service? Yes. Official Staff Commentary § 1002.3(a)
 - c) Check Cashing or ATM Cards? – No, because there is no extension of credit.
 - d) Pay as you go? No. For credit to be involved, there must be a deferral of payment of money owed. Thus, a court has found no credit involved when a home improvement contract's schedule of payments substantially coincided with completion of the work, and there was no right given by the creditor to defer payment of the obligation.¹ Similarly, when payment is made immediately upon the service being provided, there is no extension of credit.²
 - e) The line between “pay as you go” and a deferred-payment transaction is not always clear. For example, a cellular telephone service company argued that it was not covered by the ECOA because it billed customers on a monthly basis and payment was due each month. Customers could not defer payment of amounts owed.³ The court disagreed with this argument, focusing on the fact that the transaction involved was an application for cellular services in which the customer sought to use the service and pay for it later.⁴

C. Is the client an “Applicant” under the ECOA?

- 1. 15 U.S.C. § 1691a(b). "Applicant" means “any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of

¹ *Shaumyan v. Sidetex Co.*, 900 F.2d 16 (2d Cir. 1990).

² *Universal Bonding Ins. Co. v. Esko & Young, Inc.*, 1991 WL 30049 (N.D. Ill. Feb. 28, 1991).

³ See *Williams v. AT & T Wireless Servs., Inc.*, 5 F. Supp. 2d 1142 (W.D. Wash. 1998).

⁴ *Id.* (distinguishing *Shaumyan* because plaintiffs in that case prepaid a substantial portion of the amount due).

an existing credit plan for an amount exceeding a previously established credit limit.”

2. 12 C.F.R. § 1002.2(e). Applicant means “any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit.”
3. To be an applicant, a person does NOT have to submit an application. Be aware, however, that certain protections under the ECOA only apply to someone who has submitted an application. See NCLC DISCRIMINATION § 2.2.4.

D. Is the party who allegedly violated the Act a “creditor?”

1. 15 U.S.C. 1691a(e). The term "creditor" means:
 - a) any person who “regularly” extends, renews, or continues credit;
 - b) any person who regularly arranges for the extension, renewal, or continuation of credit;
 - c) or any assignee of an original creditor who *participates* in the decision to extend, renew, or continue credit.
 - d) “Regularly” is NOT defined under the ECOA or the CFR provisions based upon it. NCLC suggests looking to the old Regulation Z (Truth in Lending Act) that existed at the time the ECOA was originally passed. Cases interpreting this provision said that “regularly” means more than “isolated” or “incidental” occurrences. See NCLC DISCRIMINATION § 2.2.5.2.
2. Exclusions from the definition of creditor.
 - a) The term does not include a person whose only participation in a credit transaction involves honoring a credit card. 12 C.F.R. § 1002.2(l).
 - b) A person is not a creditor regarding any violation of the act or Regulation B committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation

before becoming involved in the credit transaction. *Id.*

3. The Government as a creditor. The ECOA applies to the government, except that governmental creditors are not subject to punitive damages. See 15 U.S.C. § 1691e(b).

E. Exempt transaction. Some transactions are partially exempt.. However, the rule against discrimination against applicants on a prohibited basis still applies. See NCLC DISCRIMINATION § 2.2.6; 12 C.F.R. § 1002.4 (a).

1. Public utilities credit.

- a) Public utilities credit refers to extensions of credit that involve public utility services provided through pipe, wire, or other connected facilities, or radio or similar transmission, if the charges for service, delayed payment, and any discount for prompt payment are filed with or regulated by a government unit. Utilities are not exempt if the extension of credit is for something other than the utility.
- b) Rural electric cooperatives and other unregulated utilities are NOT included in this exception.
- c) The credit must relate to the delivery of utility services as well. If the credit relates to another transaction (such as for equipment), the exemption would not apply.
- d) Public utilities must comply with the majority of ECOA provisions. There are, however, the following exceptions:
 - (1) Public utilities may ask the marital status of applicants.
 - (2) Public utilities may report credit reporting information in the names of both spouses.
 - (3) Public utilities are not required to maintain copies of credit applications.

2. Incidental consumer credit.

- a) Incidental credit refers to extensions of credit.
 - (1) Primarily for personal, family, and household use;
 - (2) That are NOT Public Utilities or Securities Credit;
 - (3) That are not made pursuant to the terms of a credit card account;
 - (4) That are not subject to a finance charge or interest; and
 - (5) That are not payable by agreement in more than four installments.

- b) Exceptions. The following provisions of Regulation B do not apply to incidental credit transactions:
 - (1) Section 1002.5(b) concerning information about the sex of an applicant, but only to the extent necessary for medical records or similar purposes;
 - (2) Section 1002.5(c) concerning information about a spouse or former spouse;
 - (3) Section 1002.5(d)(1) concerning information about marital status;
 - (4) Section 1002.5(d)(2) concerning information about income derived from alimony, child support, or separate maintenance payments;
 - (5) Section 1002.7(d) relating to the signature of a spouse or other person;
 - (6) Section 1002.9 relating to notifications;
 - (7) Section 1002.10 relating to furnishing of credit information; and
 - (8) Section 1002.12(b) relating to record retention.

3. Securities credit.

- a) Securities credit refers to extensions of credit subject to regulation under section 7 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a – 78eee) or extensions of credit by a broker or dealer subject to regulation as a broker or dealer under the Securities Exchange Act of 1934. 15 U.S.C. § 78c contains definitions and applicability information for this Act.
- b) Exceptions. The following provisions of Regulation B do not apply to securities credit:
 - (1) Section 1002.5(b) concerning information about the sex of an applicant;
 - (2) Section 1002.5(c) concerning information about a spouse or former spouse;
 - (3) Section 1002.5(d)(1) concerning information about marital status;
 - (4) Section 1002.7(b) relating to designation of name, but only to the extent necessary to prevent violation of rules regarding an account in which a broker or dealer has an interest, or rules necessitating the aggregation of accounts of spouses for the purpose of determining controlling interests, beneficial interests, beneficial ownership, or purchase limitations and restrictions;
 - (5) Section 1002.7(c) relating to action concerning open-end accounts, but only to the extent the action taken is on the basis of a change of name or marital status;
 - (6) Section 1002.7(d) relating to the signature of a spouse or other person;
 - (7) Section 1002.10 relating to furnishing of credit information; and
 - (8) Section 1002.12(b) relating to record retention.

4. Credit extended to the Government. 12 CFR 1002.3(d)
 - a) Government credit refers to extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities.
 - b) Except for section 1002.4, the general rule prohibiting discrimination on a prohibited basis, the requirements of this regulation **DO NOT** apply to government credit.

IV. PROHIBITED ACTIVITIES (15 U.S.C. § 1691).

- A. Discrimination by a creditor is unlawful when the creditor's actions in relation to an applicant are made because of a prohibited basis, or when the creditor's decision-making process results in individuals being treated differently because of a prohibited basis (disparate treatment). For example:
 1. Requiring a minority applicant to produce more documentation than a white applicant.
 2. Relaxing the credit standards for a non-minority applicant.
- B. Activities constituting discrimination. It is unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
 1. on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
 2. because all or part of the applicant's income derives from any public assistance program; or
 3. because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.
- C. Activities not constituting discrimination. It shall not constitute discrimination for purposes of this subchapter for a creditor—
 1. to make an inquiry of marital status if such inquiry is for the

purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of creditworthiness;

2. to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Board;
3. to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or
4. to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

D. Refusals of Credit that are **NOT** considered discriminatory. It is not a violation of the ECOA for a creditor to refuse to extend credit offered pursuant to—

1. any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;
2. any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or
3. any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the CFPB;
4. if such refusal is required by or made pursuant to such program.

E. Non-discriminatory Activities Specifically described in the ECOA (15 U.S.C. § 1691d).

1. Requests for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving

inchoate rights to property, or assigning earnings, shall not constitute discrimination. NOTE: This does NOT permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.

2. Consideration or application of state property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this subchapter.

F. Credit to husband and wife.

1. State laws prohibiting separate extension of consumer credit to husband and wife are specifically preempted by the ECOA. (15 U.S.C. § 1691d).
2. Creditors may NOT combine credit accounts of a husband and wife with the same creditor to determine permissible finance charges or loan ceilings under federal or state laws where each party to a marriage separately and voluntarily applies for and obtains separate credit accounts. (15 U.S.C. § 1691d)

V. NOTIFICATION PROVISIONS.

A. Notification requirements.

1. Creditors must notify applicants of the action taken within 30 days of receiving a completed application, within 30 days of taking adverse action on an incomplete application, within 30 days of taking adverse action on an existing account, or within 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offer.
2. The required notification of action must contain:
 - a) A statement of the action taken;
 - b) The creditor's name and address;
 - c) Written notification of adverse action which includes:
 - (1) The specific reasons for the action taken; or

- (2) The applicant's right to receive a statement of specific reasons within thirty days, provided the request is made within sixty days after notification of the adverse action
- (3) The identity and contact information of the person or office from which such statement may be obtained.
- (4) Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

B. Definition.

1. "Adverse Action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.
2. The term does **NOT** include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

VI. INCENTIVES FOR SELF-TESTING AND SELF-CORRECTION (15 U.S.C. § 1691c-1; 12 C.F.R. § 1002.15)

- A. Creditors may conduct "self-tests" to determine their compliance with the ECOA. A self-test is any program, practice, or study that:
1. Is designed and used specifically to determine the extent or effectiveness of a creditor's compliance with the act or this regulation; and
 2. Creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions.
- B. IF a creditor—
1. conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a credit transaction by a creditor, in order to determine the level or effectiveness of compliance with

this subchapter by the creditor; and

2. has identified any possible violation of the ECOA by the creditor and has taken, or is taking, appropriate corrective action to address any such possible violation.
- C. THEN, any report or results of that self-test is privileged; and may not be obtained or used by any applicant, department, or agency in any proceeding or civil action in which one or more violations of the ECOA are alleged; or examination or investigation relating to compliance with the ECOA.
- D. Self-test results MAY be used in any proceeding IF:
1. The creditor or any person with lawful access to the report or results voluntarily releases or discloses all, or any part of, the report or results to the applicant, department, or agency, or to the general public, or b) refers to or describes the report or results as a defense to charges of violations of the ECOA against the creditor to whom the self-test relates; or
 2. The report or results are sought in conjunction with an adjudication or admission of a violation of the ECOA for the sole purpose of determining an appropriate penalty or remedy.

VII. ENFORCEMENT.

- A. Administrative enforcement. (15 U.S.C. § 1691c)
1. Enforcing agencies. The ECOA is enforced by the agency with specific regulatory authority over the creditor. Depending upon the creditor involved, enforcement authority may be found in any of the following sources:
 - a) CFPB: The CFPB has enforcement authority over most ECOA violations. Automobile dealers, however, are exempted from the CFPB's jurisdiction.
 - b) Section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], as amended by Dodd-Frank Act, § 1085, sets forth the rules regarding banks, Federal savings associations, and Federal branches of Federal agencies of foreign banks, and other similar organizations. Because of the complicated nature of these

amendments and other potential practical considerations related to these recent and relatively untested changes, legal assistance attorneys should consult with a CFPB attorney to determine the appropriate enforcement agency.

2. Violations of the ECOA that also violate other statutory requirements. Agencies may enforce both the ECOA provision as well as the other statutory provision.
3. Overall enforcement authority of Federal Trade Commission.
 - a) Except where enforcement is specifically given to another agency above, such as the CFPB, the Federal Trade Commission enforces the ECOA. See Dodd-Frank Act, § 1085.
 - b) A violation of any requirement imposed under the ECOA is also a violation of the Federal Trade Commission Act.

B. Civil liability (15 U.S.C. § 1691e) 12 CFR 1002.16(b)

1. Individual or class action.
 - a) Creditor liable for actual damages.
 - b) Punitive damages.
 - (1) Any creditor, other than a government or governmental subdivision or agency, is liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000.
 - (2) In the case of a class action, the total recovery under this subsection shall not exceed the lesser of \$500,000 or 1 per centum of the net worth of the creditor.
 - (3) In determining the amount of punitive damages in any action, the court shall consider, among other relevant factors:

- (a) the amount of any actual damages awarded,
 - (b) the frequency and persistence of failures of compliance by the creditor,
 - (c) the resources of the creditor, the number of persons adversely affected, and
 - (d) the extent to which the creditor's failure of compliance was intentional.
- c) U.S. District Courts may give equitable and declaratory relief as is necessary to enforce the requirements imposed by the ECOA.
- d) If successful, the plaintiff may recover both the costs of the action, and reasonable attorney's fee as determined by the court.

2. Jurisdiction and Statute of Limitations. 12 CFR 1002.16

- a) ECOA actions may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction.
- b) Statute of Limitations. within five years after the date of the occurrence of the violation, or within one year after the commencement of an administrative enforcement proceeding or of a civil action brought by the Attorney General of the United States within five years after the alleged violation. 12 CFR 1002(b)(2). .

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CHAPTER I

MILITARY UNIQUE CONSUMER LAW ISSUES

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CHAPTER I

MILITARY UNIQUE CONSUMER LAW ISSUES

I. INVOLUNTARY ALLOTMENTS FOR CREDITOR JUDGMENTS.

- A. Background to DoD Dir. 1344.09 Feb. 1, 2022; DoD Instr. 1344.12, Nov. 18, 1994, through Change 2, July 11, 1996.
1. Congress required DoD to promulgate these regulations in the Hatch Act.
 2. The Act waives sovereign immunity for the collection of creditor judgments from federal employees.
 3. The Act directed DOD to promulgate regulations providing for involuntary allotment of military pay to account for "the procedural requirements of the Soldiers and Sailors Civil Relief Act...and in consideration for the absence of a member of the uniformed services from an appearance in a judicial proceeding resulting from the exigencies of military duty."
- B. Military Procedure For Involuntary Allotments.
1. Initiation Procedure for Creditors.
 - a) Final order of court with specific money award, and DD Form 2653. Either no appeal or the time for an appeal has expired.
 - b) Served on designated agent - DFAS - Cleveland.
 - c) Certifications [DD Form 2653, November 2007]:
 - (1) Judgment not modified, set aside or satisfied. If partially satisfied, the amount unpaid.
 - (2) Not issued while service member was on active duty. If the service member was on active duty,

then either the service member was present or represented by an attorney or the SCRA was followed fully.

- (3) State law allows garnishment of a similarly situated civilian.
- (4) Debt has not been discharged in bankruptcy or barred by other legal impediment.
- (5) Creditor agrees to repay service member within 30 days if payment to creditor is erroneous.
- (6) If creditor receives an overpayment, the creditor must refund the overpayment to the servicemember. Failure to do so may result in the creditor being prohibited from future collection via involuntary allotment.

2. Amounts Available.

- a) Pay includes - Disposable (generally taxable) pay (only).
- b) Maximum amount of allotment - 25% of disposable pay or lower if state law provides for lower amount. The states of PA and TX do not allow garnishment of wages for commercial debts, thereby precluding involuntary allotment actions from debt actions in those states. The states of NH, NC, and FL exempt such a high percentage of earnings that the practical effect precludes involuntary allotment actions for commercial debts. Be sure to check state law.

3. DFAS action.

- a) Facial review.
- b) Mail notice [DD Form 2653] to service member [90 day clock starts].- No time limit for DFAS to issue notice. Mail two additional copies to the "immediate commander" with DD Form 2654.

4. Command action ("Immediate Commander").

- a) Serve service member with copy of notice and DD Form 2654 (Rights Warning Form) [5 day req].
 - b) Inform service member of right to contest the involuntary allotment [15 days to respond].
 - c) Grant 30 day extension to respond if necessary.
5. Service member's actions.
- a) Consent.
 - b) Seek legal assistance.
6. Service member defenses per 32 CFR Part 113, § 113.6(b)(2)(iii)(d):
- a) SCRA [formerly SSCRA] was not followed in the underlying judgment.
 - b) Military exigency caused the absence of the service member from appearance in the judicial proceeding, which forms the basis of the judgment.
 - c) Application for allotment is false or erroneous in material part.
 - d) Judgment has been satisfied, set-aside, or modified.
 - e) Judgment has been materially amended, or partially satisfied.
 - f) Legal impediment (e.g. bankruptcy) prevents processing the allotment.
 - g) "Other appropriate reasons..." Violation of consumer law underlying the judgment.
7. Additional defense: Pay is already under garnishment such that an additional garnishment would exceed threshold amount.

8. Immediate Commander Response.
 - a) Rule on military exigency defense only.
 - (1) Standard of review - preponderance.
 - (2) Definition - "[M]ilitary assignment or mission essential duty that, because of its urgency, importance, duration, location or isolation, necessitates the absence of a member of the military service from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally to be presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed."
 - b) Forward the debtor response to DFAS. Debtor failure to timely respond results in automatic initiation of involuntary allotment.
9. DFAS decides all other defenses.
10. No appeal of DFAS determinations.

II. PUTTING AREAS OFF-LIMITS – ARMED FORCES DISCIPLINARY CONTROL BOARDS.

- A. References.
 1. AR 190-24, Armed Forces Disciplinary Control Boards and Off- installation Liaison and Operations (27 July 2006).
 2. AR 600-20, Army Command Policy (24 July 2020).
- B. Off-Limits Establishments and Areas.
 1. Purposes.
 - a) Maintain good discipline, health, morals, safety, and welfare of service members.

- b) Prevent service members from being exposed to or victimized by crime-conducive conditions.

2. Effect of Off-limits Designation.

- a) Service members are prohibited from entering establishments or areas declared off-limits according to AR 190-24.
- b) Violations subject the service member to discipline under appropriate regulations or the UCMJ.
- c) Family members should be made aware of the off-limits areas.

C. Procedure – The Armed Forces Disciplinary Control Board

1. The Role of Commanders

- a) Establishment of off-limits areas is a function of command.
- b) Commanders retain substantial discretion to declare establishments or areas temporarily off-limits for their commands. These areas are given first priority for review at the AFDCB.
- c) Prior to initiating AFDCB action, installation commanders will attempt to correct adverse conditions or situations through the assistance of civic leaders or officials.

2. The Armed Forces Disciplinary Control Board (AFDCB).

- a) Composition.
 - (1) Established at the installation base or station level.
 - (2) Structured according to the needs of the command, but consider reps from the following functional areas:
 - (a) Law Enforcement

- (b) Legal Counsel
 - (c) Medical, Health, and Environmental Protections
 - (d) Public Affairs
 - (e) Equal Opportunity
 - (f) Fire and Safety
 - (g) Chaplain
 - (h) Alcohol and Drug Abuse
 - (i) Personnel and Community Activities
 - (j) Consumer Affairs
- (3) Commanders designate a board president and voting members in the written agreement establishing the board. At most installations, the president is the Provost Marshal.

b) Function

- (1) Advise and make recommendations to commanders concerning eliminating conditions which adversely affect the health, safety, morals, welfare, morale, and discipline of the Armed Forces.
- (2) The Board is required to meet at least quarterly.
- (3) The Board makes recommendations as to the following conditions:
 - (a) Disorders and lack of discipline
 - (b) Prostitution

- (c) Sexually transmitted disease
 - (d) Liquor violations
 - (e) Racial and other discriminatory practices
 - (f) Alcohol and drug abuse
 - (g) Criminal or illegal activities involving cults or hate groups
 - (h) Illicit gambling
 - (i) Areas susceptible to terrorist activities
 - (j) Unfair commercial or consumer activities
 - (k) Other undesirable conditions that may adversely affect members of the military or their families.
- (4) The Board coordinates with local and civil authorities regarding these conditions.
- c) Procedure.
- (1) The Board receives and considers reports of the conditions cited above.
 - (2) The board may investigate or visit an establishment, but if they do so, the President must submit a report of the findings and recommendations from the visit at the next meeting.
 - (3) DUE PROCESS: When the board concludes that conditions adverse to Armed Forces personnel exist, they must do the following before placing the establishment off-limits:
 - (a) Notify the individual responsible (owner or manager) for the conditions of the problem. This notification letter must be sent by

certified mail.

- (b) The proprietor should be afforded an opportunity to appear before the board.
 - (c) Conduct further investigation to determine whether improvements have been made.
 - (4) Make a recommendation to the sponsoring commander. The commander will approve or disapprove and notify the president.
 - (5) The president will notify the proprietor of the outcome.
 - (6) Commanders will publish a list of off-limits establishments
- d) Limitations.
- (1) Commanders may not post signs on private property (saying "off-limits.")
 - (2) OCONUS procedures must be consistent with the SOFA for that country.
 - (3) Off-limits should only be imposed where there is substantive information supporting the action. The board must not act arbitrarily.
- e) Removal.
- (1) The proprietor may petition for removal at any time. The AFDCB must take action on a request for removal.
 - (2) A change in ownership, management, or name does NOT in and of itself revoke the off-limits order.
 - (3) Additionally, the Board should inspect off-

limits establishments at least quarterly to ensure that continued limitations are justified.

- (4) Once the board is convinced that adequate corrective measures have been taken, they should forward a recommendation for removal to the commander.

III. REPOSSESSION

A. References.

1. AR 27-40, *Litigation* (19 Sep 1994).
2. NATO SOFA Supplementary Agreement
3. NATIONAL CONSUMER LAW CENTER, *REPOSSESSIONS* ((10th ed. 2022).).
4. Uniform Commercial Code, Article 9, *Secured Transactions*.

B. Repossession on the Installation.

1. Seizure of personal property. (AR 27-40, para. 2-3f.) State and federal courts issue orders (for example, writ of attachment) authorizing a levy (seizure) of property to secure satisfaction of a judgment. DA personnel will comply with valid state or federal court orders commanding or authorizing the seizure of private property to the same extent that state or federal process is served.
2. Service of Civil Process.
 - a) Policy. (AR 27-40, para. 2-3a.)
 - (1) DA officials will not prevent or evade the service of process in legal actions brought against the United States or against themselves in their official capacities.
 - (2) If acceptance of service of process would interfere with the performance of military duties, Army

officials may designate a representative to accept service.

- b) Service on Soldiers in their individual capacity.
 - (1) DA personnel sued in their individual capacity should seek legal counsel concerning voluntary acceptance of process.
 - (2) Process of federal courts. Subject to reasonable restrictions imposed by the commander, civil officials will be permitted to serve federal process. (See Federal Rules of Civil Procedure 4, 45). (AR 27-40, para. 2-3c.)
 - (3) Process of state courts. (AR 27-40, para. 2-3d.)
 - (a) In areas of exclusive federal jurisdiction that are not subject to the right to serve state process, the commander or supervisor will determine whether the individual to be served wishes to accept service voluntarily. A JA or other DA attorney will inform the individual of the legal effect of voluntary acceptance. If the individual does not desire to accept service, the party requesting service will be notified that the nature of the exclusive federal jurisdiction precludes service by State authorities on the military installation.
 - (b) On federal property where the right to serve process is reserved by or granted to the State, in areas of concurrent jurisdiction, or where the United States has only a proprietary interest, Army officials asked to facilitate service of process will proceed initially as provided in the preceding subparagraph. If the individual declines to accept service, the requesting party will be allowed to serve the process per applicable State law, subject to reasonable restrictions imposed by the commander.

- (4) Process in Germany.
- (a) German process servers generally have access to our installations. Art. 32, SA NATO SOFA.
 - (b) The service is either accomplished through a liaison agency designated by the U.S. or with notice to that agency.
 - (c) The liaison agency for process is normally within OJA USAREUR.
 - (d) You will likely have a German civilian who acts as the liaison in your SJA office or Law Center.
 - (e) Repossession in Germany.¹
 - (i) The German Civil Code generally allows self-help repossession. Court orders are only required if there will be resistance or the agent that is doing the repossessing has to enter private property.
 - (ii) The “bailiff” (similar to a sheriff or deputy) does both service of process and execution of judgments in Germany. Thus, we will grant access to our installations in accordance with the SA to the NATO SOFA. (Through liaison or notice to liaison.)
 - (iii) Art. 34, SA NATO SOFA, however, places additional restrictions on execution of judgments. The enforcement must be “effected . . . in the presence of a representative of the force.” Thus, a U.S. representative would have to be present during the repossession.

¹ TJAGLCS would like to thank Mr. P.J. Conderman, International Law Division, OJA, USAREUR for providing invaluable support in the preparation of this section

- (iv) Note that U.S. creditors seeking to enforce their judgments must obtain a domestic (German) basis for the repossession prior to proceeding. OJA, USAREUR is unaware of any recent cases where U.S. concerns have had to enforce their security interest in this way. Without a valid German order, however, the German authorities may view the action as theft.

3. Practical Advice.

a) Know your state law.

- (1) Is self-help allowed or is a court order required?
- (2) Most states that do allow self-help, do not allow a “breach of the peace” during the repossession.

(a) Physical force is a breach of the peace. Examples of breach of peace:

- (i) A reposessor grabs keys from debtor and twists wrist.

- (ii) A reposessor pushes door open and strikes debtor in the stomach.

- (iii) A debtor’s car is towed away with her in it, and the car is put in fenced lot with loose guard dog.

- (b) If the debtor objects at the time of the taking, that may be a “breach of the peace.” See, e.g., *Hester v. Bandy*, 627 So.2d 833 (Miss. 1993); *State v. Trackwell*, 458 N.W.2d 181 (Neb. 1990); but see *Chrysler Credit Corp. v. Kootnz*, 661 N.E.2d 1171 (Ill. App. 1996) *Giles v. First*

Va. Credit Services, 563 S.E.2d 568, (N.C. Ct. App. 2002).

- (c) If there is a breach of peace, the reposessor must try again another day or get a court order.
 - (d) The repo man may have a defense to breach of the peace if he gains possession of the collateral prior to the breach. See *Clark v. Auto Recovery Bureau, Inc.*, 889 F.Supp. 543 (D.Conn. 1994).
- b) Know Your Installation. Where are the spots of exclusive jurisdiction? Did the state reserve the right to serve process?
 - c) Have a written policy!
 - (1) Person reports to MP station or SJA office with court order or documentation (contract, evidence of default, evidence of ownership, authorization from creditor if agent, etc.).
 - (2) JA review of court order/documents for validity.
 - (3) MP escorts the repossession agent to unit area to prevent breaches of the peace.
 - (4) Beware of conflicts – LAOs should not be reviewing documents – they will have to advise the soldier!

C. Assisting the Soldier.

- 1. Repossession Threatened, But Not Accomplished.
 - a) Is the security interest valid?
 - b) Voluntary Surrender?
 - (1) May save expenses and result in a larger value at the collateral sale (avoiding or minimizing the

deficiency judgment).

- (2) Know your state law – about half of the states have anti-deficiency statutes that prohibit or limit the seeking of a deficiency. In this case, voluntary surrender is almost never a good idea. For example, in Georgia the creditor must send notice of intention to seek a deficiency judgment within 10 days of the repossession. Failure to comply with the notice provision precludes a deficiency judgment.
 - (3) Negotiate favorable concessions in return for voluntary repossession. For example, they may waive the right to a deficiency.
- c) Resisting the Repossession.
- (1) Notify the creditor in writing that:
 - (a) The client objects to the repossession.
 - (b) The creditor may not trespass on the consumer's property.
 - (c) The creditor may not use force, threats, or intimidation.
 - (d) The debt is disputed and any information provided to a credit reporting agency must reflect the dispute.
 - (2) Alert family members not to consent to the repossession agent entering onto the property.
 - (3) Alert neighbors so they can watch for and witness violations by repossession agent.
 - (4) DO NOT resort to violence to resist the repossession agent – call the police.
 - (5) DO NOT resist sheriff/government official.

Simply verify identification.

(6) Advise client of the possible adverse credit consequences of resisting repossession.

d) SCRA Interface. The SCRA prohibits the self-help repossession of collateral where the debt arose prior to entry into military service even if the debtor's military status in no way affects the default. 50 U.S.C. § 3952. The creditor is limited to a judicial action to recover the collateral, and the court, even on its own motion, can stay the proceedings or take other equitable action if the debtor's entry into the military service affects the debtor's ability to repay the debt. Remember to check state law as well. Many states have laws extending the coverage of the SCRA to National Guard members on active duty.

2. Repossession has occurred, but collateral not sold.

a) Reinstate the Contract.

(1) Know your state: A number of states statutorily require the creditor to permit the consumer to reinstate the contract after default and repossession.

(2) This may be labeled redemption or right to cure, but it is not the same as the Article 9, UCC redemption.

(3) The consumer only has to pay the amounts in default PRIOR TO acceleration in order to reinstate the K. Thus the consumer would only have to pay:

(a) The amount in default plus

(b) Repossession charges.

(4) Note that this right is normally limited to a very short period of time, like 15 days after repossession.

b) Redemption.

- (1) Article 9 gives the consumer an absolute right to redeem prior to disposition of the collateral. The collateral is considered “disposed of” when a contract disposing of the collateral is entered into.
- (2) Here, however, the consumer must satisfy all obligations secured by the collateral. Thus, if the contract has been accelerated, the consumer would have to pay the entire remaining amount due, not just the delinquent installments.
- (3) Waiver.
 - (a) May NOT be waived prior to default.
 - (b) MAY be waived after default by signing a written waiver. Waiver should be knowing and voluntary.
- (4) Who may redeem? Only the “debtor.” This term is broad and should include:
 - (a) The collateral owner and primary obligor on the debt.
 - (b) Sureties like guarantors and cosigners.
- (5) Tender.
 - (a) Debtor should determine from creditor the exact amount due – get it in writing!
 - (b) Tender must be made physically – Show me the money!
 - (c) Tender must be unconditional.

c) Minimizing the Potential Deficiency.

- (1) Strict Foreclosure.

- (a) Creditors may propose that they simply keep the collateral as full satisfaction of the debt.
 - (b) They also get to keep all prior payments and do NOT have to return any surplus.
 - (c) Buyer can object within 21 days of creditor's notice.
 - (d) Where consumer has paid 60% of the debt, strict foreclosure is not allowed.
 - (2) Object to unreasonable delays in sale (that might impact value of car). Sale must be made in a commercially reasonable manner.
 - (3) Encourage others to attend sale.
3. Use of Warranty Law to Combat Repossession (See Chapter E for more detail).
- a) Revocation of acceptance. If the car has not been repossessed and there are substantial nonconformities with provisions of an express or implied warranty, revoke acceptance prior to the repossession.
 - (1) Protects the consumer from deficiencies.
 - (2) Requires return of moneys already paid.
 - b) Deducting Damages from Balance Due. Article 2 (§ 2-717) of the UCC allows the consumer to deduct damages caused by the dealer's breach from the amount owed. This may cure the default.
 - (1) Warn clients that repossession will probably still occur and they will be fighting this out in court.
 - (2) A strong letter to creditors, however, may prevent the repossession and bring them to the bargaining table.

IV. MILITARY LENDING ACT 2015 UPDATES

A. Expanded Scope.

1. Now applies to any credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is: Subject to a finance charge; or Payable by a written agreement in more than four installments.
2. Scope now generally harmonized with credit subject to disclosure under TILA, codified in Regulation Z. See 12 CFR 1026.1(c)(1).
3. Covered Borrower Definition: Soldiers on Title 10 Active Duty Status and their dependents.

B. Exceptions. The following transactions are not covered by the MLA:

1. Residential mortgages.
2. A loan to purchase a motor vehicle, secured by a lien on the same vehicle.
3. A loan to purchase personal property, secured by a lien on the same personal property.
4. Credit that is generally exempt from Regulation Z (TILA).
5. Credit transaction for which a creditor determines that a consumer is not a covered borrower using one of the methods set forth in the regulation.

C. Limitation on the cost of credit.

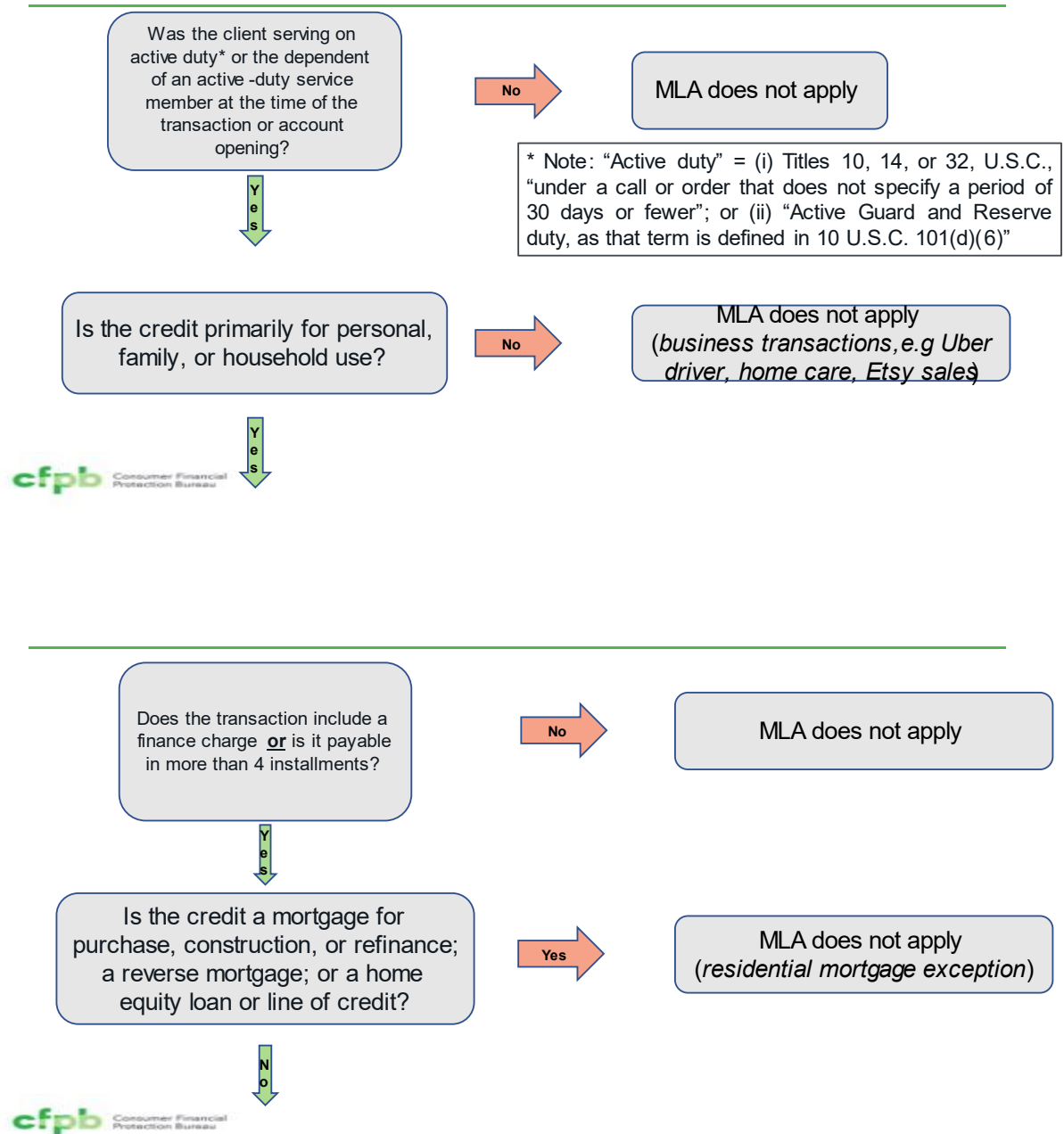
1. A creditor may not impose an MAPR (military APR) greater than 36 percent in connection with an extension of consumer credit that is closed-end credit or in any billing cycle for open-end credit.
2. The following items must be included in the calculation of the MAPR:
 - a) Any credit insurance premiums and fees;

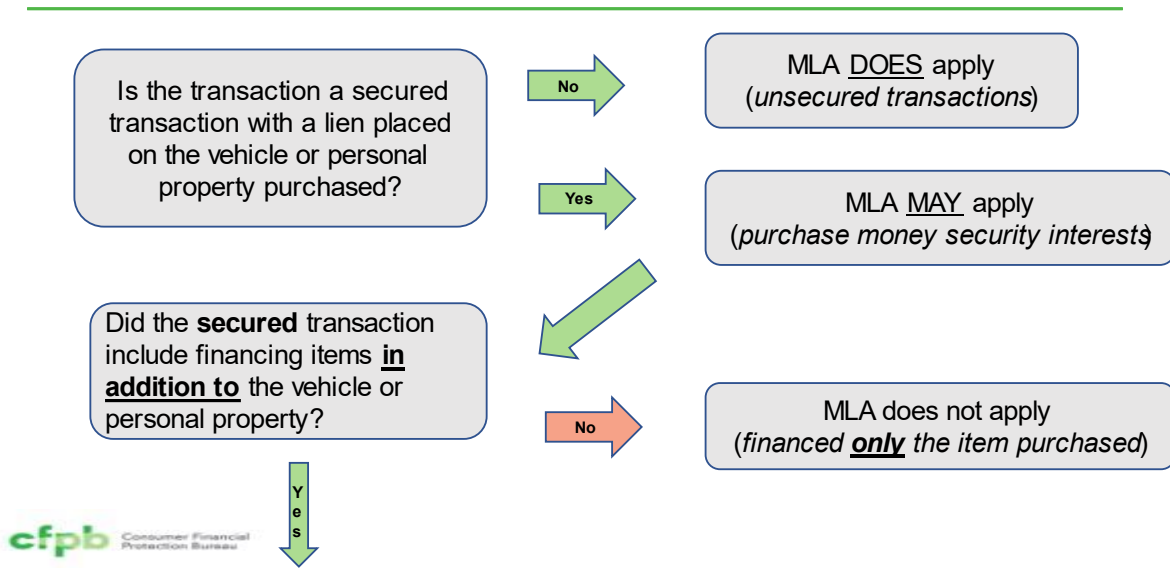
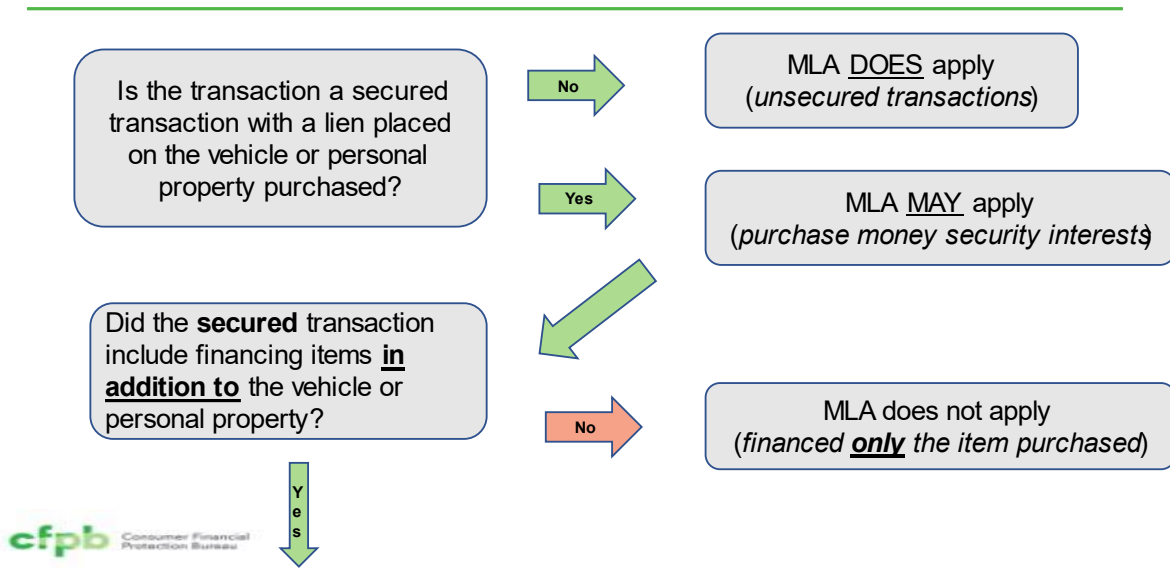
- b) Fees for debt cancellation contract;
- c) Fee for debt suspension agreement;
- d) Any fee for credit-related ancillary products sold in connection with the credit transaction;
- e) Account Finance charges;
- f) Application fees (with one exception);
- g) Certain participation fees.

D. Prohibited Loan Contract Terms. The MLA limits covered loan contracts with covered borrowers from having contract terms concerning the following concepts:

1. Refinance or rollover from the same creditor to the same consumer (this provision only applies to payday loans);
2. Waiver of rights, including SCRA rights;
3. Required arbitration;
4. Unreasonable notice as a condition for legal action;
5. Access to an account (unless compliant with cost limitation and otherwise permitted by law);
6. Auto Title security (unless a bank or credit union);
7. Mandatory allotments;
8. Prepayment penalties or prohibitions.

MLA issue spotting chart





CHAPTER J

LANDLORD-TENANT LAW

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CHAPTER J

LANDLORD-TENANT LAW

I. REFERENCES.

- A. Schoshinski, Robert S., AMERICAN LAW OF LANDLORD AND TENANT, 1980 with 1998 Supplement.
- B. AR 27-3, The Army Legal Assistance Program (26 March 2020).
- C. Uniform Residential Landlord and Tenant Act (URLTA).
- D. NATIONAL CONSUMER LAW CENTER, ACCESS TO UTILITY SERVICE (5th ed. 2011). [Hereinafter, "NCLC ACCESS"]
- E. Attached is a German Landlord Tennant Information Paper authored by the Schweinfurt Law Center.
- F. HierosGamos, Landlord & Tenant Law: www.hg.org/landlord.html
- G. Nolo, Landlords & Tenants: <http://www.nolo.com/legal-encyclopedia/real-estate-rental-property/> (helpful links and general information, but not a primary resource)

II. ELIGIBLE CLIENTS.

- A. Army.
 - 1. Legal Assistance Attorneys (LAA) will provide legal assistance and advice on consumer affairs and landlord-tenant matters. (AR 27-3, Paras. 3-5(c) and (d)).
 - 2. LAA may draft leases, but may not help clients with issues involved in income producing business activities. (AR 27-3, Para. 3-5(c), 3-6(a)(3)).
 - 3. Tenants - military members who rent from either civilian or individual military landlords. (AR 27-3, Para. 3-5(c)).
 - a) Assistance WILL be provided on:

- (1) Leases, issues, and disputes involving the military member's principal residence.
 - (2) Termination of pre-service leases under the SCRA.
 - b) Legal Assistance MAY be provided:
 - (1) On matters relating to the purchase, sale, or rental of a client's principal residence or other real property.
 - (2) This assistance, if provided, is not prohibited by the limitation on private business activities. (AR 27-3, Para. 3-6(a)(3)).
 - c) LAA should not review a lease on behalf of a tenant when another attorney in the office drafted it on behalf of the landlord.
4. Landlords - military members renting out property in the hope of returning to the home, as an investment, or renting out property due to an inability to sell the property in conjunction with transfer. (See definition of "Private business activities" in AR 27-3, Glossary.)

B. Air Force.

1. The Air Force considers Landlord-Tenant issues mission-related legal assistance.
2. Assistance must be provided, subject to availability of legal staff resources and expertise, to active duty members, including reservists and guardsmen on federal active duty under Title 10 U.S.C., and their family members entitled to an identification card; for civilian employees stationed overseas and their family members entitled to an identification card; and for civilian employees stationed overseas and their family members residing with them who are entitled to an identification card. Para. 1.3, AFI 51-504 (22 October 2014).

C. Navy.

1. Tenant Services.
 - a) Review leases, provide language and suggested modifications, and advise clients on rights and remedies.

- b) Attorneys may contact landlords on behalf of clients and negotiate or participate in ADR.
2. Landlord Services.
- a) May advise landlords on the renting of a former principal residence including lease preparation.
 - b) LAAs may assist the landlord in negotiating with prospective tenants and use of ADR.
 - c) Properties held primarily for investment or production of income are considered businesses and landlords of these properties are not eligible for legal assistance services.

III. CONSUMER LAW CAN HELP IN LANDLORD TENANT CASES.

- A. Ultimatums about rent may fall within the Fair Debt Collections Practices Act. *Romea v. Heiberger & Associates*, 988 F.Supp. 712 (S.D.N.Y. 1997).
- B. Absent consent, landlord access to credit reports when making rental decisions is limited. *Ali v. Vikar Management Ltd.*, 994 F.Supp. 492 (S.D.N.Y. 1998).

IV. LANDLORD'S OBLIGATIONS.

- A. Covenant of Quiet Enjoyment. Generally ensures that the tenant's enjoyment and use of the premises is protected against the landlord or some other taking through the landlord.
 - 1. Eviction
 - a) Is a BREACH of the lease if:
 - (1) The tenant is physically evicted from the property; AND
 - (2) That action was wrongful.
 - b) Can be caused by actions of the landlord or by third persons for whom the landlord is responsible.
 - c) Relieves the tenant of any further obligation to pay rent, even in jurisdictions that view the tenant's rent obligation as separate and distinct from the landlord's breach

generally.

- d) May be partial. See, e.g., *Washburn v. 166th East 96th Street Owners Corp.*, 166 A.D.2d 272 (1990) (Transfer of roof area adjacent to penthouse from exclusive tenant use to common use was a partial actual eviction.)
 - (1) The expulsion of the tenant is from a significant part of the premises.
 - (2) Tenant may remain in possession of the part she is not expelled from.
 - (3) Tenant does NOT have to pay ANY of the RENT!!!

- 2. Constructive Eviction. See, e.g., *Home Rentals Corporation c. Curtis*, 602 N.E.2d 859 (Ct. App. Ill. 1992); *Manhattan Mansions v. Moe's Pizza*, 561 N.Y.S.2d 331 (S.D.N.Y. 1990).
 - a) Covers actions of the landlord that fall short of actual physical expulsion.

 - b) To be actionable the landlord's action must.
 - (1) Be injurious to the tenant's use and enjoyment of the premises.

 - (2) Be so severe that they justify abandonment by the tenant. Tenant must:
 - (a) Establish that the interference is substantial and not just incidental.

 - (b) Show that the landlord intended to evict tenant. NOTE: The landlord is PRESUMED to intend the natural consequences of his actions.

 - (c) Abandon the premises within a reasonable time after the landlord's interference begins.

 - (d) Give the landlord an opportunity to correct the situation.

- c) Constructive eviction is a question of fact for the trier of fact.
- d) Some states allow a PARTIAL constructive eviction. See *Moe's Pizza* above.
- e) Examples.
 - (1) Successful
 - (a) Interference with access to the leased premises (e.g. obstructions in walkways or hallways).
 - (b) Lost use of rights or an easement.
 - (c) Loss of light, air, or ventilation.
 - (d) Persistent, harmful, and offensive odor.
 - (e) Water Leaks.
 - (2) Not Successful
 - (a) Actions of neighbors
 - (i) But may be responsible if he allows extensive remodeling.
 - (ii) May be responsible if he fails to take sufficient action to abate a nuisance.

3. Remedies for Actual & Construction Eviction.

- a) Treat the tenancy & rent obligation as terminated.
- b) Action for recovery of possession (Actual Eviction).
- c) Seek Injunctive Relief (Constructive Eviction)
- d) Action for Damages. (There is a split about whether you can get these without vacating the premises).

- (1) Usually measured by the difference between the reserved rent and the fair rental value for the remainder of the term
- (2) May be able to get special damages (such as relocation expenses) for wrongful evictions.

B. Responsibility for Condition of the Premises.

1. Traditional Rule - *Caveat Emptor*

2. Latent Defects

- a) Defects which tenant could not reasonably have made herself aware.
- b) Landlord must disclose.
- c) If not, Tenant may:
 - (1) Vacate the premises.
 - (2) Sue for Damages
 - (3) If vacates, avoid any further obligation for rent.
 - (4) Recover special damages, such as damage to tenant's property.

3. Duties to Repair

- a) Common Law
 - (1) No obligation EXCEPT
 - (2) Areas he still controls (like common areas).
 - (3) Relief limited.
 - (a) Obligation to pay rent continues.

(b) Tenant may NOT abandon the premises.

b) Express Covenants may modify this.

c) Many states have modified this with statute

C. Implied Warranty Of Habitability.

1. Formerly, provisions like the following were indicative of the doctrine of *caveat emptor* in leasing:

"Tenant has inspected the premises and finds them to be in good and habitable condition. At all times and at the Tenant's own expense, Tenant shall maintain the premises in a good and habitable condition, including all appliances and equipment. Tenant shall make all repairs required for exposed plumbing and electrical wiring."

2. Implied warranty of habitability is result of judicial frustration with the impotence of the tenant.

a) See *Javins v. First National Realty Corp*, 428 F.2d 1071 (D Cir.), *cert. denied*, 400 U.S. 925 (1970). The warranty, which is normally implied with respect to residential (v. commercial), multiple-family dwellings, constitutes an obligation by the landlord to:

(1) Deliver; and

(2) Maintain a habitable dwelling.

b) States adopting implied warranty of habitability differ regarding remedies, measure of damages, precise standards of habitability. Some states consider the following in addition to compliance with housing code:

(1) Nature of defect.

(2) Effect on safety or sanitation.

(3) Length of time it persisted.

(4) Age of structure.

(5) Amount of rent.

- (6) Tenant's intelligent waiver of defect.
 - (7) Attribution of defect to tenant's own abuse.
3. Some states have codified implied warranty of habitability, imposing a wide range of contractual duties on the landlord and affording the tenant a broad range of remedies unknown at common law.
- a) See *Aspon v. Loomis*, 816 P.2d 751 (Wash. App. 1991). Court disapproved standard jury instruction that "a landlord has a duty to use ordinary care to keep the premises fit for human habitation at all times during a tenancy." A landlord's duty to tenant is restricted to those duties enumerated by statute.
 - b) Application of the implied warranty is contingent on tenant's notice to landlord of defective conditions plus reasonable time to repair.
 - c) Courts generally find breach only when premises rendered truly unsafe, unsanitary, or uninhabitable.
4. Waiver of Implied Warranty.
- a) Tenant's continued occupancy of uninhabitable premises generally not a waiver.
 - b) "No waiver rule."
 - (1) Private agreements to shift duty fixed by warranty illegal and unenforceable.
 - (2) Rule has been adopted in some states (i.e. Wash.; D.C.; Mass.; Pa.).
 - (3) Uniform Residential Landlord and Tenant Act prohibits lease provisions waiving warranty.
 - (4) Restatement (Second) of Property allows waivers if not unconscionable.
5. Remedies.

- (1) Common Law/Contractual.
 - (2) Rescission.
 - (3) Withhold all or part of the rent.
 - (4) Pay rent and sue for damages.
 - (5) Action for specific performance.
- b) Statutory Remedies. Closely consult all state law prior to advising a client to take a particular action.
- (1) Rent abatement.
 - (2) Repair and deduct. In some states, a tenant has the right to repair the problem and deduct the amount from the rent.
 - (3) Rent escrow until repairs made. In some states, a tenant may pay rent into an escrow account until repairs are made.
 - (4) Some states permit a tenant to appoint a receiver to apply rent to repairs.
 - (5) Suits for damages and specific performance.
 - (a) Example: Idaho § 6-320 - A tenant may file suit for failure to provide reasonable weatherproofing and weather protection of the premises; failure to maintain in good working order electrical, plumbing, heating, ... or sanitary facilities supplied by landlord; maintaining premises in manner hazardous to health or safety of tenant...
 - (b) *King v. Brace*, 552 A.2d 398 (Vt. 1989). Punitive damages against lessor of mobile home park rendered uninhabitable when lessor failed to remedy problems despite repeated requests by lessee and notices from health authorities.

V. TENANT'S OBLIGATIONS.

A. Rent.

1. Existence of a Tenancy is a Prerequisite to Paying Rent.
2. Normally contractual - a specific covenant in the lease specifies the amount of the rent.
 - a) If no amount is stated, the tenant would be liable for the reasonable value.
 - b) May include collateral payments (e.g. tax payments, utility payments, etc.) as part of the rent.
3. Promises to change the rent (up or down) must be supported by fresh consideration.
4. Place & Mode of Rent Payment
 - a) Generally, AT the premises unless the parties agree otherwise. Therefore, the landlord is supposed to come and pick up the rent.
 - b) Changes to the location can be established by the parties' practice with regard to past rent payments.
 - c) Rent is normally payable in money, which may be paid in the form of check.
 - d) Can be made by mail if the parties so agree.
5. When is the Rent Due? (Time of Payment).
 - a) Generally accrues on the day it is payable, NOT day to day.
 - b) Unless the parties agree otherwise, the rent does not accrue until the period which that rent covers is complete. Provisions in the lease regarding this are construed strictly
6. Other charges.
 - a) Rent Acceleration.

- (1) Makes all rent under the lease due and payable upon the default of the tenant on any installment.
- (2) Some states allow these provisions to take effect.
- (3) Others view this as an unenforceable penalty.

b) Late Payment Charges.

- (1) Specific Dollar or a percentage fee if the rent is late.
- (2) Most states allow. There are two approaches:
 - (a) The charge is considered interest in which case it must comply with usury laws.
 - (b) The charge is considered liquidated damages. In that instance it must:
 - (i) be a good faith estimate of the loss likely to incur.
 - (ii) bear a reasonable relationship to the loss likely to occur.
 - (c) Look to case law in your jurisdiction. Particularly where the lease is residential, courts have sometimes struck these down if they are excessive.

B. Duty to Repair.

1. Common Law: Absent an express provision, tenant was required to make minor repairs to preserve the premises.
2. Modern Statutory Schemes.
 - a) Largely relieves tenant of obligations to repair.
 - b) However, must notify landlord and give landlord opportunity to repair. If not, and damage occurs because of situation of which landlord was not aware, tenant may be liable.

- c) Many place obligations on tenants to maintain the dwelling in “clean and sanitary” condition.
 - 3. Express covenants to repair may be enforceable, but this is unclear in jurisdictions with statutory schemes.
- C. Landlord's Remedies For Tenant's Breach.
 - 1. Self-help repossession.
 - 2. Many states limit or disallow self-help.
 - 3. Trend - make legal process the landlord's exclusive remedy. In many jurisdictions, landlord liable for punitive damages if uses self help.
 - 4. The Restatement (Second) of Property takes the position that the availability of summary eviction bars the use of self-help by the landlord "unless the controlling law preserves the right of self-help."
 - 5. Summary eviction.
 - a) Statutory summary eviction procedures in all states.
 - (1) Avoids protracted process required for writs of ejectment.
 - (2) Avoids potential for violence and physical injury inherent in a landlord's attempt to recover possession personally.
 - b) Available when the tenancy term expires and tenant refuses to leave the premises or upon certain statutorily enumerated conditions, such as the tenant's failure to pay the rent.
 - 6. Servicemembers Civil Relief Act (SCRA).
 - a) Prevents eviction of service member or dependent for nonpayment of rent without court order.
 - b) Military service affects ability to pay.
 - c) Rent does not exceed \$4,214.28 for 2022. The act has a calculation for rent ceiling for subsequent calendar years

based on the housing price inflation's adjustment. (See 50 U.S.C. § 3951).

- d) Court shall upon application or *sua sponte* stay the proceeding for a period of 90 days unless in the opinion of the court, justice and equity require a longer or shorter period.
 - e) Criminal sanctions are possible for self-help repossessions.
 - f) The court can order an allotment from the pay of the servicemember.
7. Landlord's liens.
- a) Statutory liens.
 - b) Contractual liens.
 - c) Retention of security deposit.
8. Landlord's Duty To Mitigate.
- a) Common Law - No duty to mitigate.
 - b) Contract-based doctrine.
 - (1) Recoverable losses limited to damages unavoidable through reasonable effort.
 - (2) Not all states require mitigation.
 - c) Uniform Residential Landlord Tenant Act, 78 U.L.A. 427 (1974).
 - (1) Contains statutory language imposing obligation to mitigate damages on landlord.
 - (2) Under the Act, if landlord fails to use reasonable efforts to re-let at fair market rental, lease is deemed terminated as of date landlord has notice of abandonment.
 - (3) Adopted by at least 15 states.

VI. SELECTED MILITARY TENANT ISSUES.

A. Early Lease Termination Due To Military Exigencies.

1. Termination of Leases of Premises. Servicemembers Civil Relief Act 50 U.S.C. § 3955).

- a) A lease of premises occupied, or intended to be occupied, by a servicemember or a servicemember's dependents for a residential, professional, business, agricultural, or similar purpose if
 - (1) The servicemember, while in military service, executes the lease and thereafter receives military orders for a permanent change of station or to deploy with a military unit for not less than 90 days.
 - (a) Note: PCS includes retirement and separation from service.
 - (2) The lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service. The termination may be made by a service member entering active duty [or by his or her dependent in their own right.
- b) Question: If a pre-service lease was signed only by non-military spouse, could he or she terminate the lease?
 - (1) Yes. Dependents have protection in their own right even though § 3955 says the lease must be executed by or on behalf of the service member.... (See §3959 which states that, upon application to a court, a dependent is protected if their ability to comply with a lease or other obligation is materially affected by the servicemember's service.
- c) Question: What if the non-military person signed the lease before marrying a person who enters military service..... could the non-military spouse terminate the lease?
 - (1) Arguably, yes. See *Tuscon Telco Federal Credit Union v. Bowser*, 451 P.2d 322 (Ariz. Ct. App. 1969) (single woman entered chattel mortgage on car, was

subsequently married to civilian who was later drafted; car registered solely in her name and she alone made payments before repossession; court held that repossession without court order violated § 532, SSCRA. SSCRA applied because her ability to pay was impaired by husband's subsequent induction.

- d) Question: If the landlord/management agency gave rental concessions or discounts must these be repaid upon termination under the SCRA?
- (1) No. See Western Rim Investors 2011-4, L.P. and Western Rim Investors 2011-3, L.P., d/b/a The Mansions at Briggs Ranch, (W.D. Tex. 5:20-cv-01147 (2020)). If a servicemember terminates a lease under the SCRA, the law prohibits the landlord from imposing any early termination charges. Servicemember-tenants who terminated their leases pursuant to the SCRA were wrongfully required to pay back rent concessions or discounts that they had received during their tenancies.
- e) Manner of Termination - Deliver written notice of termination and copy of military orders
- (1) By hand
- (2) By private business carrier
- (3) By U.S. mail
- (4) By electronic means
- f) Effective Date of Termination- the lessee may at their option terminate the lease any time after entry into military service of the date on their orders.
- (1) If lease provides for monthly payment – the lease terminates 30 days after the first date on which the next rental payment is due after notice is delivered.
- (2) If no monthly payment, effective on the last day of the month following the month in which notice is delivered.
- g) Relief to Lessor
- (1) Can go to court before termination date and make

application for relief which can be granted as justice and equity require.

h) Penalties

- (1) If a person knowingly holds security deposit, personal effects, or other property of the service member or his dependents protected under this provision, or tries to prevent removal of property, they can be fined as provided in Title 18, United States Code, or imprisoned for not more than one year.

i) Practice point

- (1) The Texas Landlord Association took the position in 2004 that in order for dependents to terminate their property interest in a lease (both servicemember and spouse on lease) under §3955 that they are required to make application to a court under §3959 which states:
 - (a) Upon application to a court, a dependent of a servicemember is entitled to the protections of this title if the dependent's ability to comply with the lease, contract, bailment, and other obligation is materially affected by reason of the servicemember's military service.
- (2) Argue that if the servicemember's name is jointly on the actual lease, then the lease can be terminated once the requirements under §3955 are met and that §3959 only pertains to the situation where the dependent is the only name on the lease and then the dependent could be required to show how the servicemembers military service materially affected the defendant in court.

2. Other Termination of Leases.

- a) State Statutory or contractual provisions for early residential lease termination are designed to meet the exigencies of military service - when a service member (either as a tenant or a landlord) must move unexpectedly due to military orders.

- (1) The soldier landlord who receives orders back into the area may wish to terminate his/her tenant's lease to

allow him/her to reoccupy the residence.

- (2) Question: If a soldier simply wanted to break an apartment lease to move into a house in the same location, would a "typical" military clause allow lease termination? No. (Of course, other contract terms could be negotiated).

3. Military clauses may be part of a contract or statutory.

- a) The SCRA is a floor not a ceiling, if a "military clause" in a contract has greater protections that do not contradict the SCRA then the contract clause is valid and enforceable.
- b) Attorneys should be careful not to "contract away" Federal or State statutory protections by drafting inconsistent "military clause" language into a lease.
- c) Some states having military clause protection by statute **(check for updates to state law prior to advising a client – the list below may be incomplete):**

State	Cite	Limitations
Arizona	ARIZ. REV. STAT. ANN. § 33-1413	Mobile Homes Only
Connecticut	CONN. GEN. STAT. § 21-82(11)	Mobile Homes Only
Delaware	DEL. CODE ANN. tit. 25, §§ 5314(b), 7007,	
Florida	FL STAT §83.682	
Georgia	GA. CODE ANN. § 44-7-37	
Idaho	IDAHO CODE § 55-2010	
Kansas	KAN. STAT. ANN. §§ 58-2504, 58-2570	
Maryland	MD. CODE ANN., REAL PROP. § 8-212.1	
Missouri	MO. REV. STAT. § 41.944	
North Carolina	N.C. GEN. STAT. § 42-45 June 20, 2011.	
Oregon	OR ST § 90.475	
Pennsylvania	PA CON. STAT. TITLE 51§ 7315	
Rhode Island	R.I. GEN. LAWS § 31-44-7	Mobile Homes Only
Virginia	VA. CODE ANN. § 55.1-1235	
Washington	WASH. REV. CODE §§ 59.20.090, 59.18.200, 59.18.220	

4. Sample Contractual Military Clause.

a) Although the SCRA now allows post service termination of leases, the Act does not cover all possible situations, and thus the servicemember may still need a military clause included in the actual lease.

(1) **MILITARY LANDLORD:** In the event LANDLORD is or hereafter becomes a member of the United States Armed Forces, then LANDLORD may terminate this lease on thirty days written notice to TENANT in any of the following events:

If LANDLORD receives permanent change-of-station orders to return to the area in which the premises are located.

If LANDLORD is released from active duty.

Other: _____

(2) **MILITARY TENANT:** In the event TENANT is or hereafter becomes a member of the United States Armed Forces, TENANT may terminate the lease on thirty days written notice in any of the following events

If TENANT receives permanent change-of-station orders to depart from the area in which the premises are located.

If TENANT is released from active duty.

If TENANT has leased the property prior to arrival in the area and TENANT is ordered to a different area before occupying the property.

If TENANT has been ordered to on-post housing.

Other: _____

(3) **MILITARY NOTICE AND RENT ADJUSTMENT:** Notice furnished under the provisions of this paragraph shall include a copy of official orders or a letter signed by the party's commander reflecting the circumstances warranting termination under this paragraph. If LANDLORD terminates the lease under this paragraph, a credit shall be allowed toward the rental otherwise due, and if TENANT terminates the lease under this paragraph, TENANT shall pay an amount in addition to the rental otherwise due. Such adjustment (credit or addition) shall constitute a liquidation of the damages caused by such termination, but shall be in addition to a proration of the rental to the actual termination date and shall not reflect any actual physical damages to the

property for which TENANT is otherwise liable under this lease. Said adjustment amounts shall be computed as follows:

If termination occurs before expiration of one-half of the original term, without extension, ___ percent of one month's rent.

If termination occurs on or after the period stated above but before the end of the original term, without extension,

_____ percent of one month's rent.

If termination occurs on or after the end of the original term of the lease, without extension, there shall be no adjustment of rent under this paragraph.

B. Security Deposits

1. Common Law. (highly dependent on state law)
 - a) No ceiling on the size of the tenant's security deposit.
 - b) Landlord not obliged to pay interest on the deposit or to avoid commingling deposit with the landlord's own funds.
 - c) Ordinarily, tenant cannot compel landlord to return deposit or to apply deposit to rent or damages while the tenancy or tenant's obligations continue.
 - d) *See also, Burgess v. Stroud*, 840 P.2d 1206 (Ct. App. Kan. 1992). A Kansas statute stating that a tenant forfeits the security deposit if the tenant applies or deducts any portion of the deposit from the last month's rent requires affirmative action on the part of the tenant, and not simply an action or silence such as delivering notice to vacate without any payment for rent.
 - e) If the landlord's deductions are challenged, burden of proving the absence of damages sustained is on the tenant.
2. State Statutes.
 - a) Limit the size of the deposit that a landlord can demand (usually limiting this to 1 to 2 months' rent).

- (1) Regulate the landlord's use of the deposit during the tenancy.
 - (a) Require that interest be paid on the deposit.
 - (b) Require that the deposit be refunded within a specified period of termination, often 30 to 60 days.
- (2) Require that landlords furnish tenants an itemized list of deductions from the deposit. Even if cost of repair is in dispute, landlord must comply with statute requiring accounting within 45 days of itemized costs to repair and refund of difference between repair costs and security deposit.
- (3) Provide for return of the entire deposit, punitive damages, and attorneys' fees for the tenant if the landlord fails to comply with the statute.
 - (a) Burden on the landlord to prove damages caused by the tenant in order to retain deposit. See, e.g., *Battis v. Hofman*, 832 SW 2d 937 (Mo. App. 1992). If landlord fails to return security deposit within 30 days and it is later discovered tenant is entitled to it, then landlord has wrongfully withheld under the Missouri statute providing for penalty, regardless of landlord's intent. Court may consider reasons money withheld in determining penalty to impose.
 - (b) See, *Love v. Monarch Apartments*, 771 P.2d 79 (Kan. App. 1989). Statutory damages mandatory under Kansas law for wrongfully withholding security deposit, even if landlord acted in good faith and tenant suffered no damages.

C. Discrimination.

1. Additional References

- a) Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C.A. §§ 3601-3631.

- b) DoD Instruction 1100.16, Equal Opportunity in Off-Base Housing (14 August 1989).
 - c) DoD 4165.63-M, DoD Housing Management (31 August 2018).
 - d) AR 420-1, Army Facilities Management (12 Feb 2008, Admin Revision 6 Mar 2019).
 - e) DA Pam 420-1-1, Housing Management (2 Apr 2009)
 - f) AR 190-24, Armed Forces Disciplinary Control Boards and Off Installation Liaison and Operations (27 July 2006).
 - g) AR 600-20, Army Command Policy para. 6-10 (6 Nov 2014).
2. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C.A. §§ 3601-3631.
- a) Equal opportunity for all citizens in obtaining housing regardless of race, color, religion, sex, national origin, age, handicap or familial status. (See Fair Housing Amendments Act of 1988; see *also* state statutes).
 - b) Applicable within the U.S.
 - c) OCONUS, intent carried out to extent possible within laws and customs of foreign country.
3. DOD Instruction 1100.16, Equal Opportunity in Off-Base Housing (14 August 1989) - eliminate discrimination in off-base housing to include familial status discrimination.
- a) Army Implementation: AR 420-1, Army Facilities Management (12 Feb 2008, Admin Revision 6 Mar 2019).
 - b) Navy/Marine Corps: SECNAVINST 5350.16A (18 December 2006).

- c) Air Force: Air Force Instruction 32-6001 (21 August 2006).
4. Provisions of DoD Program.
- a) Intent of Program: To eliminate discrimination in housing against DoD Personnel on the basis of race, color, religion, gender, national origin, age, physical disability, or familial status.
 - b) An agent's refusal to show, rent, lease, or sell otherwise suitable housing may be basis for housing discrimination complaint, as well as agent's words or statements.
 - c) Legal assistance must be provided to complainants to the extent that they are eligible under the program. DoD Inst. 1100.16, pg. 4-2.
 - d) Housing Referral Services (HRS) or CHRRO.
 - (1) Maintains listings of adequate off-post rental and sales units reflecting full range of prices, sizes, and locations. Also lists property and agents against whom restrictive sanctions have been imposed for founded discrimination complaints.
 - (2) Processes off-post housing discrimination complaints concerning DoD personnel.
 - e) Processing complaints.
 - (1) Refer complaint to HRS or CHRRO which makes a preliminary inquiry.
 - (2) Time limits:
 - (a) All complaints must begin within 3 working days of receiving the complaint. DoD Inst. 1100.16, pg. 4-2.
 - (b) ARMY: Each allegation processed within 30 days of complaint with provision for 10-day extension. (AR 420-1, para. 3-38b(3).)
 - (3) Use of "verifiers" is authorized. (DoD 1100.16, pg. 4-

3; AR 420-1, para. 3-38d). The purpose of verification is to isolate the attribute of race, color, religion, sex, national origin, age, handicap, or familial status that is the suspected basis for the alleged discrimination against the complainant.

- (4) Informal hearing. Conducted when basic facts of the preliminary inquiry appear to confirm the complaint.
- (5) Legal review. DoD 1100.16, pg. 4-4 – 4-5; AR 420-1, para. 3-38g.
- (6) Commander's actions. DoD 1100.16, pg. 4-5 – 4-8; AR 420-1, paras. 3-38h and i.
 - (a) If complaint not supported by evidence --
 - (i) Advise complainant of action and rights.
 - (ii) Advise alleged discriminator.
 - (iii) Send file to Department of Justice or Department of Housing & Urban Development if complainant requests.
 - (b) If complaint supported by the evidence --
 - (i) Impose restrictive sanctions for minimum of 180 days.
 - (ii) Service members renting BEFORE the imposition of sanctions MAY continue to rent and MAY renew. NEW rentals, however, are prohibited. DoD Inst. 1100.16, pg. 4-8.
 - (c) Removal of sanctions. DoD Inst. 1100.16, pg. 4-8.
 - (i) Before 180 days:
 - (a) ARMY: Only HQDA may remove and then only if unusual

circumstances are shown.

- (b) DoD-Wide: Approved waiver request must go to service department from Senior Installation Commander.
- (ii) After 180 days: Local commander may remove upon receipt of written assurance of nondiscrimination in the future.
- f) Housing Discrimination Overseas. DoD Inst. 1100.16; AR 420-1, para. 3-38l.
 - (1) Civil Rights Act of 1866 and Fair Housing Act inapplicable.
 - (2) Process complaint as if in the United States, but do not forward case to HUD or DOJ.
 - (a) Consider local laws,
 - (b) Determine if any civil redress can be pursued. Many nations have laws prohibiting discrimination. Your OSJA may have access to, or employ, a local attorney.
 - (c) Consider Status of Forces Agreement.

D. Protecting Tenants at Foreclosure Act of 2009

1. On 20 May 2009 the President signed S. 896, the "Protecting Tenants at Foreclosure Act of 2009." This Act was codified as Public Law 111-22.
2. Section 702 of the Act provides that, for any foreclosed residential property purchased with a "federally related" mortgage loan (defined below), a tenant living in the property under a conventional lease agreement has a right to remain in the property until the end of the lease, subject to specific exceptions.
3. Essentially, "federally related" mortgage loans are either: (1) regulated, insured, or otherwise assisted by the Federal Government; (2) included in a housing or urban development program administered by the Federal Government; or (3) intended to

be sold by the lender to the Federal National Mortgage Association or the Government National Mortgage Association. For example, any Veterans Administration (VA) loan or Federal Housing Administration (FHA) loan qualifies as a “federally related” loan. However, a loan from a private company that does not take any federal funds may not qualify as a “federally related” loan. Those seeking additional “light reading” are encouraged to review 12 U.S.C. § 2602 for a complete definition.

4. Nothing in this act affects the validity of any state or federal law currently in existence that provides additional legal protections for tenants. In particular, legal assistance practitioners should remember Section 301 of the Servicemember’s Civil Relief Act (SCRA) (50 U.S.C. App. 531), which precludes the eviction of a servicemember or dependents from a rented property without a court order. This is especially important in cases where mortgage loans may not be “federally related.”
- E. The American Rescue Plan Act: The American Rescue Plan Act provides up to \$9.961 billion for states, the District of Columbia, U.S. territories, Tribes or Tribal entities, and the Department of Hawaiian Home Lands to provide relief for our country’s most vulnerable homeowners.
1. The purpose of the Homeowner Assistance Fund (HAF) is to prevent mortgage delinquencies and defaults, foreclosures, loss of utilities or home energy services, and displacement of homeowners experiencing financial hardship after January 21, 2020. Funds from the HAF may be used for assistance with mortgage payments, homeowner’s insurance, utility payments, and other specified purposes. The law prioritizes funds for homeowners who have experienced the greatest hardships, leveraging local and national income indicators to maximize the impact.
 2. Guidance: Treasury updated HAF Guidance on August 8, 2022 to provide additional guidance on the reimbursement of certain qualified expenses.
- F. The Homeowners Assistance Program (HAP).
1. The American Recovery and Reinvestment Act of 2009 (ARRA) temporarily expanded the existing HAP to cover certain persons affected by BRAC 2005, certain persons on permanent change of station (PCS) orders, and certain wounded persons and surviving spouses. At this time, applications are only being accepted from Wounded, Injured, or Ill and Surviving Spouse applicants. There is currently no HAP approved for BRAC Impacted Personnel.

- a) HAP: HAP is authorized by Section 1013 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended. It authorizes the Secretary of Defense to provide financial aid to eligible military (including Coast Guard), civilian, certain overseas employees, and non-appropriated fund employee homeowners who have served or have been employed at or near military installations which the Department of Defense (DoD) has ordered to be closed or whose operations have been significantly reduced and where real estate values have declined because of the announced closure or realignment. Section 1001 of the American Recovery and Reinvestment Act expanded the HAP authority to authorize the Secretary of Defense to provide financial aid to:
 - (1) Members of the Armed Forces (30% or greater disability) who incur a wound, injury, or illness in the line of duty during a deployment in support of the Armed Forces on or after September 11, 2001.
 - (2) Wounded DoD and Coast Guard civilian homeowners reassigned in furtherance of medical treatment or rehabilitation or due to medical retirement in connection with a disability incurred in the performance of his or her duties during a forward deployment occurring on or after September 11, 2001 in support of the Armed Forces.
 - (3) Surviving spouses of fallen warriors who move within two years of the death of such employee or member.
- 2. The program is administered by Headquarters, United States Army Corps of Engineers (HQUSACE). The specific requirements and availability can be found on their website.

VII. ACCESS TO UTILITY SERVICE.

A. Types of Utilities

1. Regulated - Public Utilities.

- a) Definition: "A business whose services are sufficiently important so as to warrant government regulation; The public interest is implicated because the commodity which the utility provides -- whether electric, gas, water, or telephone service -- is viewed as being of great economic consequence." NCLC ACCESS at 27.

b) Characteristics:

- (1) The nature of the industry is such that the market would not produce many competitors.
- (2) Facilities must be constructed with “excess capacity” because the commodity they deliver (e.g. electricity) cannot be stored indefinitely, yet consumers expect the service to be available whenever they need to use it.
- (3) Consumer demand for the services is inelastic. That is, the service is viewed as indispensable so there is little if any fluctuation in demand when prices increase.
- (4) Consumers have little choice in who they buy from.

c) Duties & Obligations

- (1) Provide service on reasonable terms to all who request it.
 - (a) Whether or not it is profitable.
 - (b) Can be limited to a particular service area; to persons willing to comply with the utilities rules & regulations; and to the amount that they have the technical capacity to support.
- (2) Must provide safe and adequate service to all of its customers.
- (3) Must serve all members of the public on equal terms.
- (4) Must charge “just and reasonable” prices for their services.

d) Types of Regulated Utilities

- (1) Natural Gas
- (2) Electric Power

(3) Water

(4) Telephone

2. Unregulated Utilities

a) Municipal Utilities

(1) Most common in electric & water industries

(2) Key distinction is that these are publicly owned, government- run utilities, NOT private.

(3) Will usually meet the duties of a public utility, even though they do not answer to any public utility commission.

b) Rural Electric Cooperatives.

(1) Authorized by Congress in 1936.

(2) Some courts will make them comply with public utility duties.

(3) Many view them for what they are today - large scale public utilities.

c) Deliverable Fuels

(1) Propane, oil, kerosene, & wood.

(2) Almost totally unregulated.

(3) Dangerous because they are usually *de facto* monopolies.

B. Payment Issues

1. Late Charges

a) Authorized since 1915. Generally, 1-2 percent per month.

b) Purposes.

- (1) To compensate the utility for expenses incurred as a result of the lateness.
 - (2) To provide an incentive for consumers to make timely payments.
 - (3) Prevent subsidization of late payers by timely payers.
- c) Some states now regulate late charges
- (1) Some states prohibit all late charges.
 - (2) Some states prohibit late charges to residential customers.
 - (3) Some states limit late charges.
- d) Courts tend to use the “penalty” v. interest distinction discussed with late charges for rent above.
- e) Challenging Late Fees
- (1) Regulatory Challenges - Use Public Utility Commission (PUC) procedures for states where late charges are regulated.
 - (2) Late Receipt of Bill/Late payment by others. If the utility bill is late or some other party (like the Army) doesn't issue pay on time, courts will usually not enforce late fees.
 - (3) Consumer Protection Statutes
 - (a) Equal Credit Opportunity Act - If late fees are assessed in a discriminatory fashion.
 - (b) UDAP Statutes (if utilities are not exempted).
 - (c) Fair Credit Billing Act (at least for unregulated utilities).
 - (4) Improper Pyramiding - Applying the utility payments to

the late fee first, then to the bill causing the consumer to continually underpay and have continual late charges. FTC Rule Prohibits this. 12 C.F.R. § 226.13.

(5) Challenges Based Upon Regulatory Principles

- (a) Late charge should only cover reasonable & legitimate expenses.
- (b) Late charges should not begin to accrue until a reasonable time (20-30 days) after mailing of the bill.
- (c) Late payment charges to induce prompt payment
 - (i) Does this rationale apply if the consumer cannot pay?
 - (ii) Is the amount excessive for this purpose?
 - (iii) Some states have a general "residential hardship category" against whom late charges are banned

2. Budget Billing Plans

- a) Some or all gas and electric companies offer a form of budget billing plan, sometimes called level payment plan. These plans allow customers to pay the same amount each month.
- b) The rules of many public utility commissions (PUCs) require the utility to offer some sort of payment schedule or budget billing plan to low-income customers.
- c) Level payment plans allow customers to divide their anticipated annual utility bill into twelve (sometimes fewer) payments, payable in equal amounts each month throughout the year, to cushion the blow of large winter-heating bills or summer air-conditioning bills.
- d) These plans are particularly useful to people on low fixed incomes and are used widely. Most of these plans are designed so that the customer begins in the "off season" to make payments that are larger than the actual bills in those months and to build up a reserve against anticipated higher bills plans

have been widely approved by regulators.

3. Deferred Payment Plans

- a) Required in 36 states as an alternative to utility shut-off.
- b) Utility must essentially offer credit to the consumer who has failed to pay their bill prior to turning off the service. If the consumer agrees to make all future payments, plus an amount toward the arrearages in installments, the utility must continue to provide service.

C. Fighting Terminations

1. Grounds for Termination

- a) Nonpayment of the bill.
- b) Meter Tampering or Fraud
- c) Misrepresenting Identity to Evade Payment.

2. Protections from Disconnection

- a) Special Protections for Elderly, Low-income, & Disabled Consumers
 - (1) Winter Moratorium: Prohibition against disconnection during certain periods likely to have extreme weather.
 - (2) Special Payment Plans: See Above.
- b) Disputed Bills
 - (1) Rule found in both common law and regulatory jurisdictions.
 - (2) Must be a “bona fide” dispute.
 - (3) Cannot disconnect until the dispute is resolved.
 - (4) Cannot threaten to disconnect.

- (5) Utility may be subject to claims for damages if they violate this rule.
- c) Collateral Matters. A utility cannot disconnect a customer based on collateral matters. It must be based on the current contract.
 - (1) Unrelated contracts/Debts from another time or place.
 - (2) Separate Business of Utility. Generally, you cannot disconnect a customer from a service simply because they have not paid on a different service provided by the same utility. There are several exceptions:
 - (a) Water & Sewer. Since use of water necessarily results in waste water, these are not considered collateral. Thus, water utilities CAN disconnect the water for failure to pay the sewer charges.
 - (b) Local & Long Distance Telephone. Another set of intertwined services. PUCs have long allowed one to be disconnected for failure to pay the other.
 - (3) Third Party Debts.
 - (a) Note: attempting to collect a debt not owed could for the basis of a UDAP or the Fair Debt Collection Practices Act.
 - (b) Arrearages of Prior Occupant
 - (c) Landlord in arrears.
 - (d) Roommate/Family member in arrears.
- d) Mistaken Undercharge. After months or years of undercharging, the consumer is presented with a lump sum payment required by the utility. Several theories may help.
 - (1) Mistake. Basic K doctrine that places the burden of an error on the party most capable of preventing it and most capable of bearing the risk.

- (2) Equitable Estoppel.
 - (3) Past undercharges as a collateral matter.
 - (4) Regulatory Rules.
- e) Proper Notice Before Disconnection.
- (1) Required at Both common law and regulatory jurisdictions.
 - (2) General Requirements:
 - (a) Notice of the disconnection & the reason therefore.
 - (b) Hearing or other procedure to protest the disconnection.
 - (c) Timing of the notice must be sufficient to allow consumer to prepare for and be present at any procedure for objecting to the disconnection.
 - (d) Except Meter Tampering

D. Erroneous Billing & Unauthorized Use

1. Reverse Metering

- a) Due to improper wiring or connection of meters in multi-family dwellings, Consumer A pays Consumer B's bills and vice versa. When the situation is finally rectified, one's bills will probably go up and the other down. Additionally, the electric company may try to collect arrearages from the person who underpaid before, particularly if they have had to credit the other consumer's account. This can result in a large lump sum payment.
- b) Generally, the utility MAY collect for the undercharge, even if the mistake is simply in reading the meter.
- c) May be able to use equitable limitations on COLLECTIONS to

prevent disconnection of service as a means to force the consumer to pay. See the alternate payment methods above.

- d) May be able to argue the undercharge amount is “collateral” to the current service.

2. Non-exclusive Use

- a) In multiple unit dwellings, through mistake or intention, more than one tenant’s service may run from a particular meter.
- b) The general rule is that the tenant is on the hook for all metered service and must go after the third party who is tapped into the meter for relief.
- c) Some courts, however, have held that one tenant cannot be denied service because another has not paid.
- d) Moreover, some jurisdictions are shifting away from the general rule and placing the burden on others more suited to bear it.

- (1) IL prohibits billing of a consumer who is the innocent victim of an *illegal* tap. The utility must go against the third party to collect. *Jones v. Peoples Gas Light & Coke Co.*, 97 P.U.R.4th 178 (Ill. 1988).

- (2) MA and MD shift the burden to the landlord to either collect from tenants routinely if there is non-exclusive use and pay the bill themselves (MA) or be held liable after the fact for any tenant who does not pay (MD). See 105 Mass. Regs. Code §§ 410.354(A) (electric & gas) & 410.180 (water) (1986); *Legg v. Castruccio*, 642 A.2d 906 (Ct. App. Md. 1994).

3. Alleged Unauthorized Use by the Consumer

- a) Meter Tampering & Meter Bypass - changing the meter so that it will record less use than what actually occurs.

- (1) Disconnection of service

- (a) Ordinarily, the utility must still give the

consumer notice and an opportunity to dispute the allegation of tampering before disconnection. (Bona Fide Dispute). See *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978) (Supreme Court found a property interest in continued electrical service and held that this interest could not be taken by a government utility without due process (notice & a pre-termination hearing)); *Sowell v. Douglas County Electric Membership Corporation*, 258 S.E.2d 149 (Ga. App. 1979)(While the consumer was liable to pay for the service, the utility must still meet its procedural obligations).

(b) However, some utilities have succeeded in terminating without notice by citing safety concerns. See *Hendrickson v. Philadelphia Gas Works*, 672 F.Supp. 823 (E.D.Pa. 1987)(distinguishing *Myers* based on safety concerns because of the particular tampering done).

(c) Generally, If the consumer obtains service through a meter and that meter has been tampered with, there is a presumption that the consumer did the tampering! This is not a universal presumption so check state law.

b) Reconnection - Use mandamus or injunctive actions to force restoring of service.

c) Liability for Unmetered Use

(1) Generally, the utility MAY estimate the use and charge the person who's meter was tampered with or bypassed!

(2) Utility must show two things:

(a) It is entitled to be paid (i.e. the meter was tampered with); AND

(b) The appropriate amount to bill the consumer.

(i) Some courts allow "billing analysis" to

suffice.

(ii) Others require more evidence.

4. High Bills - Claims of the fast meter.

- a) Some jurisdictions force testing of the meter by the utility if the consumer complains that it is reading too high. These jurisdictions require that this be done free of charge once in certain period.
- b) Normally if the test is within a certain tolerance, the meter is deemed accurate.
- c) If the meter is running fast, the utility must refund the overcharge. Commissions differ on how many months back the utility must go with this refund.
- d) Burden of proof is generally on the customer. Some jurisdictions will accept evidence of usage patterns, even in the face of a tested meter, to establish a claim of overcharging.

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**ADMINISTRATIVE AND CIVIL LAW DEPARTMENT
CONSUMER LAW DESKBOOK
APPENDICES**

September 2022

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- B State Lemon Laws (as of 2022)
- C State Service Contracts and Regulations

State-by-state analysis of UDAP law

National Consumer Law Center, Unfair and Deceptive Acts and Practices (10th ed. 2021), Appendix A, updated at www.nclc.org/library.

Ala. Code §§ 8-19-1 through 8-19-15 Deceptive Trade Practices Act

Prohibited Practices: 27 enumerated practices, plus a catchall provision prohibiting other unconscionable or deceptive practices.

Scope: “Trade or commerce” includes advertising, buying, offering for sale, sale or distribution, or performance of any service, goods, article, commodity, or other thing of value. Goods include real estate, intangibles, and franchises. Leases and consignments are included. Private cause of action is limited to consumers, except for certain violations involving pyramid sales and seller-assisted marketing plans.

Exclusions: Advertisements by publisher, radio, television, or telephone media, with no knowledge of falsity; any person or activity subject to state insurance code, or bank or affiliate regulated by State Banking Department of Alabama, U.S. Comptroller of Currency, FDIC or Federal Reserve; violations of federal Consumer Credit Protection Act or Alabama Securities or Sales of Checks Act; violations of statute for issuance of certain industrial revenue bonds; utility, telephone company or railway regulated by state public service commission; health care service plans (subject to §§ 10-4-100 through 10-4-115; seller of goods or services who disseminated material from manufacturer or distributor without knowing false or misleading and per attorney general request provides name and address of manufacturer, distributor, and in writing agrees to stop disseminating the materials.

Private Remedies: Actual damages, \$100 minimum damages; treble damages are discretionary based on amount of actual damages, frequency, number of persons affected, and intent; shall award attorney fees to successful consumer, or to respondent if suit frivolous or brought in bad faith or to harass; injunctive relief; class actions specifically prohibited.

Limitations: Monetary damage required; claimant must elect between UDAP remedies and certain fraud-type common law claims; 15-day notice letter is required; consumer who rejects settlement officer loses right to additional damages, costs, and attorney fees in some circumstances; statute of limitations is 1 year from date violation should have been discovered, but in no event more than 4 years from date of transaction, but no statute of limitation for counterclaim, and 1-year period from expiration of long-term contract or warranties. It is a defense if the defendant did not knowingly commit an act or knowingly engage in an activity that violates the statute. “Knowingly” is defined to include such awareness as a reasonable person should have in the circumstances.

State Remedies: Attorney general or district attorney enforces; \$2000 per initial violation if knowing; injunctive relief; sequestration of assets; license suspension; other relief; may represent a class of claimants for actual damages, costs and attorney fees;

contempt and \$25,000 per violation of injunction; business dissolution after second violation of any injunction; misdemeanor penalties for continuous, willful violations.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: FTC interpretations are given “great weight.”

Alaska Stat. §§ 45.50.471 through 45.50.561 Unfair Trade Practices and Consumer Protection Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices, including 57 enumerated practices, plus restrictions on several specific industries.

Scope: Trade or commerce.

Exclusions: Advertisement by disinterested publisher, radio or television media without knowledge of falsity; act or transaction regulated under (a) laws administered by state, regulatory board, or U.S. or state officer, unless law does not prohibit the UDAP violation; (b) Alaska Stat. §§ 21.36.010 through 21.36.460 governing trade practices in insurance; or (c) Alaska Stat. §§ 06.05.005 through 06.05.995, Alaska Banking Code, except for transaction between a bank and its borrowers, depositors, or other customers or potential customers.

Private Remedies: Treble actual damages; \$500 minimum damages; other relief the court considers necessary and proper; full reasonable attorney fees shall be awarded prevailing plaintiff; prevailing defendant also entitled to full reasonable attorney fees if the action was frivolous or brought to obtain a competitive business advantage, otherwise is entitled to fees as provided by court rule. A former provision about class actions has been eliminated so that attorney general approval is unnecessary and class actions are now brought pursuant to Alaska Rules of Civil Procedure Rule 23, not directly under § 45.50.471. With prior notice, any person who is a victim of an act violation may bring an action for injunctive relief, whether or not that person suffered actual damages.

Limitations: Ascertainable loss of money or property required for private damage actions; statute of limitations is 2 years from date violation was or should have been discovered.

State Remedies: Attorney general has substantive and procedural rulemaking powers and enforces; injunction; restitution; not less than \$1000 nor more than \$25,000 per initial violation; up to \$50,000 per violation of injunction.

State UDAP Regulations: Alaska Admin. Code tit. 9, §§ 05.010 through 05.900, 12.010 through 12.900, 14.010 through 14.900—pricing; availability of advertised goods; charitable solicitations; telephone sellers.

Precedential Value of FTC Interpretations: Great weight.

Ariz. Rev. Stat. Ann. §§ 44-1521 through 44-1534 Consumer Fraud Act

Prohibited Practices: Deception, omission of material fact with intent that others rely on it.

Scope: Sale, offer for sale, advertisement, or lease of goods, intangibles, real estate or services.

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: Attorney general specifically and county attorney by delegation given enforcement powers; procedural rulemaking in attorney general; injunction; receiver; disgorgement of profits; \$10,000 per willful initial violation; \$25,000 per violation of injunction; court costs, with attorney fees discretionary.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Used as a guide.

Ark. Code Ann. §§ 4-88-101 through 4-88-207 Deceptive Trade Practices Act

Prohibited Practices: Deceptive and unconscionable practices, including but not limited to 11 enumerated practices; concealment of material fact with intent that others rely on it in sale or advertisement of goods, services, or charitable contributions; pyramid schemes.

Scope: Sale or advertisement of goods, services, or charitable solicitations.

Exclusions: Advertising complying with FTC standards; acts or transactions specifically permitted by laws administered by state departments of insurance, securities, highways, public service, and banking or any other U.S. or state regulatory body; acts by a public utility that have been authorized by certain regulatory authorities; broadcasters, printers, publishers and others who disseminate information without actual knowledge of intent, design, purpose or deceptive nature of advertising or practice.

Private Remedies: Any person who suffers "actual financial loss" (defined as the difference between the amount paid for goods and services and their actual market value) as result of reliance on the use of a prohibited practice may bring suit for the actual financial loss caused by the violation. The court may award reasonable attorney fees. Older or disabled person may also recover punitive damages. Private class actions prohibited except for a violation of a usury prohibition in the state constitution.

Limitations: Five years for any civil action.

State Remedies: Injunction, restitution, attorney fees, costs, and civil penalties of up to \$10,000 per violation; up to \$10,000 for violation of injunction; forfeiture of licenses. An additional \$10,000 per violation may be assessed if conduct is directed at older or disabled consumers; criminal penalties. Attorney fees if attorney general prevails.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Not mentioned.

Cal. Civ. Code §§ 1750 through 1785 (West) Consumers Legal Remedies Act

Prohibited Practices: 27 enumerated unfair practices and unfair or deceptive practices.

Scope: Transactions that are intended to result or which result in sale or lease of goods or services to any consumer.

Exclusions: Construction and/or sale of entire residence or all or part of commercial or industrial structure; sales of realty, including site preparation; dissemination of advertisements by any advertising medium with no knowledge of falsity; non-consumer transactions.

Private Remedies: Actual damages, injunction; restitution of property; punitive damages; any other relief court deems proper; up to \$5000 additional award in certain individual or class actions where consumer is older or disabled; restitution; attorney fees to prevailing consumers, attorney fees for defendant if prosecution of action not in good faith. Class actions specifically authorized and in no class action may total award of actual damages be less than \$1000.

Limitations: Consumer must suffer damages; give 30-day notice letters if seeks damages; no damages if correction or replacement given after notice sent; 3-year statute of limitation from commission of act. No violation if act unintentional, resulted from bona fide error notwithstanding reasonable procedures, and defendant appropriately cures.

State Remedies: None specified.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Cal. Bus. & Prof. Code §§ 17200 through 17594 (West) Unfair Competition Law

Prohibited Practices: Unfair, deceptive, untrue or misleading advertisements and unfair methods of competition, i.e., unfair, fraudulent or unlawful business acts or practices. Statute also restricts home solicitation sales, referral sales, charitable solicitations, and many other specific acts and practices.

Scope: Unfair, fraudulent and unlawful acts and practices by natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations. Section 17500 applies to persons, firms, or associations and their

employees who directly or indirectly dispose of real or personal property or perform services or anything of any nature or induce the public to enter into an obligation relating thereto, or make or disseminate or cause others to make or disseminate statements about these matters.

Exclusions: None specified.

Private Remedies: Injunction; receiver; restitution; other orders necessary to prevent unfair competition. Any person acting for the interest of itself, its members, or the general public may sue for these remedies, but must have suffered injury in fact and lost money or property. Certain prohibitions carry additional remedies, such as treble or punitive damages. Prevailing plaintiff may seek attorney fees as private attorney general under Cal. Civ. Proc. Code § 1021.5 (West).

Limitations: Statute of limitations is 3 years from discovery of untrue or misleading statements and for § 17500 causes of action, and 4 years for § 17200 causes of action.

State Remedies: Enforced by attorney general and district attorney, and, in some circumstances, by city attorney or prosecutor or county counsel. Injunction, civil penalties up to \$2500 per violation; additional civil penalties up to \$2500 for violation against senior citizen or disabled person; receiver; restitution; orders necessary to prevent unfair competition; \$6000 per day for intentional violation of injunction.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretation: None specified.

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Scope: Unfair, fraudulent and unlawful acts and practices by natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations. Section 17500 applies to persons, firms, or associations and their employees who directly or indirectly dispose of real or personal property or perform services or anything of any nature or induce the public to enter into an obligation relating thereto, or make or disseminate or cause others to make or disseminate statements about these matters.

Exclusions: None specified.

Private Remedies: Injunction; receiver; restitution; other orders necessary to prevent unfair competition. Any person acting for the interest of itself, its members, or the general public may sue for these remedies, but must have suffered injury in fact and lost money or property. Certain prohibitions carry additional remedies, such as treble or punitive damages. Prevailing plaintiff may seek attorney fees as private attorney general under Cal. Civ. Proc. Code § 1021.5 (West).

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State Remedies: Enforced by attorney general and district attorney, and, in some circumstances, by city attorney or prosecutor or county counsel. Injunction, civil penalties up to \$2500 per violation; additional civil penalties up to \$2500 for violation against senior citizen or disabled person; receiver; restitution; orders necessary to prevent unfair competition; \$6000 per day for intentional violation of injunction.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretation: None specified.

Colo. Rev. Stat. §§ 6-1-101 through 6-1-115 Consumer Protection Act

Prohibited Practices: Numerous enumerated deceptive practices, plus separate sections on specific industries. Catchall prohibition of knowingly or recklessly engaging in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice.

Scope: Practices in course of a person's business, vocation or occupation. The term "property," used in many substantive prohibitions, is broadly defined to include real property, personal property, intangible property, or services.

Exclusions: Conduct complying with rules or orders of or statute administered by state, federal, or local governmental agency; publishers, advertising agencies, broadcasters or printers who disseminate information without knowledge of deception.

Private Remedies: Private cause of action granted to actual or potential consumer of defendant's goods, services, or property; residential subscriber who receives unlawful telephone solicitation; successor in interest to consumer who made purchase; and person who is injured in course of business or occupation by deceptive trade practice. Except in class action, may recover greater of actual damages, \$500, or, if defendant acted in bad faith, treble damages, plus attorney fees and costs for a successful action. Attorney fees and costs for seller if action in bad faith and groundless or for purposes of harassment. Special restrictions on treble damages in cases against construction professionals are found at Colo. Rev. Stat. § 13-20-806.

Limitations: Statute of limitation is 3 years from occurrence or discovery; may be extended one year if defendant engaged in conduct calculated to induce plaintiff to postpone action.

State Remedies: Attorney general or district attorney enforces; injunction; restitution; orders necessary to prevent unjust enrichment; civil penalty of up to \$2000 for each violation with a maximum of \$500,000 for a related series of violations; civil penalty up to \$10,000 per violation if older victim; up to \$10,000 for violation of injunction; civil penalty of \$10,000 per violation of certain provisions of charitable fraud statute, capped at \$3 million (subject to increase for inflation) for a series of violations; rulemaking; attorney fees and costs where successful; criminal penalties for certain violations.

Attorney general need not prove that deceptive trade practice has significant public impact.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Conn. Gen. Stat. §§ 42-110a through 42-110q Connecticut Unfair Trade Practices Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices.

Scope: Trade or commerce means the advertising, sale, lease, offer for sale or lease, or distribution of any services or property, real, personal or intangible, or anything else of value.

Exclusions: Transactions or actions permitted under law as administered by board or officer of state or U.S.; advertisements by publisher, radio and television media, with no knowledge of falsity, and with no direct financial interest in the sale of the product.

Private Remedies: Actual damages; punitive damages in court's discretion; injunctive or other equitable relief in court's discretion; class actions; court "may" award costs and attorney fees to consumer, even if granted only non-monetary relief in class action. Right to jury trial except for equitable relief, punitive damages, and attorney fees.

Limitations: Ascertainable loss of money or property required for private cause of action; mail complaint and any judgment or decree to attorney general and commissioner of consumer protection; 3-year limitation period. Proof of public interest for private action shall not be required.

State Remedies: Enforced by commissioner of consumer protection or attorney general; injunction; restitution; receivership; accounting; equitable relief; \$5000 civil penalty per initial violation if willful; up to \$25,000 per injunction violation; dissolution of corporation that violates injunction; rulemaking by commissioner.

State UDAP Regulations: Connecticut Regulations for the Department of Consumer Protection, Conn. Agencies Regs. § 42-110b—bait and switch; contests; comparison price advertising; failure to disclose; disparaging competitors; misrepresentations of approval, affiliation, characteristics, uses, benefits, manufacture, quantity, quality, and seller's status; refunds; motor vehicle sales; used for new; warranties; price gouging of petroleum products; refusal to sell home heating fuel; foreign language advertising; limitations of offers; use of word "free"; posting of prescription drug prices; packaging and sales of commodities; packaging of meat; labeling.

Precedential Value of FTC Interpretations: Guided by FTC.

Del. Code Ann. tit. 6, §§ 2511 through 2527, 2580 through 2584 Consumer Fraud Act

Prohibited Practices: Deceptive practices; omission of material fact with intent that others rely.

Scope: Sale, offer of sale, attempt to sell, lease, or advertisement of merchandise, including objects, wares, commodities, goods, services, real estate or intangibles.

Exclusions: Advertisement by publisher, radio and television media, with no knowledge of falsity; advertisement complying with FTC rules; matters regulated by state commissioner of insurance or public service commission.

Private Remedies: Private cause of action for any victim of a violation. Under Del. Code Ann. tit. 6, § 2583, victims who are over 65 or disabled are entitled to treble damages in addition to any other damages provided by common law or other provisions of the Delaware Code.

Limitations: None specified.

State Remedies: Attorney general enforces; injunction; annul corporate charter; suspend state license for failure to respond to investigative demand; restitution; receiver; civil penalty up to \$10,000 per willful violation; costs.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Del. Code Ann. tit. 6, §§ 2511 through 2527, 2580 through 2584 Consumer Fraud Act

Prohibited Practices: Deceptive practices; omission of material fact with intent that others rely.

Scope: Sale, offer of sale, attempt to sell, lease, or advertisement of merchandise, including objects, wares, commodities, goods, services, real estate or intangibles.

Exclusions: Advertisement by publisher, radio and television media, with no knowledge of falsity; advertisement complying with FTC rules; matters regulated by state commissioner of insurance or public service commission.

Private Remedies: Private cause of action for any victim of a violation. Under Del. Code Ann. tit. 6, § 2583, victims who are over 65 or disabled are entitled to treble damages in addition to any other damages provided by common law or other provisions of the Delaware Code.

Limitations: None specified.

State Remedies: Attorney general enforces; injunction; annul corporate charter; suspend state license for failure to respond to investigative demand; restitution; receiver; civil penalty up to \$10,000 per willful violation; costs.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

D.C. Code §§ 28-3901 through 28-3913

Prohibited Practices: 35 enumerated deceptive, unfair or unlawful trade practices, including unconscionable terms.

Scope: Private cause of action must relate to trade practice, 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.

Exclusions: Persons subject to regulations of public service commission; professional services of clergy, lawyers, Christian Science practitioners; advertisements by publisher, radio and television media of others' goods with no knowledge of falsity; acts of government agency. Department of consumer and regulatory affairs may not order damages for personal injury of a tortious nature or apply its complaint procedures to landlord-tenant relations.

Private Remedies: A consumer, defined as a person who "does or would purchase, lease . . . , or receive consumer goods or services, . . . or does or would otherwise provide the economic demand for a trade practice," may bring a UDAP action regarding a violation of any District law. There are also provisions for testers to bring suit, and for nonprofit and public interest organizations to bring suit on behalf of themselves, their members, or the general public. A suit may seek treble damages or \$1500 per violation, whichever is greater, payable to the consumer, attorney fees, punitive damages, an injunction against the use of the practice, and any other relief the court deems proper. In a representative action, the consumer may also recover any other relief necessary for restitution.

Limitations: Attorney general may seek injunction if in public interest.

State Remedies: Department of consumer and regulatory affairs may issue cease and desist orders; order redress through contract damages, restitution, rescission, reformation, repairs and replacement; suspend license if no other board oversees it; impose civil fines for initial violations and up to \$1000 for each violation of order or consent decree. The D.C. attorney general has authority to seek injunction, restitution, civil penalty up to \$5000 per violation (\$10,000 per violation if repeated), economic damages, costs, and attorney fees. D.C. Code § 1-301.89a gives the attorney general authority to issue subpoenas. Mayor may issue rules to carry out this chapter.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Fla. Stat. §§ 501.201 through 501.213 Deceptive and Unfair Trade Practices Act

Prohibited Practices: Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices. Violations may be based on violation of FTC rules, FTC standards of unfairness and deception, or any statute, rule, regulation or ordinance proscribing unfair, deceptive, or unconscionable practices. Special restrictions on motor vehicle sales, added in 2001, are found at Fla. Stat. §§ 501.975 to 501.976 and are explicitly made actionable.

Scope: Trade or commerce, defined as advertising, soliciting, providing, offering, or distributing, by sale, rental, or otherwise, any good or service, or any tangible or intangible property, or anything else of value. Includes nonprofit activities. "Consumer" is defined to include wide variety of businesses and commercial entities.

Exclusions: Act or practice required or specifically permitted by federal or state law; personal injury or death actions; actions for damage to property other than subject of consumer transactions; banking and insurance entities and activities regulated by state or federal agencies; publisher, broadcaster, printer or other person who disseminates information for others without actual knowledge of violation; activities regulated under laws administered by public service commission; some real estate sales, leases, rentals or appraisals by licensed persons.

Private Remedies: Any person aggrieved by a violation may seek injunction and declaratory relief; person who has suffered loss may seek actual damages, unless retailer disseminated manufacturer's claims in good faith and without knowledge of violation; damaged person may be reimbursed by Consumer Fraud Trust Fund; attorney fees and costs may be awarded to prevailing party.

Limitations: Although a probable cause hearing is not required, the head of the enforcing authority must determine in writing that declaratory or damages action serves the public interest. Statute of limitations for state or department is later of 4 years from violation or 2 years from last payment of consumer transaction.

State Remedies: Enforced by department of legal affairs or state attorney; substantive rulemaking in department; declaratory judgment; injunction; action on behalf of one or more consumers or governmental entities for actual damages, except against retailer who disseminated manufacturer's claims in good faith and without knowledge; receiver; strike unconscionable contract clauses; order performance of transaction in accordance with consumers' reasonable expectations; order divestiture of defendant's interest in enterprise or real estate; restrict defendant's future activity; order dissolution or reorganization of an enterprise; civil penalty of \$10,000 per willful violation (\$15,000 for victimizing senior citizens or disabled persons); other relief. Relief limited to unjust enrichment damages if violator committed bona fide error with reasonable procedures. Department may bring cease and desist order if in public interest, with \$5000 for each violation of order. Attorney fees to prevailing party in civil litigation initiated by enforcing authority, but only if there was a complete absence of justiciable issue of law or fact or party acted in bad faith.

State UDAP Regulations: Florida repealed the majority of its UDAP rules effective June 19, 1996, on the ground that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice. One rule remains in effect: Fla. Admin. Code Ann. r. 2-18.002 (disclosure and cancellation of future service contracts).

Precedential Value of FTC Interpretations: Due consideration and great weight.

Ga. Code Ann. §§ 10-1-370 through 10-1-375 Uniform Deceptive Trade Practices Act

Prohibited Practices: 12 enumerated deceptive practices and conduct likely to create confusion or misunderstanding.

Scope: Action in course of business, vocation or occupation.

Exclusions: Conduct which complies with federal, state or local rules, orders, or statutes; publishers, broadcasters, printers or other persons who disseminate information without knowledge of deceptive character.

Private Remedies: Injunction; costs to prevailing party; attorney fees to prevailing party in court's discretion if consumer's case groundless or seller knew of deception.

Limitations: None specified.

State Remedies: None specified.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Ga. Code Ann. §§ 10-1-390 through 10-1-407 Fair Business Practices Act

Prohibited Practices: Unfair or deceptive acts or practices in consumer transaction, including 36 itemized examples and special provisions for office supply transactions, health spas, telemarketing, Internet activities, home repair, roof repair, pre-need funeral contracts, and price-gouging in emergencies.

Scope: Consumer transactions, defined as sale, purchase, lease, or rental of goods, services, or real or personal property primarily for personal, family, household purposes; must be in trade or commerce, defined as advertising, sale, lease, or offering for distribution, sale, or lease, of any goods, services, real or personal property, intangibles, or thing of value. Consumer must be a natural person.

Exclusion: Actions or transactions specifically authorized under laws administered or rules promulgated by state or U.S. regulatory agency; advertisements by publisher, radio and television media, with no knowledge of falsity, did not prepare advertisement, or no direct financial interest in product.

Private Remedies: Injunction; general damages; exemplary and treble damages for intentional violations; costs and attorney fees to successful consumer (but no award for fees incurred after rejection of reasonable settlement offer); fees to respondent if case

continues in bad faith or for purposes of harassment past rejection of settlement offer; recovery limited to actual damages if violation result of non-negligent bona fide error notwithstanding reasonable procedures. No class actions are authorized. Section 10-1-853 also gives older or disabled person right to bring action for actual damages, punitive damages, and attorney fees.

Limitations: Plaintiff must have suffered injury or damage; notice letter 30 days before suit and relief limited to offer if plaintiff rejects offer but court finds offer reasonable; for private right of action, 2-year statute of limitations after knew or should have known of violation or after state action terminated; no statute of limitations for set off.

State Remedies: Attorney general enforces when deems in public interest and can issue cease and desist orders and order civil penalty of \$200 per initial violation if willful. May bring suit for \$5000 civil penalty per initial violation; declaratory judgment; injunction; restitution; receiver; damages action on behalf of others in representative capacity; \$25,000 per violation of injunction; additional civil penalty up to \$10,000 per violation if committed against older or disabled person. Must give written notice in most circumstances before proceeding.

State UDAP Regulations: Georgia Office of Consumer Affairs Regulations, Ga. Comp. R. & Regs. r. 60-2-2 through 60-2-5—door-to-door sales; mail order sales; negative option plans; preservation of consumers' claims and defenses.

Precedential Value of FTC Interpretations: Construction to be interpreted consistently with FTC. Attorney general may adopt FTC rules.

5 Guam Code Ann. §§ 32101 through 32603 Deceptive Trade Practices—Consumer Protection Act

Prohibited Practices: False, misleading or deceptive trade practices, including 50 enumerated practices. Additional provisions regarding vehicle warranties, telemarketing, prizes and gifts, homeowners' warranties, and cable television.

Scope: Very broad. Protects business consumers (including corporations and the government) as well as individuals purchasing goods or services for personal use.

Exclusions: Newspaper, magazine, broadcasting station, billboard, unless the owners had actual knowledge of falsity or a financial interest in the unlawfully advertised goods or services. Acts or practices authorized under specific rules of the FTC.

Private Remedies: Private right of action for actual and exemplary and punitive damages. If misconduct was knowing and a regular business practice, then damages may be trebled. Also temporary or permanent injunction, restitution, any orders necessary to restore money or property acquired in violation of this chapter, other relief at law or equity, including appointment of a receiver and revocation of business license. Consumer who prevails in action under this section entitled to costs and attorney fees. A sale of goods in violation of this chapter is not enforceable by party responsible for the violation. Consumer may revoke if there was reasonable reliance on or material damage to the consumer from the false, misleading, deceptive or prohibited act or practice.

Limitations: Three years after consumer knew or should have known of the occurrence of the false, misleading, deceptive or prohibited act or practice. 180-day extension if delay caused by defendant's knowingly engaging in conduct to cause plaintiff to refrain from or delay commencement of the action. Before filing a suit for damages, consumer must give 30-day notice to prospective defendant. Defendant may inspect the goods, and may make an offer of settlement. If offer of settlement is rejected, it may be filed with court, and if trier of fact finds that actual damages were no more than settlement offer, consumer may recover only lesser of actual damages or amount offered.

State Remedies: Attorney general must receive notice of private actions, and may intervene. Attorney general may also sue on behalf of individual consumers or a class, or the government of Guam, for equitable relief, rescission, damages, restitution, and civil penalties. If attorney general prevails, entitled to costs and attorney fees. Attorney general may accept assurance of voluntary compliance, if restitution is made. Civil penalty of up to \$5000 for violation of this chapter. Penalty of up to \$10,000 for violation of injunction. Penalties of up to \$5000 for concealing evidence, up to \$50,000 for destroying or falsifying evidence.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Haw. Rev. Stat. §§ 480-1 through 480-24

Prohibited Practices: Unfair methods of competition and unfair or deceptive trade practices; antitrust violations.

Scope: Trade or commerce. Private action extended to consumer, defined to be natural person who primarily for personal, family or household purposes attempts to purchase, purchases, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment. "Purchase" includes leasing and licensing. (Business entities can bring suit only for violation of prohibition of unfair competition.)

Exclusions: Acts permitted by state insurance law.

Private Remedies: Consumer may sue for \$1000 or treble actual damages, whichever is greater; attorney fees and costs; injunction with attorney fees and costs for successful plaintiff; class actions; contract in violation of statute void and unenforceable. Plaintiff over 62 years of age may, in the alternative, be awarded the greater of \$5000 or treble damages, plus attorney fees and costs.

Limitations: Consumer must have been injured by unlawful practice. Limitation period is four years, but there is no statute of limitations for actions by state.

State Remedies: If state is injured party, attorney general may sue for treble damages. Where injury is to consumer, office of consumer protection or attorney general can file suit for injunction or damages, including class actions for threefold damages suffered by consumers. State can also seek civil penalties of not less than \$500 or more than \$10,000 per violation, plus an additional civil penalty of \$10,000 if the victim is over

62 years of age. State can obtain penalties of \$500 to \$10,000 for violations of injunction. Attorney fees.

State UDAP Regulations: Hawaii Rules Relating to Unfair or Deceptive Practices in Advertising, Haw. Code R. §§ 16-86-1 through 16-86-35, 16-106-1 through 16-106-58, 16-303-1 through 16-303-10 (Weil) (motor vehicle dealers and salespersons; time sharing; availability of merchandise; limitations of offers; bait and switch; deceptive pricing; use of the word “free”).

Precedential Value of FTC Interpretations: Give due consideration to FTC interpretations.

Haw. Rev. Stat. §§ 481A-1 through 481A-5 Uniform Deceptive Trade Practice Act

Prohibited Practices: 12 enumerated deceptive practices and catchall prohibiting conduct creating confusion or misunderstanding.

Scope: Actions in course of business, vocation or occupation by individuals, corporations, partnerships, trusts, estates, governmental agency or subdivision, unincorporated association, or any other legal or commercial entity.

Exclusions: Conduct complying with orders or rules of, or statutes administered by, 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 fees to prevailing party “may” be awarded if violation is willful or suit is groundless.

Limitations: None specified.

State Remedies: None specified.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Idaho Code §§ 48-601 through 48-619 Consumer Protection Act

Prohibited Practices: 19 enumerated unfair methods of competition and unfair or deceptive acts or practices including catchalls prohibiting misleading consumer practices and unconscionable practices, except the latter catchall does not apply to regulated lenders; special restrictions specific industries.

Scope: Trade or commerce, defined as advertising, offering for sale, selling, leasing, renting, collecting debts arising out of, or distributing any goods or services. Goods include any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value.

Exclusions: Actions or transactions permitted under laws administered by public utility or state or U.S. regulatory body; advertisements by publisher, broadcasters, printers or

retailers in good faith based on material supplied by others and without knowledge of deceptive or misleading character; persons subject to unfair insurance practices statute; actions complying with applicable FTC statutes or regulations.

Private Remedies: Void contract for purchase or lease of goods or services; greater of actual damages or minimum \$1000 damages, but a class action may only obtain actual damages or \$1000 for the whole class, whichever is greater; punitive damages in court's discretion; restitution; injunction; other equitable relief if repeated or flagrant violations; any other appropriate relief; attorney fees to prevailing plaintiff, to defendant in court's discretion if action spurious or to harass. Enhanced penalty of \$15,000 or treble damages, whichever is greater, for certain violations against older or disabled persons.

Limitations: Must suffer ascertainable loss of money or property; statute of limitations for private action is 2 years after cause accrues. Acts are violations only if respondent knows or should know of violation.

State Remedies: Attorney general enforces and has substantive rulemaking authority; if has reason to believe in public interest, may bring action for declaratory judgment, injunction, actual damages or restitution for consumers, specific performance, revocation of state license, receiver; up to \$10,000 and dissolution of corporation, in court's discretion, for violation of injunction, specific performance, \$5000 per violation as civil penalty for initial violations; attorney fees, expenses, and investigative costs; court may make additional orders "as may be necessary." Attorney general must, with certain exceptions, give notice before suit.

State UDAP Regulations: Idaho Consumer Protection Regulations, Idaho Admin. Code r. 04.02.01.020 through 04.02.02.999—definition of deception; bait and switch; contests; deceptive pricing; delay and nondelivery; failure to disclose; door-to-door sales; home improvements; layaway plans; mail order; misrepresentations of method of selecting consumer and of legal rights; pyramid sales; referral sales; used for new; standards of deception; defenses against assignees; automobile advertising and sales; loan broker fees; preservation of consumer claims and defenses (holder rule); subsequent correction; unordered goods or services; unsubstantiated claims; violation of FTC consent and other orders; telephone solicitation and pay per call; use of the word "free"; going out of business sales; insufficient supply/limitation of offers; estimates.

Precedential Value of FTC Interpretations: Due consideration and great weight; construe statute uniformly with federal law and regulations.

815 III. Comp. Stat. 505/1 through 505/12 Consumer Fraud and Deceptive Business Practices Act

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 many enumerated prohibitions; violation of UDTPA.

Scope: Trade or commerce, defined as advertising, sale, offering for sale, or distribution of any real, personal or intangible property or services, and any other thing of value.

Exclusions: Actions or transactions specifically authorized by state or U.S. laws administered by regulatory body; trademark laws; advertisements by publisher, radio and television media, that had no knowledge of falsity, did not prepare the ad, or had no direct financial interest; unknowing deceptive communication by licensed realtor. The statute also states that it does not apply to claims seeking damages for conduct that results in bodily injury, death, or damage to property not the subject of the alleged unlawful practice, but this language had been added by the civil justice reform act, an act declared unconstitutional by *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

Private Remedies: Actual economic damages, injunctive relief, or other relief court deems proper; court “may” award attorney fees and costs to prevailing party.

Limitations: Plaintiff must have suffered actual damage. Attorney general action in public interest; statute of limitations for private suit is 3 years from accrual, action by attorney general tolls private action for pendency of suit and one year after. If defendant is motor vehicle dealer or holder of motor vehicle installment contract, must give 30-day notice before suit and show public injury, pattern, or effect on consumers and public interest, and punitive damages are barred unless conduct willful or intentional and done with evil motive or reckless indifference, but these provisions were struck down as unconstitutional special legislation by *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12, 802 N.E.2d 752, 280 Ill. Dec. 501 (2003). Private plaintiff must mail complaint and judgment or order to attorney general. Three-year limitation period does not apply to state attorney general actions.

State Remedies: Attorney general enforces and has rulemaking power; court has discretion to exercise all powers necessary including injunction, revoke license, receiver; restitution; \$50,000 civil penalty (\$50,000 per violation if intent to defraud shown); costs; forfeiture or suspension of any authority for person to do business in the state. The penalty can be enhanced by \$10,000 if the victim is older.

State UDAP Regulations: Illinois Attorney General Consumer Protection Rules, Ill. Admin. Code tit. 14, §§ 460.5 through 460.265, 470.110 through 470.310, 475.110 through 475.810, 485.10 through 485.60—buyers clubs, price comparisons, availability of advertised merchandise, motor vehicle advertising (including credit sales advertising and leasing advertising), immigration services.

Precedential Value of FTC Interpretations: Consideration to be given.

815 Ill. Comp. Stat. 510/1 through 510/7 Uniform Deceptive Trade Practices Act

Prohibited Practices: 11 enumerated deceptive trade practices plus a catchall prohibiting any conduct likely to cause confusion or misunderstanding.

Scope: In course of business, vocation or occupation.

Exclusions: Conduct complying with orders or rules of or statute administered by federal, state, or local agency; publishers, broadcasters, printers or other persons who disseminate information without knowledge of its deceptive character.

Private Remedies: Injunctive relief; costs or attorney fees if defendant willfully violated act.

Limitations: None specified.

State Remedies: None specified.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Construed to promote uniformity among states enacting.

Ind. Code §§ 24-5-0.5-1 through 24-5-0.5-12 Deceptive Consumer Sales Act

Prohibited Practices: General prohibition of any unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction, including both implicit and explicit misrepresentations, plus 8 enumerated deceptive acts, including transactions involving contracts with unconscionable clauses; special provisions for specific industries.

Scope: Most substantive provisions apply to consumer transactions, defined as sale, lease, assignment, award by chance, or other disposition of real or personal property, intangibles, or services, with or without an extension of credit, to a person for purposes that are primarily personal, familial, charitable, agricultural or household, or solicitations to supply any of these things. Specifically includes transfer of a structured settlement payment.

Exclusions: Supplier in good faith reliance on representation made by another if discloses source to consumer; acts or practices required or expressly permitted by federal or state law or regulation; insurance, securities. Telephone company or other directory provider not liable for misleading business name in directory.

Private Remedies: Actual damages in individual or class actions; treble damages if violation is willful or committed against consumer aged 60 or older; attorney fees “may” be awarded prevailing party; court may void contracts; security for costs may be imposed. While private remedies are not available for real estate transactions, they are available for practices involving timeshares and camping club memberships.

Limitations: No private action unless plaintiff relied on incurable (i.e., done with intent to defraud or mislead) or uncured (i.e., not cured after notice within specific time limits) deceptive act, or bona fide error despite reasonable procedures to avoid error is defense; statute of limitations 2 years after act.

State Remedies: Attorney general enforces; injunction; restitution; treble restitution for violation committed against consumer aged 60 or older; court may void or limit contract; \$15,000 plus costs per violation of injunction; up to \$500 per knowing initial violation of most prohibitions; up to \$500 per incurable violation (i.e., one done with intent to defraud). Rulemaking (see Ind. Code § 4-6-9-8); costs of prosecution; restitution where contracts are voided.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Iowa Code §§ 714.16 through 714.16A, 714H.1 through 714H.8

Prohibited Practices: A general prohibition of unfair practices, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent to cause reliance, and 14 other enumerated practices.

Scope: Lease, sale, offer of sale, attempt to sell, or advertisement of any objects, wares, goods, commodities, intangibles, stocks, bonds, securities, debentures, realty or services, or solicitation of charitable contributions.

Exclusions: Advertisements by publisher, radio, television, and other electronic media, with no knowledge of falsity; advertisements that comply with FTC rules, regulations and statutes; retailer not liable for using certain ads prepared by supplier except in certain circumstances.

Private Remedies: Actual damages; equitable relief to protect public from further violations; reasonable attorney fees. Treble damages available in addition to actual damages if clear, convincing, and satisfactory evidence shows willful and wanton disregard for the rights or safety of another.

Limitations: Private cause of action statute specifies the substantive violations, including a somewhat different version of the broad, general prohibition of deception, for which it is available. Many types of defendants that are generally subject to the UDAP statute, including insurers, insurance producers, many creditors, many licensed professionals and health care providers funeral directors, real estate brokers and salespersons, and certain utility service providers, are exempt from the private cause of action. Retailers that unknowingly distribute false information in manufacturers' advertisements, and media that publish advertisements, are not subject to private cause of action. Statute creates defenses for bona fide errors, conduct required or permitted by other law, and affirmative acts that are specifically required by other law if actor could not avoid a UDAP violation. Class action may be filed only if attorney general approves it; approval must be granted unless the attorney general determines it is frivolous. Statute sets preponderance of evidence standard except for treble damages. Two year statute of limitations, running from discovery.

State Remedies: Attorney general enforces; injunction; \$40,000 penalty for initial violations; \$5000 per day of violation of injunction; restitution; receiver for substantial and willful violation; costs and attorney fees; rulemaking. If costs of administering restitution order outweigh the benefits to consumers or the consumers entitled to restitution cannot be located, the restitution amount may be used for implementation of state's consumer fraud act. If violation committed against a person 65 years of age or older, additional penalties up to \$5000 per violation.

State UDAP Regulations: Iowa Admin. Code r. 61-25.1 through 61-36.7—membership campgrounds, health spas, salvaged vehicles, automobile repair, price gouging during

an emergency, prize promotions. The Iowa Department of Justice has also issued guidelines for motor vehicle advertising.

Precedential Value of FTC Interpretations: None specified.

Kan. Stat. Ann. §§ 50-623 through 50-640 and 50-675a through 50-679a Consumer Protection Act

Prohibited Practices: Any deceptive acts or practices including but not limited to 12 enumerated prohibitions, one of which is willful concealment of material fact; unconscionable practice, determined by considering 7 enumerated factors.

Scope: Consumer transaction, defined as sale, lease, assignment, or other disposition for value of property or services, including real estate and intangibles, or solicitation by supplier, to individual, sole proprietor, or family partnership for personal, family, household, business or agricultural purposes. Prohibitions apply only to suppliers, defined as manufacturers, distributors, dealers, sellers, lessors, assignors, or other persons who, in the ordinary course of business, solicit, engage in or enforce consumer transactions, whether or not dealing directly with a consumer. Definition excludes the disposition of collateral by any supplier that is subject to and compliant with state or federal laws or regulations with regard to the disposition of such collateral.

Exclusions: Insurance contracts regulated under state law; publisher, broadcaster, printer or other person who disseminates information without actual knowledge of violation. There is no private cause of action against a licensed health care professional for personal injury or death resulting from medical negligence.

Private Remedies: In individual action, consumer may seek greater of actual damages or civil penalty up to \$10,000 per violation (additional \$10,000 under Kan. Stat. Ann. § 50-677 if victim is older, disabled, a veteran, a veteran's surviving spouse, or an immediate family member of a member of the military); if consumer suffers loss from a specific act proscribed by statute, judgment or consent decree, then class action allowed for actual damages. Aggrieved consumer can seek declaratory or injunctive relief in individual or class action regardless of whether entitled to damages or has adequate remedy at law or equity. Reasonable attorney fees to prevailing party, to supplier if suit groundless. Older or disabled person can also recover punitive damages under Kan. Stat. Ann. § 50-679.

Limitations: Must give notice of certain suits to attorney general. Most enumerated deceptive prohibitions require seller know or have reason to know of violation or require intent.

State Remedies: Attorney general or local prosecuting attorney enforces; procedural rulemaking by attorney general; declaratory judgment; injunction; damages for consumers; reasonable expenses and investigation fees; court may make other orders "necessary"; receiver; revoke licenses; order transactions carried out in accordance with consumers' reasonable expectations; grant other appropriate relief; civil penalty up to \$10,000 per violation, up to \$20,000 per willful violation of court order in addition to

other penalties court may deem proper. Under Kan. Stat. Ann. § 50-677, the penalty can be enhanced by \$10,000 if the victim is older or disabled.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Ky. Rev. Stat. Ann. §§ 367.110 through 367.990 (West) Consumer Protection Act

Prohibited Practices: Unfair, false, misleading, or deceptive acts or practices; unfair construed to mean unconscionable; antitrust violations.

Scope: In trade or commerce, defined as the advertising, offer for sale, or distribution of any service, real, personal, tangible or intangible property and any other thing of value.

Exclusions: Advertisements by publisher, radio and television media, with no knowledge of falsity; activities authorized or approved under federal or state law or regulation.

Private Remedies: Actual damages; equitable relief court deems “necessary or proper”; attorney fees and costs may be awarded to prevailing party. Statute provides that it does not limit right to seek punitive damages where appropriate.

Limitations: Private cause of action extended only to persons who purchase or lease goods or services primarily for personal, family, or household purposes and thereby suffer ascertainable loss of money or property as result of unlawful act; statute of limitations is 1 year after end of attorney general suit or 2 years after violation.

State Remedies: Attorney general, and, in certain situations, commonwealth and county attorneys have enforcement authority; injunction; restitution; receiver; revoke license; up to \$2000 civil penalty per initial violation (\$10,000 in some circumstances if older victim); up to \$25,000 per injunction violation. Ky. Rev. Stat. Ann. § 15.180 (West) gives general rulemaking authority to attorney general.

State UDAP Regulations: Kentucky’s Office of Consumer Protection has adopted a number of rules, found at 40 Ky. Admin. Regs. §§ 2:001 to 2.350. Most appear to be intended to implement other more specific consumer protection statutes.

Precedential Value of FTC Interpretations: None specified.

La. Stat. Ann. §§ 51:1401 through 51:1420 Unfair Trade Practices and Consumer Protection Law

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices.

Scope: Trade or commerce, defined as advertising, sale, offers of sale, or distribution of any service, property (corporeal or incorporeal, movable or immovable), and any thing of value.

Exclusions: Any federally insured financial institution, its subsidiaries, and affiliates; any licensee of the Office of Financial Institutions, its subsidiaries, and affiliates; actions or

transactions subject to the jurisdiction of the Louisiana Public Service Commission or other public utility regulatory body, the commissioner of financial institutions, the insurance commissioner, the financial institutions and insurance regulators of other states, or federal banking regulators who possess authority to regulate unfair or deceptive trade practices; advertisements by publisher, radio, television, or other media, with no knowledge of falsity, no direct financial interest, and no participation in preparation of ad; acts complying with FTC Act, rules and court interpretations; seller of products or services who disseminates advertisements or promotional material and agrees to assurance of voluntary compliance, unless refuses attorney general request to reveal name and address of advertiser, but this exception does not limit consumer's right of action.

Private Remedies: Actual damages; treble damages for knowing violation done after notice given by director or attorney general; attorney fees and costs to successful consumer, to defendant if suit groundless and brought in bad faith or for harassment. Any contract made in violation of the statute is an illegal contract and no recovery may be had thereon. No class action for damages.

Limitations: Need ascertainable loss of money or movable property for private action; statute of limitations one year from transaction for private action; investigation by attorney general if in public interest. Consumer must mail copy of complaint and any judgment or order to attorney general.

State Remedies: Attorney General has rulemaking and enforcement authority; district attorneys may also enforce, subject to attorney general's supervision; injunction; restitution, civil penalty, which may be up to \$5000 if intent to defraud is shown; additional civil penalty up to \$5000 if violation committed against older or disabled person; revocation of any license, charter, etc.; suspension of right to do business in state; dissolution of corporation; receivership; court "may" issue additional relief necessary to compensate aggrieved party; up to \$5000 per violation of injunction or assurance of voluntary compliance.

State UDAP Regulations: La. Admin. Code tit. 16, pt. III §§ 301 through 515; charitable solicitations; damaged goods; deceptive pricing; endorsements; magazine subscriptions; multi-level distribution and chain distributor marketing schemes; used for new; distressed goods.

Precedential Value of FTC Interpretations: Statute does not apply to conduct that complies with FTC Act, rules, and court decisions.

Me. Stat. tit. 5, §§ 205A through 214 Unfair Trade Practices Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices.

Scope: Trade or commerce, defined as advertising, sale, offer for sale, or distribution of any services, real or personal property, intangibles or any thing of value.

Exclusions: Transactions or actions otherwise permitted under laws as administered by any Maine or federal regulatory body are exempt, but only if the defendant shows that its business activities are subject to regulation by a state or federal agency and the specific activity that would otherwise be a violation is authorized, permitted, or required by the agency or by applicable law, rule, regulation, or other regulatory approval. A separate banking law, Me. Stat. Ann. tit. 9-B, § 244, exempts banks and credit unions.

Private Remedies: Restitution; actual damages; injunction; other equitable relief court may deem necessary; attorney fees and costs if violation proven. Right to jury trial if action brought in superior court.

Limitations: Attorney general acts in public interest and in most cases must give prior notice. Private actions require consumer transaction resulting in ascertainable loss of money or property. Consumer must give 30-day notice attempting to settle before bringing suit; no post-offer fees if rejects offer and then does not recover more at trial.

State Remedies: Attorney general enforces and has rulemaking power; injunction; restitution if defendant violates injunction; up to \$10,000 per violation of injunction; costs of investigation and suit if permanent injunction granted to attorney general; costs of defense to prevailing defendant if action frivolous; up to \$10,000 civil penalty for intentional initial violation involving unfair or deceptive conduct.

State UDAP Regulations: 26-239 Code Me. Rules, ch. 100 through 109 urea formaldehyde foam insulation; motor vehicle sales; sale of residential heating oil; charitable solicitations by law enforcement.

Precedential Value of FTC Interpretations: Guided by FTC interpretations of FTC Act. State regulations may not be inconsistent with FTC rules.

Me. Stat. tit. 10, §§ 1211 through 1216 Uniform Deceptive Trade Practices Act

Prohibited Practices: 12 enumerated deceptive practices including a catchall provision prohibiting any conduct likely to create confusion or misunderstanding.

Scope: In course of business, vocation or occupation.

Exclusions: Conduct complying with orders, rules, or statute administered by federal, state or local agency; publishers, broadcasters, printers or other persons who disseminate information without knowledge of deceptive character.

Private Remedies: Injunction; court “may” award attorney fees to prevailing party in exceptional cases; costs or attorney fees against defendant only if willful violation.

Limitations: None specified.

State Remedies: None specified.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Construed to create uniformity among states which enact statute.

Md. Code Ann., Com. Law §§ 13-101 through 13-501 (West) Maryland Consumer Protection Act

Prohibited Practices: Numerous enumerated unfair, abusive, or deceptive trade practices. See also Md. Code Ann., Com. Law §§ 14-101 through 14-3202 (West) for additional consumer protection provisions regarding unit pricing, guaranties, door-to-door sales, debt collection, and other topics.

Scope: Trade practices in sale, lease, rental, loan, or bailment of consumer goods, realty or services, or offers of same; extension of consumer credit or collection of consumer debts. Also covers “We Buy Homes/Cars/Other Consumer Goods” transactions.

Exclusions: Professional services by insurance company authorized to do business in the state, insurance agent or broker licensed by state, real estate brokers and salespersons, CPA, lawyer, medical or dental practitioner, or certain other professionals; a public service company to the extent its services and operations are regulated by public service commission; publisher, printer, radio, television, or newspaper that disseminates advertising with no knowledge of falsity and not involving its own goods. No private cause of action for injuries sustained as a result of professional services provided by a health care provider.

Private Remedies: Actual damages; attorney fees “may” be awarded if plaintiff recovers damages; seller receives attorney fees if action in bad faith or is frivolous.

Limitations: Must sustain loss or injury for private action.

State Remedies: Division of consumer protection may issue cease and desist order, which may include restitution, economic damages, performance bond, and requirement that defendant provide information to the division, and may seek injunction in court; has rulemaking power; attorney general may seek injunction, receiver, and costs; both agencies can obtain civil penalty up to \$1000 civil fine per initial violation by merchant, \$5000 per repeat violation.

State UDAP Regulations: Maryland Regulations of the Consumer Protection Division, Md. Code Regs. §§ 02.01.01.01 through 02.01.01.16, 02.01.05.01 through 02.01.05.05, and 02.01.07.01 through 02.01.07.10—invitation services; refunds; unit pricing. Md. Code Regs. §§ 02.01.08.01 through 02.01.08.05 (kosher food), 02.01.09.01 through 02.01.09.04 (deposits on new homes), 02.01.10.01 through 02.01.10.04 (halal food). The statute (§ 13-103) allows counties and municipalities to adopt more stringent provisions.

Precedential Value of FTC Interpretations: Due consideration and weight.

Mass. Gen. Laws Ann. ch. 93A, §§ 1 through 11 Regulation of Business Practice and Consumer Protection Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices.

Scope: Trade or commerce includes advertising, distribution, offers or consummation of sale, rent or lease, of any services, real or personal property, commodity for future delivery, intangibles, or any other article of value; securities explicitly included.

Exclusions: Transactions or actions permitted under laws administered by regulatory board or officer.

Private Remedies: Section 9 allows 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 fees and costs to prevailing plaintiff unless rejected reasonable offer of settlement. Persons engaged in conduct of trade or commerce who are injured by persons who also engage in trade or commerce have right to bring private action but must proceed under somewhat different provisions of § 11.

Limitations: Attorney general acts in public interest and must give prior notice except when seeking temporary restraining order; consumer action if injured and provides notice letter; consumer must give notice prior to suit and is limited to reasonable relief tendered if rejects a settlement offer; court may suspend court action to bring action before appropriate regulatory board if court action would require acts inconsistent with regulatory scheme or regulatory board had substantial interest court may issue interlocutory orders to preserve status quo.

State Remedies: Attorney general has rulemaking power consistent with FTC and federal court interpretations of FTC Act; attorney general enforces; injunction; restitution; special penalties, damages, and restitution provisions for securities violations; civil penalty of \$5000 per violation and costs of investigation and litigation if the defendant knew or should have known it was violating the act; \$10,000 penalty for each violation of injunction or court order; corporation may be dissolved or banned from doing business for habitual injunction violations.

State UDAP Regulations: Massachusetts Consumer Protection Regulations, 940 Mass. Code Regs. §§ 3.01 through 10.14, 15.01 through 16.09, 18.01 through 19.07, 21.01 through 22.09—advertising practices; automobile repair; automobile sales; bait-and-switch advertising; business opportunities; credit; debt collection; deceptive pricing; delay and nondelivery; failure to disclose; door-to-door sales; vocational schools; home improvements; landlord-tenant; layaway plans; magazine subscriptions; mail order; nursing homes; misrepresentations of methods of manufacture and quantity; mortgage brokers and mortgage lenders; other prohibited practices; petroleum product price gouging; referral sales; refunds; repairs and services; used for new; liability disclaimers; warranties; leases; rent to own; termination of group health insurance; manufactured home parks; travel services; retail marketing and sale of electricity; handgun sales; smokeless tobacco; viatical settlements and viatical loans.

Precedential Value of FTC Interpretations: Guided by FTC interpretations; rules cannot be inconsistent with FTC rules.

Mich. Comp. Laws §§ 445.901 through 445.922 Consumer Protection Act

Prohibited Practices: 38 enumerated unfair, unconscionable, or deceptive practices, plus specific provisions for business opportunities, gift certificates, clothing donation boxes, advertisements in telephone directories, and quotes for vehicle rentals.

Scope: Trade or commerce, defined as conduct of business providing goods, property, or service primarily for personal, family, or household purposes, including advertising, solicitation, sale or offer for sale, rent, lease or distribution of service, real or personal property, intangible, or any other article. Includes business opportunities and pyramid schemes but not franchises.

Exclusions: A transaction or conduct specifically authorized under laws administered by state or U.S. regulatory board; advertisements by disinterested publisher, radio, television station, or other communications medium without knowledge of falsity or financial interest in sale; certain acts made unlawful by insurance code. Except for purposes of the private cause of action, Act does not apply to violations of 5 enumerated Michigan statutes.

Private Remedies: Declaratory judgment and injunction regardless of whether consumer seeks damages or has adequate remedy at law; if consumer has suffered loss, may seek greater of actual damages or \$250 minimum damages, plus attorney fees, or may file class action for actual damages, restitution, performance of transaction in accord with consumer's reasonable expectations, striking of unconscionable clauses, receiver, or other appropriate relief.

Limitations: Attorney general acts upon probable cause with notice given; statute of limitations for private actions or class action by attorney general is later of 6 years from act or 1 year from last payment; consumer may raise defense or counterclaim regardless of statute of limitations; if violation occurs by bona fide error despite reasonable procedures, then limited to actual damages.

State Remedies: Attorney general enforces and has rulemaking power; injunction with costs to prevailing party; up to \$5000 per injunctive or judgment violation; restitution; criminal penalties; class actions for actual damages or restitution, strike unconscionable contract clause, order transaction carried out in accordance with aggrieved persons' expectations, or other appropriate relief; receiver; civil penalty up to \$25,000 for persistent and knowing violations.

State UDAP Regulations: Michigan Regulations of the Consumer Protection Division, Mich. Admin. Code r. 14.202 through 14.204, 14.206 through 14.208—sale advertisements; disclosure of limitations; successive advertisements; catalogs, circulars; clearance sales; disclaimers.

Precedential Value of FTC Interpretations: None specified.

Minn. Stat. § 8.31

Prohibited Practices: Unfair, discriminatory and other unlawful practices including, without limitation, §§ 317A.001 through 317A.909 (nonprofit corporation act), §§ 325D.01 through 325D.07 (unfair discrimination and competition), §§ 325D.09 through 325D.16 (unlawful trade practices), §§ 325D.49 through 325D.66 (antitrust), § 325F.67 (false and fraudulent advertising), § 325D.67 (petroleum price discrimination), § 325D.68 (monopolization of food products), §§ 325F.69 through 325F.70 (prevention of consumer fraud), § 325E.39 (telephone advertising services), § 53A (currency exchanges).

Scope: In business, commerce or trade.

Exclusions: None specified.

Private Remedies: Any person injured by violation of certain specified laws, including §§ 325D.67 and 325F.68 through 325F.70, may sue for actual damages; costs and disbursements, including costs of investigation and attorney fees; equitable relief as court determines.

Limitations: Consumer must sustain injury to sue.

State Remedies: Attorney general enforces; injunction; civil penalties up to \$25,000 per initial violation, if attorney general sues for consumer may obtain damages, equitable relief, costs and attorney fees.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Minn. Stat. §§ 325D.09 through 325D.16 Unlawful Trade Practices Act

Prohibited Practices: Misrepresentation of quality, ingredients, or origin of merchandise, certain pricing misrepresentations, and misrepresentation regarding the nature of a business.

Scope: Most provisions are limited to sale of merchandise.

Exclusions: None specified.

Private Remedies: Injunction and actual damages. Can also be enforced through Minn. Stat. § 8.31.

Limitations: See Minn. Stat. § 8.31.

State Remedies: See Minn. Stat. § 8.31.

State UDAP Regulations: None specified.

Minn. Stat. §§ 325D.43 through 325D.48 Uniform Deceptive Trade Practices Act

Prohibited Practices: 13 enumerated deceptive practices, including a catchall provision prohibiting any other conduct which similarly creates a likelihood of confusion or misunderstanding.

Scope: In course of business, vocation or occupation.

Exclusions: Publishers, broadcasters, printers or other persons who disseminate information without knowledge of deception or financial interest in goods or services; conduct in compliance with orders or rules of, or statute administered by, federal state or local agency.

Private Remedies: Injunction; costs to prevailing party unless court directs otherwise; court “may” award attorney fees to prevailing party if plaintiff brings suit knowing it to be groundless or defendant’s willful violation found.

Limitations: None specified.

State Remedies: State remedies through Minn. Stat. § 8.31, i.e., attorney general enforces; injunction; civil penalties up to \$25,000 per violation, if attorney general sues for consumer may obtain restitution, equitable relief, costs, and attorney fees. Where conduct perpetrated against older or disabled consumer, Minn. Stat. § 325F.71 provides for an additional \$10,000 civil penalty per violation in certain cases.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Construe to create uniformity among states which enact statute.

Minn. Stat. § 325F.67 False Statement in Advertising Act

Prohibited Practices: Untrue, deceptive, or misleading advertising.

Scope: Advertising in relation to merchandise, securities, service, or anything offered directly or indirectly to the public for sale or distribution.

Exclusions: None specified.

Private Remedies: See Minn. Stat. § 8.31. See also Minn. Stat. § 325F.71(4) (creating special cause of action for elders and disabled persons for damages, costs, attorney fees, and other equitable relief).

Limitations: See Minn. Stat. § 8.31.

State Remedies: See Minn. Stat. § 8.31. Where conduct perpetrated against older or disabled consumer, Minn. Stat. § 325F.71 provides for an additional \$10,000 civil penalty per violation is available in certain cases.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Minn. Stat. §§ 325F.68 through 325F.70 Prevention of Consumer Fraud Act

Prohibited Practices: Fraud, misrepresentation, false promise, false pretense, misleading statement, or deceptive practice with intent that others rely thereon in connection with sale, whether or not person in fact is misled, deceived or damaged; special restrictions on deceptive billing, pyramid sales, and other specific industries.

Scope: Sale, offer for sale, or attempt to sell merchandise, defined as objects, wares, goods, commodities, intangibles, real estate, loans, or services.

Exclusions: Owners or employees of print, broadcast or other advertising media, unless owner or employee has knowledge of falsity or financial interest in sale of merchandise.

Private Remedies: As specified in Minn. Stat. § 8.31, i.e., actual damages, costs, and attorney fees, and equitable relief as court determines. See also § 325F.71(4) (creating special cause of action for senior citizens and disabled persons for damages, costs, attorney fees, and other equitable relief).

Limitations: None specified, but under § 8.31 consumer must sustain injury to sue.

State Remedies: Attorney general or county attorney may seek injunction. See also attorney general's remedies under § 8.31. Where conduct perpetrated against older or disabled consumer, an additional \$10,000 civil penalty per violation is available in certain cases.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretation: None specified.

Miss. Code Ann. §§ 75-24-1 through 75-24-27 Consumer Protection Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive trade practices, including but not limited to 13 enumerated practices and special restrictions on price gouging in emergency.

Scope: Trade or commerce, defined as advertising, offering for sale, or distribution of any service, any tangible, intangible, personal, real, or mixed property, or any other thing of value.

Exclusions: Advertisements by disinterested publisher, printer, radio or television media, with no knowledge of falsity and no financial interest in product; officer acting under court order.

Private Remedies: Actual damages; attorney fees and costs allowed to prevailing defendant for frivolous, dilatory or harassing suits.

Limitations: Attorney general action in public interest; private action allowed only to person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers ascertainable loss of money or property as a

result of violation; in any private action must make resolution attempt through informal dispute settlement program approved by attorney general; no class actions.

State Remedies: Attorney general and district and county attorneys enforce; injunction; attorney general has rulemaking authority; court may make judgments necessary including restitution, receiver, revocation of license; civil penalty up to \$10,000 per injunction violation, up to \$10,000 per knowing and willful initial violation; criminal penalties.

State UDAP Regulations: None adopted.

Precedential Value of FTC Interpretations: Guided by FTC and federal court interpretations.

Mo. Rev. Stat. §§ 407.010 through 407.307 Merchandising Practices Act

Prohibited Practices: Deception, fraud, false pretenses, false promises, misrepresentations, unfair practices, or concealment or omission of material fact.

Scope: Sale, lease, offer for sale or lease, attempt to sell or lease, distribution, or advertisement of any merchandise including goods, commodities, intangibles, realty or services. Also includes solicitation of funds for any charitable purpose.

Exclusions: Advertisements by publisher, radio and television media, with no knowledge of falsity; institutions supervised by director of insurance, credit unions, or finance unless director authorizes attorney general to act or a statute authorizes attorney general or a private citizen to act; transactions involving new homes, if consumer accepts a new home warranty and contract contains a disclosure; actions for personal injury or death for medical malpractice subject to other Missouri laws.

Private Remedies: Actual damages, punitive damages discretionary; court "may" award attorney fees to prevailing party; equitable relief as is necessary or proper; class action for actual and punitive damages, injunction or other equitable relief; injunction; attorney fees. For damages, consumer must have acted as reasonable consumer would, must establish damages to reasonable degree of certainty, and the practice must be one that would cause a reasonable consumer to enter into the transaction. Special provisions for and restrictions on class actions.

Limitations: For private action, must purchase or lease goods or services for personal, family, household purposes and thereby suffer ascertainable loss of money or property. Under a 2020 amendment, cause of action accrues on date of purchase or lease, or on receipt of notice of an unlawful act.

State Remedies: Attorney general enforces; may issue cease and desist order after giving notice; may seek injunction; court may make necessary orders including receiver, restitution, up to \$5000 civil penalty per violation of injunction or restitution order; costs; up to \$1000 civil penalty for initial violations, unless defendant shows bona fide error despite procedures; rulemaking authority. Criminal penalties are available for willful conduct.

State UDAP Regulations: Mo. Code Regs. Ann. tit. 15, §§ 60-3.010 through 60-4.080, 60-6.010 through 60-9.110—deception; omission of material fact; substantiation for claims; price comparisons; bait and switch; availability of advertised goods; unsolicited merchandise; unfair practices, including price gouging, duty of good faith, duress, breach of contract, unconscionable practices, illegal conduct; timeshare rules; health spas; charitable solicitations; sale prices.

Precedential Value of FTC Interpretations: Interpretive rules make reference to FTC decisions.

Mont. Code Ann. §§ 30-14-101 through 30-14-142 Unfair Trade Practices and Consumer Protection Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices. Special provisions for gift certificates.

Scope: Trade or commerce, defined to include advertising, sale, offering for sale, or distribution of any services, real or personal property, intangibles, or any thing of value.

Exclusions: Actions or transactions permitted under laws administered by state public service commission or state auditor; advertisements by publishers, radio and television media, advertising agency or retail merchants with no knowledge of falsity; national advertising.

Private Remedies: Actual damages or \$500, whichever is greater; treble damages discretionary; court may provide equitable relief necessary or proper; attorney fees “may” be awarded prevailing party; no class actions. A 2005 amendment to § 30-14-131 makes attorney fees mandatory to a prevailing party who “bring[s] a successful action,” but this provision is located in a section of the statute that applies to suits by the state, and the discretionary fee award provision in the section authorizing a private cause of action is unchanged.

Limitations: Consumer must purchase or lease goods or services primarily for personal or family purposes and suffer an ascertainable loss of money or property as a result of violation.

State Remedies: Rulemaking in department of justice consistent with FTC rules and decisions; enforcement by department of justice and, if requested, county attorney; injunction if in public interest and upon notice; court may make additional orders as necessary, including restitution, receiver, revocation of license, and other relief required by equity; court has discretion to dissolve corporate franchise if defendant violates injunction; civil fine of up to \$10,000 per injunction violation, up to \$10,000 per initial violation (plus an additional \$10,000 in certain circumstances if victim is older or developmentally disabled) if willful; criminal penalties for fraudulent conduct; attorney fees to prevailing party for bringing successful action.

State UDAP Regulations: Mont. Admin. R. 23.19.101 through 23.19.507 (general advertising, repair estimates and invoices, motor vehicle repairs, motor vehicle sales); consumer reporting agencies; telemarketing.

Precedential Value of FTC Interpretations: Due consideration and great weight; rules may not be inconsistent with FTC rules and decisions.

Neb. Rev. Stat. §§ 59-1601 through 59-1623 Consumer Protection Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices; antitrust violations.

Scope: Trade or commerce, defined as sale of assets or services and any commerce affecting people of the state. "Assets" includes real or personal property, intangibles and anything of value.

Exclusions: Nonprofit labor, agricultural or horticultural organizations in lawful pursuits; civil penalties do not apply to advertisements by publishers, radio, television, or other advertising media, with no knowledge of falsity; actions and transactions permitted, prohibited, or regulated under laws administered by public service commission, Federal Energy Regulatory Commission, or regulatory body acting under state or U.S. authority, except that insurance transactions, loan brokers, and transactions regulated by funeral board or agriculture department are not exempt; a variety of utility service providers including public power district, irrigation district, electric membership association, joint public power authority, cooperative, municipalities or associations furnishing electricity to consumers.

Private Remedies: Injunction, actual damages; attorney fees and costs; court has discretion to increase damages up to \$1000 to include actual damages that are difficult to measure.

Limitations: Must be injured in business or property for private remedy; statute of limitations 4 years after cause accrues.

State Remedies: Attorney general enforces; injunction; attorney fees and costs discretionary to prevailing party; court may make additional orders for restitution; if state has suffered damages it may sue for actual damages and attorney fee; dissolution of franchise for injunction violation; civil penalty up to \$25,000 for injunction violation, up to \$2000 per initial violation.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Neb. Rev. Stat. §§ 87-301 through 87-306 Uniform Deceptive Trade Practices Act

Prohibited Practices: 20 enumerated deceptive trade practices; unconscionable acts in connection with consumer transaction.

Scope: In course of business, vocation or occupation. Specifically includes transactions conducted wholly or partly within Nebraska against residents or nonresidents, and to transactions conducted outside the state if there is a direct connection to deceptive practices conducted wholly or partly in the state.

Exclusions: Conduct complying with orders, rules, or statute administered by federal, state or local agency; publishers, broadcasters, printers or others who disseminate information without knowledge of deceptive character.

Private Remedies: Injunction; attorney fees in court's discretion to prevailing party if violation was willful and knowing, to prevailing defendant if plaintiff knew suit was groundless; if entered sale or lease, may rescind contract or retain merchandise or service without paying; costs to prevailing party unless court otherwise directs. Proof is by a preponderance of the evidence.

Limitations: Four-year statute of limitations from date of purchase.

State Remedies: Attorney general, or county attorney with consent of attorney general enforces; rulemaking in attorney general; revoke license or other relief if necessary to force defendant to provide information or obey attorney general order; cease and desist orders; injunction; restitution; criminal penalties for initial violation or willful violation of injunction or assurance of voluntary compliance; up to \$2000 civil penalty per initial violation or willful violation of injunction or assurance of voluntary compliance. Attorney general may seek revocation of privilege of conducting business or dissolution of corporation in certain circumstances.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Construe to create uniformity among states enacting statute.

Nev. Rev. Stat. §§ 598.0903 through 598.0999 Trade Regulation and Practices Act; Nev. Rev. Stat. § 41.600

Prohibited Practices: Numerous enumerated deceptive trade practices, including knowing failure to disclose material fact in connection with sale or lease of goods or services; knowing violation of state or federal statute relating to the sale or lease of goods or services; taking advantage of consumer's inability to protect his or her interests due to illiteracy, mental or physical impairment, or similar condition.

Scope: In course of business or occupation.

Exclusions: Conduct complying with orders, rules, or statute administered by federal, state or local agency; publisher, advertising agencies, broadcasters and printers who disseminate information without knowledge of deceptive character.

Private Remedies: Actual damages; any appropriate equitable relief; costs and reasonable attorney fees if victim of consumer fraud prevails (§ 41.600). Older or disabled person suffering injury sue for actual damages, punitive damages, and attorney fees (§ 598.0977).

Limitations: Statute of limitations is four years after aggrieved person discovers or should have discovered the facts constituting the violation (Nev. Rev. Stat. § 11.190). District attorney 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.

State Remedies: Commissioner of consumer affairs, director of department of business and industry, the attorney general, or district attorney enforces; commissioner may issue cease and desist orders; for initial violations may issue cease and desist order, award restitution, require payment of certain costs, and impose administrative fine of \$1000 or treble the amount of restitution; court may order cease and desist order enforced; attorney general may seek injunction; court may make orders necessary including restitution; civil penalty up to \$10,000 for violation of injunction, up to \$5000 plus costs and attorney fees per initial violation if willful; criminal penalties; payment of damages to aggrieved party on all profits derived from knowing and willful practice, and treble damages; rulemaking in commission and director. Additional civil penalty of up to \$12,500 for each violation if practice directed toward older or disabled consumer. State UDAP Regulations: Nev. Admin. Code §§ 119B.260 through 119B.460, §§ 598.200 through 598.560, §§ 599B.011 through 599B.091—comparative price advertising; sellers of travel; tour brokers and tour operators; telephone solicitation; campground memberships.

Precedential Value of FTC Interpretations: None specified.

N.H. Rev. Stat. Ann. §§ 358-A:1 through 358-A:13 Consumer Protection Act

Prohibited Practices: Unfair method of competition or any unfair or deceptive acts or practices including but not limited to 17 enumerated prohibitions.

Scope: Trade or commerce, defined to include advertising, sale, offer of sale, or distribution of any service, real or personal property, intangibles and any other thing of value.

Exclusions: Trade or commerce subject to the jurisdiction of the banking commissioner, the director of securities regulation, the insurance commissioner, the public utilities commissioner, the financial institutions and insurance regulators of other states, or federal banking or securities regulators who possess the authority to regulate unfair or deceptive practices, including trade or commerce under the jurisdiction of and regulated by the bank commissioner relative to retail installment sales of motor vehicles; defendants against whom FTC action is pending for same trade or commerce; publishers, broadcasters, printers or others engaged in dissemination of information without knowledge of its deceptive character.

Private Remedies: Person injured by violation may sue for actual damages and equitable relief including injunction as court deems necessary and proper; \$1000 minimum damages; at least double, no more than treble damages for willful or knowing violation; costs and attorney fees to prevailing plaintiff; class action for actual damages, injunctive or equitable relief, and attorney fees.

Limitations: Statute does not apply to transactions entered into more than three years prior to time plaintiff knew or should have known of conduct violating statute; attorney general must send notice letter prior to suit except in emergency circumstances.

State Remedies: Rulemaking by attorney general under attorney general's general rulemaking power; administered by consumer protection and antitrust division of justice department; attorney general may seek injunction, restitution; court may make necessary orders, may award up to \$10,000 civil penalty per initial violation, unless defendant shows good faith misunderstanding; receiver; criminal penalties for violation of act or injunction; legal costs and expenses may be awarded state; court may dissolve corporate franchise for habitual injunction violations.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Guided by FTC and judicial interpretations.

N.J. Stat. Ann. §§ 56:8-1 through 56:8-91 (West)

Prohibited Practices: Unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation; knowing concealment, suppression or omission of material fact with intent to cause reliance; numerous enumerated prohibitions.

Scope: In connection with sale or advertisement of any merchandise or real estate; sale defined to include rental, distribution, and offer or attempt to sell, rent, or distribute; merchandise includes goods, commodities, services or anything offered to the public for sale; real estate specifically mentioned in prohibition section.

Exclusions: Advertisements by publisher, radio and television media, with no knowledge of advertiser's intent; restrictions on liability of realtors for unknowing communication of false information.

Private Remedies: Actual and treble damages; attorney fees and costs; refund of money; other appropriate legal or equitable relief.

Limitations: Must suffer ascertainable loss of money or property; must mail copy of pleading to attorney general.

State Remedies: Attorney general enforces; attorney general may issue cease and desist order; rulemaking in attorney general; restitution; injunction; receiver; annul corporate charter; revoke license; enjoin from managing or owning business or serving as officer or director; costs to attorney general; penalty up to \$7500 for first offense, up to \$15,000 for each subsequent offense; cease and desist orders; up to \$25,000 per violation of such order. Additional civil penalty of up to \$10,000 if defendant knew or should have known injured victim was older or disabled, up to \$30,000 if violation part of a scheme directed at older or disabled people.

State UDAP Regulations: New Jersey Administrative Rules of the Division of Consumer Affairs, N.J. Admin. Code §§ 13:45A-1.1 through 13:45A-28.8—mail order; freezer meats; sale of unsafe products; furniture delivery; availability of advertised items; deceptive advertising, deceptive pricing; unsubstantiated claims; home appliance repair; pet dealers; unit pricing; refunds; home improvement practices; plain language; entertainment ticket sales; kosher or halal food; toy and bicycle safety; health clubs; motor vehicle advertising; automobile sales; automobile repairs; tires; motor vehicle leasing.

Precedential Value of FTC Interpretations: None specified.

N.M. Stat. Ann. §§ 57-12-1 through 57-12-22 Unfair Practices Act

Prohibited Practices: Unfair or deceptive trade practices (deception must be knowing), including 17 enumerated prohibitions; unconscionable trade practices that, to a person's detriment, take advantage of the knowledge, experience, ability or capacity of a person to a grossly unfair degree, or result in gross disparity between price and value received; referral sales; willful misrepresentation of age or condition of motor vehicle; other specific prohibitions.

Scope: Trade or commerce includes advertising, offering for sale, or distribution 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 or transactions expressly permitted under laws administered by state or U.S. regulatory body, but acts forbidden by that body, or about which it remains silent, are actionable; publishers, broadcasters, printers or others who reproduce material without knowledge of deceptive or unconscionable character.

Private Remedies: \$100 minimum damages; \$300 minimum damages or treble damages if willful; actual damages; person likely to be damaged may seek injunction; attorney fees mandatory if consumer prevails, to defendant if suit groundless; class actions for actual damages. Mediation mandatory if either party requests during 30-day period following service of summons and complaint.

Limitations: Attorney general 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 of money or property.

State Remedies: Attorney general, or district attorney if delegated by attorney general enforces; injunction; restitution; civil penalty up to \$5000 per violation if willful; rulemaking in attorney general; writ of ne exeat may be granted.

State UDAP Regulations: N.M. Code R. §§ 12.2.1.1 through 12.2.7.20, 12.2.11 through 12.2.14; motor vehicle advertising and sales; promotion and advertising of subdivided land, timeshares, condominium, and membership campgrounds; environmental marketing claims; automotive repair; Native American crafts; spot delivery of motor vehicles; automatic renewal of contracts; collection of time-barred debt.

Precedential Value of FTC Interpretations: Guided by FTC and judicial interpretations.

N.Y. Exec. Law § 63(12) (McKinney)

Prohibited Practices: Repeated fraudulent or illegal acts, including deception, suppression, and unconscionable contractual provisions.

Scope: Conduct or transaction of business.

Exclusions: None specified.

Private Remedies: None specified.

Limitations: Attorney general must give notice 5 days before suit.

State Remedies: Attorney general enforces; injunction; restitution; damages; cancel filed certificate; court may award other relief proper.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

N.Y. Gen. Bus. Law §§ 349 through 350-f-1 (McKinney)

Prohibited Practices: Deceptive acts or practices and false advertising, plus prohibitions of certain enumerated specific practices.

Scope: In conduct of business, trade or commerce or furnishing of any service in state.

Exclusions: Action subject to and in compliance with rules of FTC or other federal agency; any broadcaster or printer of advertising.

Private Remedies: Any person who has been injured may seek injunction for deceptive act; actual damages or \$50, whichever is greater; treble damages discretionary up to \$1000 if willful or knowing violation; court "may" award attorney fees to prevailing plaintiff.

Limitations: Attorney general must give notice before suing, unless not in public interest; private action predicated on injury.

State Remedies: Attorney general enforces; injunction, restitution available for deceptive act; \$500 civil penalty per initial violation; up to \$10,000 additional civil penalty for consumer frauds against older persons.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

N.C. Gen. Stat. §§ 75-1.1 through 75-35

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices; antitrust violations; special provisions for specific industries.

Scope: In or affecting commerce, which includes all business activities.

Exclusions: Professional services by member of learned profession; advertisements by a disinterested publisher, radio or television media, with no knowledge of falsity.

Private Remedies: Actual damages; treble damages; attorney fees may be awarded in court's discretion to prevailing plaintiff in case of willful violation and unwarranted refusal by defendant to resolve suit, to prevailing defendant if action frivolous and malicious.

Limitations: Private action based on injury to person or business; statute of limitations is 4 years after cause accrues, but tolled for private action while state action pending and 1 year afterwards.

State Remedies: Attorney general enforces; injunction; court “may” order restitution or cancel contracts; court has discretion to impose up to \$5000 civil penalty per knowing violation or violation of court order.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

N.D. Cent. Code §§ 51-15-01 through 51-15-11

Prohibited Practices: Deceptive acts or practices, fraud, false pretense, false promise, or misrepresentation with intent others rely on it; acts or practices that are unconscionable or that are likely to cause substantial injury to a person which is not reasonably avoidable by the injured person and not outweighed by countervailing benefits to consumers or to competition. A provision that is explicitly made enforceable only by the state provides that it is a violation to provide assistance or support while knowing or consciously avoiding knowing that a person is violating the statute.

Scope: Sale or advertisement of any merchandise, or any charitable solicitation; sale includes offers for and attempts to sell; merchandise includes goods, commodities, intangibles, realty, charitable contributions or services.

Exclusions: Advertisements by publisher, radio and television media, with no knowledge of advertiser’s intent.

Private Remedies: Actual damages; discretionary treble damages and mandatory costs and attorney fees where violation knowingly committed.

Limitations: Attorney general must give notice before seeking injunction.

State Remedies: Attorney general enforces and has rulemaking power; injunction; cease and desist order; receiver; restitution; costs, investigation fees; expenses and attorney fees to attorney general; attorney general may impose civil penalty up to \$1000 for violation of cease and desist order; court “may” assess statutory penalty of up to \$5000 per initial violation.

State UDAP Regulations: N.D. Admin. Code §§ 10-15-01.01 through 10-15-01.11—retail price advertising.

Precedential Value of FTC Interpretations: None specified.

Ohio Rev. Code Ann. §§ 1345.01 through 1345.13 (West) Consumer Sales Practices Act

Prohibited Practices: Unfair and deceptive act or practice including but not limited to 10 enumerated prohibitions, plus two prohibitions applicable to certain residential mortgage loans; any unconscionable act or practice, determined by considering 7 enumerated

factors; special prohibition of unconscionable practices in connection with certain residential mortgage loans.

Scope: Applies to acts by supplier, defined as seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with consumer. Must also be consumer transaction, defined as sale, lease, assignment, award by chance or transfer of goods, service, franchise or intangible to individual for personal, family, household purpose.

Exclusions: Transactions between entities regulated by public utilities commission and their customers; between financial institutions, dealers in intangibles, or insurance companies and their customers (but residential mortgage transactions with loan officers, mortgage brokers, and nonbank mortgage lenders are specifically included); between CPAs, public accounts, attorneys, physicians or dentists and clients or patients; transactions between veterinarians and patients for medical treatment; acts required or specifically permitted by federal or state law except attorney general may seek injunction in some circumstances; 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; purely real estate transactions (exempt by judicial decision).

Private Remedies: Rescind transaction (with exception for residential mortgage loans); actual damages; treble damages or minimum \$200 for certain violations; declaratory judgment; injunction; class action for actual damages or "other appropriate relief" for certain violations; court may award attorney fees to prevailing party if consumer action is groundless and in bad faith or supplier commits a knowing violation. Attorney fees for prevailing consumer if supplier acted knowingly. Non-economic damages are capped at \$5000. It was vetoed by the governor.

Limitations: Attorney general brings actions in public interest; 2-year statute of limitations after occurrence for attorney general actions, 2 years after occurrence or 1 year after attorney general action terminates for private action; consumer may assert counterclaim in supplier's suit without regard to statute of limitations; in action for rescission, revocation must occur within reasonable time after discovers or should have discovered violation and before substantial change in condition of subject of transaction; private action by consumer precludes inclusion in subsequent class action by attorney general on same transaction. No civil penalties, attorney fees or amounts beyond actual damages if supplier proves bona fide error despite reasonable procedures; if acts were permitted by FTC rule, trade regulation or federal court interpretation of FTC Act and not prohibited by rule adopted before occurrence, no private action allowed and attorney general is limited to injunctive relief; in private action, consumer must choose between rescission and damages. Special protections for assignees of residential mortgage loans.

State Remedies: Attorney general has substantive and procedural rulemaking powers and acts upon petition of any person; attorney general enforces; may seek declaratory judgment; injunction; \$5000 per each day injunction is violated if supplier has notice; class actions for consumers damaged by certain violations; receiver; restitution; performance of transaction in accord with consumer's reasonable expectations; strike

unconscionable clauses; other appropriate relief; court may impose up to \$25,000 civil penalty for certain initial violations; criminal penalties available for “slamming” by natural gas or public telecommunications services.

State UDAP Regulations: Ohio Attorney General Consumer Protection Rules, Ohio Admin. Code 109:4-3-01 through 109:4-3-30—automobile sales; bait and switch; contests; deceptive pricing; delay and nondelivery; failure to disclose; door-to-door sales; insulation; misrepresentations of method of selecting consumer and seller’s status; other prohibited practices; repairs and services; used for new; advertisement and sale of motor vehicles (amended); motor vehicle rust inhibitors; sale of gasoline containing alcohol; distress sales; motor vehicle repairs and services; use of the word “free.”

Precedential Value of FTC Interpretations: Due consideration and great weight in interpretation of deceptive acts and in rulemaking.

Ohio Rev. Code Ann. §§ 4165.01 through 4165.04 (West) Deceptive Trade Practices Act

Prohibited Practices: 13 enumerated deceptive trade practices.

Scope: In course of business, vocation or occupation.

Exclusions: Conduct complying with orders, rules, or laws administered by government agency; publishers, broadcasters, printers or other persons who disseminate information without knowledge of deception.

Private Remedies: Injunction; actual damages; court may award attorney fees to plaintiff if willful and knowing violation, to defendant if plaintiff knew action to be groundless. No requirement of monetary damage.

Limitations: None specified.

State Remedies: None specified.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Okla. Stat. tit. 15, §§ 751 through 763 Consumer Protection Act

Prohibited Practices: 32 enumerated unlawful practices.

Scope: In course of person’s business. Many substantive prohibitions apply only to consumer transactions, defined as advertising, offering for sale, purchase, sale, or distribution of services, real or personal property, intangibles, or other thing of value, for purposes that are personal, household, or business oriented.

Exclusions: Advertisements by publisher, radio and television media, with no knowledge of unlawful practice; actions or transactions regulated under laws administered by

corporation 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.

Private Remedies: Aggrieved consumer may sue for actual damages, costs and attorney fees. Costs and attorney fees to either party up to \$10,000 if a claim or defense is in bad faith or groundless. Civil penalties up to \$2000 per violation recoverable in individual action for unconscionable conduct.

Limitations: None specified.

State Remedies: Attorney general or district attorney enforces; declaratory judgment; injunction; actual damages; expenses and investigation fees; restitution; order that defendant carry out transaction in accord with consumer's reasonable expectations; receiver; revocation of license; other appropriate relief; civil penalty up to \$10,000 per initial violation if willful, \$10,000 per willful violation of injunction or court order plus other penalties as court deems necessary and proper; costs, investigation expenses, and attorney fees; criminal penalties.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Okla. Stat. tit. 78, §§ 51 through 55 Deceptive Trade Practices Act

Prohibited Practices: 14 enumerated deceptive trade practices.

Scope: In course of business, vocation or occupation.

Exclusions: Conduct complying with order, rules, or statute administered by federal, state or local agency; advertisements by publisher, radio and television media, with no knowledge of falsity; new car franchise dealers covered by motor vehicle commission law.

Private Remedies: Injunction; actual damages; court has discretion to award attorney fees to prevailing party, with fees mandatory to prevailing party if suit based on willful violation or plaintiff acting in bad faith; trade associations may bring suit for injunction on behalf of its members. No requirement of monetary damage.

Limitations: None specified.

State Remedies: For violation of telephone directory prohibitions, attorney general may seek injunction, restitution, and reasonable expenses, plus attorney fees under same rules as private suits.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Or. Rev. Stat. §§ 646.605 through 646.656 Unlawful Trade Practices Law

Prohibited Practices: Numerous enumerated unlawful practices, including general prohibitions of unconscionable acts and unfair or deceptive conduct as defined by attorney general rule. “Representation” is defined to include failure to disclose.

Scope: Trade or commerce, defined as advertising, offering, or distributing, by sale, rental, or otherwise, any real estate (defined to exclude conduct covered by the state landlord-tenant law), goods or services, including loans and extensions of credit, obtained primarily for personal, family or household purposes or as a result of a telephone solicitation; franchises, distributorship, and other similar business opportunities. Acts are violations if done in the course of the person’s business, vocation, or occupation.

Exclusions: Insurance; conduct complying with orders, rules, or statute administered by federal, state or local agency; advertisements by publisher, radio and television media, with no knowledge of falsity; landlord-tenant matters.

Private Remedies: Actual damages; \$200 minimum damages; punitive damages; equitable relief; court may award costs and attorney fees to prevailing plaintiff, or to prevailing defendant if there was no objectively reasonable basis for bringing suit or appeal, but not to prevailing defendant in class action. Class actions specifically allowed, and relief may include punitive damages and equitable relief, but statutory damages only if class members have sustained ascertainable loss of money or property as result of reckless or knowing violation.

Limitations: Attorney general or district attorney acts upon probable cause; private action must be based on ascertainable loss of money or property as result of willful violation; no judgment rendered for plaintiff until plaintiff sends copy of complaint to attorney general; private action statute of limitations is one year from discovery, tolled during state prosecution of violation, limitations waived for counterclaims against seller or lessor of realty, goods, or services; does not create private cause of action for violation of certain vehicle registration, odometer disclosure, and odometer tampering laws, or for violation of Or. Rev. Stat. § 646.607, which prohibits unconscionable tactics, failure to deliver, and violation of the state debt collection law and several other statutes; private cause of action is available for violation of catchall prohibition of “other unfair or deceptive conduct” only if attorney general has promulgated a rule declaring the conduct to be unfair or deceptive.

State Remedies: Attorney general has rulemaking power; attorney general or district attorney enforces; injunction; notice letter required before seeking injunction except in specified circumstances; court may award attorney fees to prevailing party, and shall award fees to prevailing defendant if district attorney or attorney general did not have reasonable grounds or defendant offered to agree to satisfactory assurance of voluntary compliance before suit; court may make additional orders including restitution; civil penalty up to \$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.

State UDAP Regulations: Or. Admin. R. 137-020-0010 through 137-020-0805—deceptive advertising; free offers; motor vehicle sales, motor vehicle advertising; manufactured home consignments; federal credit and leasing laws; plain language; gasoline advertising; telemarketing; advance fee loan broker solicitations; unordered property; prize promotions; manufactured dwellings; notarios; mortgage loan servicing.

Precedential Value of FTC Interpretations: None specified.

73 Pa. Stat. Ann. §§ 201-1 through 201-9.3 (West) Unfair Trade Practices and Consumer Protection Law

Prohibited Practices: 21 enumerated unfair methods of competition and unfair or deceptive acts or practices, including a catchall prohibiting any other fraudulent or deceptive conduct likely to create confusion or misunderstanding; separate sections providing cancellation rights for home solicitation sales and protections for dog purchasers.

Scope: Trade and commerce means advertising, sale, offering for sale, or distribution of any service, real or personal property, intangibles and any other thing of value.

Exclusions: Advertisements in good faith by publisher, radio and television media, with no knowledge of falsity.

Private Remedies: Actual damages; \$100 minimum damages; treble damages discretionary; “may” award attorney fees and costs; may provide additional relief if proper.

Limitations: State action for injunction must be in public interest; private action authorized only for persons who purchase or lease goods or services primarily for personal, family or household purposes and thereby suffer ascertainable loss of money or property as a result of unlawful act.

State Remedies: Attorney general has rulemaking power; attorney general or district attorney enforces; injunction; court has discretion to award restitution; civil penalty up to \$5000 per violation of injunction or assurance of compliance, \$1000 per willful initial violation (\$3000 if victim is 60 years or older); equitable relief deemed proper; court has discretion to dissolve business for violation of injunction; may appoint a receiver.

State UDAP Regulations: Pa. Regulations of the Bureau of Consumer Protection, 37 Pa. Code §§ 301.1 through 309.2—automotive industry, loan broker practices, plain language; sale of dogs.

Precedential Value of FTC Interpretations: None specified.

P.R. Laws Ann. tit. 3, §§ 341 through 341w Department of Consumer Affairs Organic Act

Prohibited Practices: Fraud, deceit, or misrepresentation of brand, price, quantity, size, quality, guaranty, or wholesomeness of a product, article, or service.

Scope: Not specified.

Exclusions: None specified.

Private Remedies: Consumer may make administrative complaint to department of consumer affairs. Any party adversely affected by department's ruling may appeal to court.

Limitations: None specified.

State Remedies: Department of consumer affairs may issue cease and desist orders and impose fines up to \$10,000 for initial violation or violation of order.

State UDAP Regulations: Department of consumer affairs has rulemaking authority.

Precedential Value of FTC Interpretations: None specified.

P.R. Laws Ann. tit. 10, §§ 257 through 273 Fair Competition Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts and practices in trade or commerce.

Scope: Applies to any natural or artificial person who draws substantial income from used or consumed goods or services rendered in Puerto Rico and/or receives substantial income within the scope of the economy of Puerto Rico or from any impact or effect in a specific local market.

Exclusions: None specified.

Private Remedies: No private remedy for violation of § 259, the section which forbids unfair and deceptive acts and practices.

Limitations: Statute of limitations for criminal proceedings is four years after commission of last act constituting in whole or in part the violation charged.

State Remedies: Office of monopolistic affairs may bring administrative complaints before the department of consumer affairs. Judicial review available. Civil penalties of up to \$5000 for violation of department of consumer affairs order of knowing violation of regulations. Certain violations are misdemeanors, punishable by a fine of \$5000 to \$50,000 or up to one year in jail. Secretary of justice may sue to enjoin or punish violations. Violation of court order is contempt, punishable by fine up to \$25,000 or one year in jail.

State UDAP Regulations: Office of monopolistic affairs has rulemaking authority.

Precedential Value of FTC Interpretations: None specified.

R.I. Gen. Laws §§ 6-13.1-1 through 6-13.1-27 Unfair Trade Practice and Consumer Protection Act

Prohibited Practices: 21 enumerated unfair or deceptive acts or practices of competition and unfair or deceptive practices, plus special provisions for specific industries.

Scope: Trade or commerce, defined as advertising, sale, offering for sale, or distribution of any service, real or personal property, intangibles, and any other thing of value.

Exclusions: Actions or transactions permitted under laws administered by department of business regulation or other state or federal regulatory body.

Private Remedies: Actual damages; minimum \$200; punitive damages; equitable relief as court deems proper; class action for actual, minimum, and punitive damages and court has discretion to award injunction or other equitable remedy; court may award attorney fees and costs.

Limitations: Attorney general action for injunction if in public interest and notice given; private action authorized only for person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers ascertainable loss of money or property as result of unlawful act.

State Remedies: Attorney general enforces; injunction; court may make additional orders necessary including restitution, receiver, revocation of license; civil penalty up to \$10,000 per injunction violation and court may order dissolution of corporation.

State UDAP Regulations: R.I. Department of Attorney General, Consumer Protection Division Rules & Regulations, R.I. Code R. tit. 110, §§ 40-00-3.1 through 40-00-4.5 (time shares and odometer tampering).

Precedential Value of FTC Interpretations: Due consideration and great weight.

S.C. Code Ann. §§ 39-5-10 through 39-5-160 Unfair Trade Practices Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices.

Scope: Trade or commerce, defined to include advertising, sale, offering for sale, or distribution of any service, real or personal property, intangible or any other thing of value.

Exclusions: Actions or transactions permitted under laws administered by state or federal regulatory body, or permitted by any other state law; advertisements by disinterested publisher, radio and television media, with no knowledge of falsity; actions governed by §§ 38-55-10 through 38-55-410 relating to regulation of insurance; actions that comply with FTC rules, decisions, and statutes.

Private Remedies: Actual damages; treble damages for willful or knowing violation and court “may” provide other relief deemed proper; attorney fees and costs to successful plaintiff.

Limitations: Attorney general action for injunction if in public interest and upon notice; private action predicated on ascertainable loss of money or property; private action may not be brought in representative capacity; statute of limitations is 3 years after discovery.

State Remedies: Attorney general, county or city attorney upon attorney general approval enforces; injunction with costs to state; court may make additional orders necessary including restitution, revocation of license; rulemaking; civil penalty up to \$5000 per initial violation if willful, up to \$15,000 per injunction violation; court may dissolve corporation that violates injunction.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Guided by FTC interpretations.

S.D. Codified Laws §§ 37-24-1 through 37-24-35 Deceptive Trade Practices and Consumer Protection Law

Prohibited Practices: 14 enumerated deceptive practices, including knowing omission of material fact in connection with sale or advertisement of merchandise.

Scope: No scope limitations.

Exclusions: Advertisements by 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 4 years after discovery.

State Remedies: Director of Consumer Protection has rulemaking power; attorney general or state's attorney with attorney general approval has enforcement power; injunction; civil penalty up to \$5000 per violation of injunction, up to \$2000 per intentional initial violation; reasonable attorney fees and costs if state wins injunction; court may make necessary additional orders including restitution and receiver. For state actions, engaging in a practice is prima facie evidence that it is done knowingly and intentionally; criminal penalties.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Tenn. Code Ann. §§ 47-18-101 through 47-18-125 Consumer Protection Act

Prohibited Practices: Unfair or deceptive acts or practices, including but not limited to 51 enumerated prohibitions; special provisions for specific practices.

Scope: Trade, commerce, or consumer transaction, defined as advertising, offering for sale, lease, rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated.

Exclusions: Acts or transactions required or specifically authorized by laws administered by, or rules promulgated by, state or federal regulatory body or officer; advertisements by publisher, radio and television media, who have not been notified of falsity by division of consumer affairs; credit terms except insofar as state equal consumer credit act

applies; retailer disseminating manufacturer's claims in good faith and without actual knowledge of violation.

Private Remedies: Actual damages; if willful or knowing violation, court may award treble damages and grant other relief necessary and proper; declaratory judgment; injunction, provided no state action filed; court "may" award attorney fees and costs to prevailing plaintiff, and to defendant if action frivolous, without merit, or for purposes of harassment. Only attorney general may enforce catchall prohibition of "any other" deceptive act or practice. No private cause of action for violation involving marketing or sale of a security. Class actions for damages prohibited. Court may not award exemplary or punitive damages for the same violation for which treble damages are awarded.

Limitations: Injunction if in public interest and upon notice; private action if suffered ascertainable loss of money or property, but anyone "affected by" violation may seek injunction; 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 for private rights of action is 1 year from discovery but in no event more than 5 years from transaction. No statute of limitations mentioned for actions brought by state. The Act's private damages remedy does not apply to violation of state equal consumer credit act.

State Remedies: Attorney general enforces; injunction; costs and attorney fees; restitution; revoke license for knowing and persistent violation; civil penalty up to \$1000 per initial violation or knowing violation of assurance of voluntary compliance, up to \$2000 for knowing violation of injunction, up to \$10,000 per initial violation that targets persons 60 years old or older; criminal penalties.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Interpreted and construed consistently with FTC.

Tex. Bus. & Com. Code Ann. §§ 17.41 through 17.63 (West) Deceptive Trade Practices—Consumer Protection Act

Prohibited Practices: Deceptive acts or practices, including but not limited to 34 enumerated prohibitions; also creates cause of action for breach of warranty, certain insurance violations, and unconscionable acts, defined as those that, to the consumer's detriment, take advantage of lack of knowledge, ability, experience, or capacity to a grossly unfair degree.

Scope: Trade or commerce, defined as advertising, offer for sale, sale, lease, or distribution of any service, good, real or personal property, intangible or any other thing of value.

Exclusions: Financially disinterested owners or employees of newspaper, magazine, telephone directory, billboard, broadcast station who advertise without knowledge; acts authorized by FTC rules or regulations; claims for bodily injury or death, or mental anguish other than specifically provided. Limited exemptions for certain types of acts and omissions by persons providing professional services and for real estate brokers

and sales agents; for certain written contracts for more than \$100,000; and for all written contracts for more than \$500,000 not involving a consumer's residence.

Private Remedies: Consumer may seek economic damages, injunction, restitution, other relief including receiver and, in some circumstances, license revocation; if the acts were "knowingly" committed, consumer may recover for mental anguish and treble economic damages; if "intentionally," both types of damages may be trebled. Prevailing consumer entitled to costs and fees; defendant if suit was groundless, in bad faith, or brought for purposes of harassment. Either party may demand mediation. For deceptive practices claim, consumer must show detrimental reliance on one of the specifically enumerated deceptive acts.

Limitations: Consumer may bring deceptive practices suit only for enumerated practices, and only if detrimental reliance. Consumer may sue only if violation is producing cause of economic damages or mental anguish. No double recovery of actual damages and penalties for same act; consumer must give specific notice 60 days prior to damages action unless statute of limitations would run. Statute creates defense if defendant tenders full amount of economic and mental anguish damages claimed, plus reasonable attorney fees, within 30 days after notice letter; if plaintiff rejects an offer made within 60 days of notice letter, 90 days after answer filed, or 20 days after mediation, and court finds plaintiff not entitled to larger amount, plaintiff's recovery is limited and only attorney fees incurred before offer may be awarded; defense also exists if proves gave plaintiff written notice of defendant's reliance without knowledge on false information, provided in government records, tests, or another source; in addition, a general post-offer fee-shifting statute, Tex. Civ. Prac. & Rem. Code §§ 42.001 through 42.005, makes consumer who rejects defendant's offer and then wins significantly less at trial in a non-class action liable for defendant's post-offer litigation expenses, including attorney fees, up to a cap. Statute of limitations 2 years from discovery of violation; additional 180 days given if consumer proves defendant knowingly induced postponement of action. Waivers authorized under specified circumstances. Consumer filing class action must notify consumer protection division and give it opportunity to intervene.

State Remedies: Consumer protection division and district attorney or county attorney upon notice to division enforces; injunction; restitution; receiver; civil penalty up to up to \$10,000 per initial violation, plus up to \$250,000 more if victim was 65 or older; up to \$10,000 per violation of injunction (not to exceed total of \$50,000); criminal penalties. Attorney general may intervene in private class actions. State acts in public interest and upon notice for injunction.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Guided by FTC Act and interpretations.

Utah Code Ann. §§ 13-2-1 through 13-2-8 and 13-5-1 through 13-5-18 (West) Unfair Practices Act

Prohibited Practices: Unfair methods of competition, including many enumerated unlawful practices primarily relating to antitrust, but also including advertising goods, wares, or merchandise without being prepared to supply them.

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 to meet price competition; sale under court order; sales at prices set by interstate competition.

Private Remedies: Injunction; actual damages; treble damages, minimum \$2000 damages; court costs; contract made in violation is illegal and no recovery may be had on it.

Limitations: Division acts in public interest; actual damages given only if injury occurred.

State Remedies: State may seek injunction; civil penalty up to \$2000 per day of injunction violation upon notice of injunction; criminal penalties.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Utah Code Ann. §§ 13-11-1 through 13-11-23 (West) Consumer Sales Practices Act

Prohibited Practices: Deceptive acts or practices by a supplier in consumer transaction, including but not limited to 23 enumerated prohibitions, and unconscionable practices; special prohibition regarding targeted marketing to financial institution account holders by an entity that does not hold the account.

Scope: Consumer transactions, defined as offers or solicitations and sale, lease, assignment, award by chance, or other transfer or disposition of goods, services, or other tangible or intangible property for primarily personal, family or household purposes, including business opportunity requiring expenditure of money or property and personal services on continuing basis and charitable solicitations.

Exclusions: Securities and insurance; act or practice required or specifically permitted by or under state or federal law; claims for personal injury, death, or damage to property other than subject of consumer transaction; credit terms; public utilities regulated by state public service commission; publisher, broadcaster, printer or other person who disseminates information for others if done without actual knowledge of violation.

Private Remedies: Declaratory judgment and injunction regardless of whether consumer has suffered actual damages or has adequate remedy at law, actual damages with minimum of \$2000 plus court costs; class actions for declaratory judgment, injunction and appropriate ancillary relief or, in specified circumstances, actual damages; court

“may” award attorney fees to consumer if violation shown, to defendant if consumer’s action is groundless.

Limitations: If supplier proves bona fide error despite reasonable procedures, damages in class action brought by state or consumer are limited to unjust enrichment; statute of limitations is 2 years from violation, extended in private actions to 1 year after state action terminates; no statute of limitations on consumer counterclaims; detailed special provisions for consumer class actions; consumer action predicated upon loss suffered.

State Remedies: Division of consumer protection or state official (see Utah Code Ann. § 13-2-1 (West)) or agency with supervisory authority over supplier enforces; division of consumer protection may issue cease and desist order and impose administrative fine of \$2500 per initial violation; civil penalty up to \$5000 per day of injunction violation; substantive and procedural rulemaking; declaratory judgment; injunction; actual damages for consumers who complained; fine; class action for actual damages for consumers in specified circumstances; reasonable attorney fees and costs; court may make appropriate orders, including receiver, reimbursement, carry out transaction in accord with consumer’s reasonable expectations, strike unconscionable clauses, grant other relief.

State UDAP Regulations: Rules for the Utah Consumer Sales Practices Act, Utah Admin. Code r. 152-11-1 through 152-11-13—exclusions and limitations in advertising; bait advertising; use of the word “free”; repairs and services; prizes; new for used; substitution of goods; door-to-door sales; deposits and refunds; franchises, distributorships, and referral sales; travel packages; negative option sales.

Precedential Value of FTC Interpretations: Construe to avoid inconsistency with FTC policies and to create uniformity among states enacting similar statutes.

Utah Code Ann. §§ 13.11a-1 through 13.11a-5 (West) Truth in Advertising

Prohibited Practices: Twenty enumerated deceptive practices.

Scope: Practices in course of defendant’s business, trade, or occupation. Most substantive prohibitions involve “goods or services,” which are broadly defined.

Exclusions: Conduct in compliance with orders or rules of, or statute administered by, a federal, state, or local governmental agency; publishers and others who disseminate information without knowledge of deception.

Private Remedies: Any person may sue for injunction and, if injured, for actual damages or \$2000, whichever is greater. Court may award costs and shall award attorney fees to prevailing party.

Limitations: No action for injunctive relief may be brought unless plaintiff first gives notice to defendant and allows defendant an opportunity to publish a correction notice.

State Remedies: State may seek injunction and same remedies as private plaintiff.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Vt. Stat. Ann. tit. 9, §§ 2451 through 2480g Consumer Protection Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts or practices.

Scope: In commerce.

Exclusions: Advertisements by publisher, radio and television media, with no knowledge of fraudulent intent.

Private Remedies: Equitable relief; actual damages; restitution; attorney fees; exemplary damages not exceeding treble the consideration given.

Limitations: State acts in public interest. Private action limited to consumers, defined as those who purchase goods or services (defined as objects, wares, goods, commodities, work, labor, intangibles, courses of instruction or training, securities, bonds, debentures, stocks, real estate, or other property or services of any kind) for specified purposes other than resale; for private action plaintiff must show injury or reliance.

State Remedies: Attorney general rulemaking consistent with FTC Act; attorney general, or state's attorney if authorized by attorney general, enforces; injunction; dissolution of corporation; civil penalty up to \$10,000 per initial violation or violation of injunction; restitution to consumer; expenses and reasonable value of attorney general's services; court may authorize any relief in public interest.

State UDAP Regulations: Vt. Consumer Fraud Rules, Vt. Admin. Code 3-2-100:CP 100 through 3-2-118:CP 120—automobile advertising; bait advertising, contests and prizes; debt collection; deceptive pricing; substitution of products and nondelivery; credit reporting; chain distribution schemes (pyramids); refunds; telephonic home solicitation sales; rent-to-own disclosures; sale of vacation packages; LPG gas sales; distress sales; charitable solicitations; odometers; statements of origin of fruits and vegetables; representations of Vermont origin.

Precedential Value of FTC Interpretations: Guided by FTC construction.

Va. Code Ann. §§ 59.1-196 through 59.1-207 Consumer Protection Act

Prohibited Practices: Numerous prohibited practices, including catchall for any other deceptive practices. See also § 18.2-216 (false advertising), enforceable under § 59.1-68.3.

Scope: Committed by a supplier (including sellers, lessors, licensors, manufacturers, and distributors) in connection with a consumer transaction, defined as the advertisement, sale, lease or offer for sale or lease of goods or services for personal, family or household purposes, certain business opportunities, layaway agreements, sales to churches, and goods or services relating to finding or obtaining of employment;

“goods” defined to include all real, personal, or mixed property, tangible or intangible, plus computer information and informational rights.

Exclusions: Aspects of consumer transactions authorized under state or U.S. laws, regulations or advisory opinions; advertisements by publisher, owner, agent or employee of a newspaper, periodical or radio or television station, or other advertising media, with no knowledge of falsity; aspects regulated by federal Consumer Credit Protection Act; banks, savings institutions, credit unions, small loan companies, and public service corporations; mortgage lenders as defined in § 6.1-409, broker-dealers as defined in § 13.1-501 and insurance companies regulated and supervised the state corporation commission or a comparable federal regulating body; any aspect of a consumer transaction subject to the landlord and tenant act, §§ 55-217 through 55-248 or the residential landlord and tenant act, §§ 55-248.2 through 55-248.4 unless the act or practice of a landlord constitutes misrepresentation or fraudulent act or practice under § 59.1-200; and real estate licensees who are licensed under §§ 54.1-2100 through 54.1-2111.

Private Remedies: Actual damages or \$500, whichever is greater, or in the case of a willful violation, damages may be increased to three times actual damages or \$1000 whichever is greater; court “may” award reasonable attorney fees and court costs; court may make additional orders for restitution.

Limitations: State must give pre-suit notice in most cases; private action based on loss suffered; restitution allowed only to consumers identified within 180 days from grant of permanent injunction. No liability imposed upon a supplier who proves violation was act or practice of a manufacturer or distributor over which the supplier had no control or resulted from bona fide error despite procedures, but court may still order restitution and payment of reasonable attorney fees and court costs to individuals aggrieved by unintentional violation. Statute of limitations is two years from accrual, but tolled during government suit. If defendant delivers written cure offer including at least \$500 for attorney fees and inconvenience before filing answer, it may be introduced into evidence at trial, and supplier is not liable for consumer’s attorney fees and court costs unless the actual damages awarded, without consideration of attorney fees and court costs, exceed the offer.

State Remedies: Attorney general, commonwealth attorney, city, county, or town attorney enforces; injunction; restitution; civil penalty up to \$2500 plus up to \$1000 for expenses per initial violation if willful, up to \$5000 plus up to \$1000 for expenses per violation of injunction or assurance of voluntary compliance; contempt for violation of any court order.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

V.I. Code Ann. tit. 12A, §§ 101 through 123 and 180 through 185 Consumer Protection Law of 1973

Prohibited Practices: Deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts, including but not limited to 16 enumerated practices. Additional prohibitions on deceptive pricing in § 121. Additional requirements for price disclosure of prescription drugs. Prohibited practices by motor vehicle dealers and repair shops enumerated at §§ 183 and 184.

Scope: Covers sale, lease, rental or loan, or the offer of sale, lease, rental or loan of consumer goods, or collection of consumer debt. Consumer goods and consumer debts are defined to mean goods, services, credit, and debts primarily for personal, household or family purposes.

Exclusions: None specified.

Private Remedies: Consumer who suffers a loss as a result of violation of this chapter may sue for the greater of actual damages or \$250 in individual action. May also seek declaratory judgment or injunction regardless of whether has suffered damages or has adequate remedy at law. Consumer class actions available for declaratory judgment, injunction, ancillary relief other than damages, and, in some circumstances, damages. Criteria for class certification similar to federal. Attorney fees to prevailing party, if merchant violated this chapter or consumer brought action known to be groundless.

Limitations: For private action, statute of limitations is 2 years after violation, 1 year after last payment, or 1 year after termination of state proceedings, whichever is later; for commissioner's class action, 2 years. If merchant shows bona fide error despite reasonable procedures, recovery is limited to amount by which merchant was unjustly enriched. Before bringing civil action against motor vehicle dealer or repair shop, consumer must submit the dispute to the department of licensing and consumer affairs.

State Remedies: Director of consumer services administration has rulemaking power. Commissioner of licensing and consumer affairs, after a hearing, may impose administrative fines of up to \$5000 per violation. May petition court for enforcement; court may impose up to \$5000 additional fine for noncompliance. In case of repeated violation may petition for court order requiring violator to pay all proceeds of violations into court for consumer redress, and court may revoke business's license.

Commissioner may sue to enjoin violations. Court may award costs and attorney fees to prevailing party. Commissioner may bring class action on behalf of consumers.

State UDAP Regulations: 12A V.I. Code R. §§ 102(a)(2)-1 through 102(a)(11)-15—car rentals, refund policy disclosure, truth-in-pricing, layaway plans, jewelry repair and appraisals, sale of furniture, posting of prescription drug prices, deceptive price marking, display of octane rating and price.

Precedential Value of FTC Interpretations: Construe to supplement FTC rules, regulations, and decisions. State regulations may supplement but shall not be inconsistent with UCC, UCCC, and FTC Act rules, regulations and decisions.

Wash. Rev. Code §§ 19.86.010 through 19.86.920 Consumer Protection Act

Prohibited Practices: Unfair methods of competition and unfair or deceptive acts; monopolization and restraint of trade. Violations of numerous other statutes are per se violations of § 19.86.

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 by publisher, radio and television media, in good faith and with no knowledge of falsity; actions or transactions permitted, prohibited, or regulated by the state insurance commissioner (with significant exceptions), utilities and transportation commission, or federal power commission; actions or transactions permitted by other state or federal regulatory body or officer.

Private Remedies: Injunction; actual damages; costs and attorney fees; treble damages at court's discretion, not to exceed \$25,000.

Limitations: Private action predicated upon injury to business or property; statute of limitations is 4 years after cause accrues, but tolled during pendency of attorney general action in most circumstances. Act must be injurious to public interest.

State Remedies: Attorney general enforces; injunction; restitution; court has discretion to award prevailing party costs and attorney fees; civil penalty of up to \$2000 per initial violation (up to \$500,000 for certain antitrust violations), up to \$25,000 for injunction violation; court may order dissolution of corporation that violates injunction.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: Guided by FTC interpretations.

W. Va. Code §§ 46A-6-101 through 46A-6-110

Prohibited Practices: Unfair methods of competition and unfair or deceptive practices, including 16 enumerated prohibitions.

Scope: Trade or commerce, defined as advertising, sale, offering for sale, or distribution of any goods or services.

Exclusions: Statute states that legislative intent is that Act should not be construed to prohibit acts that are reasonable to develop and preserve business or that are not injurious to public interest; not to be interpreted to repeal §§ 47-11A-1 through 47-11A-14 (antitrust) or §§ 47-11B-1 through 47-11B-17 (closeout sales, fire sales and defunct business sales); advertisements by disinterested publisher, radio and television media, with no knowledge of falsity and without involvement in preparation.

Private Remedies: Actual damages or \$200 minimum damages, whichever is greater, provided that plaintiff suffered an actual out-of-pocket loss that was proximately caused by a violation; 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. W. Va. Code § 46A-5-104 allows the court to award reasonable attorney fees to the consumer in any action involving illegal, fraudulent, or unconscionable conduct or any prohibited debt collection practice. The court may award fees to the defendant if the consumer brought the case in bad faith and for purposes of harassment.

Limitations: Private action allowed only to persons who purchase or lease goods or services and thereby suffer an ascertainable loss of money or property as result of violation. Demand letter giving opportunity to cure required 20 days prior to suit. No attorney fees or court costs to consumer unless actual damages awarded exceed any cure offer.

State Remedies: Attorney general has rulemaking power; injunction action, other equitable relief, other appropriate relief (W. Va. Code § 46A-7-108).

State UDAP Regulations: W. Va. Code R. §§ 142-5-1 through 142-5-4, 142-6-1 through 142-6-4, 142-8-1 through 142-8-17, 142-13-1 through 142-13-8, and 142-22-1 through 142-22-6—home improvements; sale of damaged goods; health spas; pre-need burial contracts; rent-to-own transactions.

Precedential Value of FTC Interpretations: Guided by federal court interpretations; regulations should conform as nearly as practicable with FTC's.

Wis. Stat. § 100.18

Prohibited Practices: Untrue, deceptive or misleading advertisements and representations, including numerous itemized deceptive representations.

Scope: Detailed scope provision applying to virtually any transaction.

Exclusions: Insurance; statements made by licensed real estate brokers and salespersons without knowledge of falsity; publishers, radio, and television stations who publish advertisements in good faith without knowledge of falsity.

Private Remedies: Any person suffering pecuniary loss may sue for the loss, plus costs and attorney fees. Double damages are available if the defendant violated an injunction issued under the UDAP statute. Attorney fees are not recoverable from licensed real estate brokers.

Limitations: 3-year limitations period, running from occurrence of unlawful act.

State Remedies: Department of agriculture, trade and consumer protection has rulemaking authority; it, the department of justice, and district attorneys have enforcement powers; injunction; court has discretion to make other orders, including restitution; court may award costs of investigation and attorney fees; fines and civil forfeiture in varying amounts ranging from \$100 to \$10,000 for violations of statute, rule, or order; civil forfeiture of \$100 to \$10,000 for violation of injunction; supplemental forfeiture up to \$10,000 in some cases if victim is older or disabled.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

Wis. Stat. §§ 100.20 through 100.264

Prohibited Practices: Unfair methods of competition and unfair trade practices; special sections on specific industries.

Scope: Business.

Exclusions: None specified.

Private Remedies: Double pecuniary loss, costs and attorney fees, but private remedies available only for violation of general orders (i.e., regulations) or special orders (i.e., cease and desist orders) issued by department of agriculture, trade and consumer protection.

Limitations: Department of agriculture, trade and consumer protection acts after public hearing for rulemaking and injunction and cancellation; must give notice; private actions require pecuniary loss. Violations must be knowing.

State Remedies: Department of agriculture, trade and consumer protection has rulemaking and enforcement powers; injunction to enforce regulation or order; restitution; court may award costs of investigation and attorney fees; cancel corporate certificate if in public interest for substantial and willful violation; \$25 to \$5000 and/or imprisonment for failure to obey regulation or order; civil forfeiture of \$100 to \$10,000 for rule, order, or injunction violation; enhanced penalties if engage in acts against older or disabled consumers.

State UDAP Regulations: Wis. Department of Agriculture, Trade and Consumer Protection Rules, Wis. Admin. Code ATCP §§ 106 through 137—price gouging in emergency, home improvements; referral sales; pyramid sales; deceptive pricing; price comparison advertising; manufactured home parks; door-to-door sales; automobile repairs; automobile rentals; landlord-tenant; environmental labeling of products; freezer meats; basement waterproofing; gasoline advertising; real estate advertising, advance fees; art prints; academic material; coupon sales; work recruitment schemes; telecommunications and cable television billing practices; hazardous substances.

Precedential Value of FTC Interpretations: None specified.

Wyo. Stat. Ann. §§ 40-12-101 through 40-12-114 Consumer Protection Act

Prohibited Practices: 16 enumerated practices, including a catchall generally prohibiting unfair or deceptive acts or practices.

Scope: In course of business and in connection with a consumer transaction, defined as the advertising, sale, offering for sale, or distribution of any merchandise, defined to include real or personal property, services, intangibles or any article of value, for purposes that are primarily personal, family or household.

Exclusions: Acts or practices required or permitted by state or federal law, regulation or decision; advertisements by publisher, radio and television media, with no knowledge of falsity.

Private Remedies: Class actions or individual actions for actual damages; attorney fees to prevailing plaintiff in class action.

Limitations: Attorney general may seek injunction in public interest and upon notice; private action authorized only if person 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 no cure within reasonable time; consumer must give written notice to alleged violator within 1 year of discovery of violation or 2 years after consumer transaction, whichever first, and must file suit within 1 year of giving notice; remedies in act are exclusive remedies for actions brought pursuant to this act.

State Remedies: Attorney general enforces; injunction; restitution (including attorney fees if victim is older or disabled and violation was willful and knowing); up to \$10,000 civil penalty for willful violations (up to \$15,000 for willful and knowing violations that victimize or attempt to victimize older or disabled person), up to \$5000 for violation of injunction.

State UDAP Regulations: None specified.

Precedential Value of FTC Interpretations: None specified.

State Lemon Laws (as of 2022)

ALABAMA

Ala. Code. §§ 8-20A-1 to 8-20A-6

Vehicles covered: All vehicles, new or previously untitled, that are under 10,000 lbs., self-propelled, and intended primarily for operation on public highways (§ 8-20A-1(2)). Excludes motor homes. No reference to leased vehicles.

Persons covered: Purchasers or any persons entitled to enforce the warranty if vehicle used in substantial part for personal, family, or household purposes (§ 8-20A-1(1)).

Period covered: Whichever comes first: one year after date of original delivery or first 12,000 miles (§ 8-20A-1(8)).

Disclosure requirements: None for manufacturer.

Required consumer notice: Written notification describing the vehicle and all previous attempts to correct the nonconformity (§ 8-20A-1(7)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity has been subjected to three or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days (§ 8-20A-2(c)).

Affirmative defenses: The nonconformity does not significantly impair the use, market value or safety of the vehicle, or is the result of abuse, neglect, or any unauthorized modification or alteration by the consumer (§ 8-20A-3(b)); statute of limitations (§ 8-20A-6).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable allowance (defined) (§ 8-20A-2(b)).

Other reimbursement: Collateral charges, taxes, fees, finance charges and incidental costs (§ 8-20A-2(b)); attorney fees (§ 8-20A-3).

Other remedies: There is no limit on other consumer remedies. Consumers have no lemon law cause of action against dealer, and dealer may not be made party to lemon law suit (§ 8-20A-5).

Informal dispute resolution: For remedies under this section, a consumer must first exhaust any remedy available through an informal dispute procedure established by the manufacturer (§ 8-20A-3(a)).

Resale of lemon: Full disclosure required. Title must be branded with notice of return to manufacturer because of non-conformity to warranty (§ 8-20A-4).

ALASKA

JUST UPDATED

Alaska Stat. §§ 45.45.300 to 45.45.360

Vehicles covered: Vehicles normally used for personal, family, or household purposes and registered under Alaska Stat. §§ 28.10.011 to 28.10.661; excludes tractors, farm vehicles, and off-road vehicles (§ 45.45.360(6), (8)). No reference to leased vehicles. Alaska also has a lemon law for boats, all-terrain vehicles (ATVs), snowmobiles, and similar vehicles: Alaska Stat. §§ 45.27.100 to 45.27.395 (§ 45.27.190).

Persons covered: Purchasers, other than for resale, of new motor vehicles, and transferees (§ 45.45.360(8)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 45.45.305).

Disclosure requirements: None for manufacturer.

Required consumer notice: Specific written notice by certified mail to the manufacturer and its dealer or repairing agent demanding a refund or replacement with description of nonconformity and the attempts to conform (§ 45.45.310).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity has been subjected to repair three or more times, or the vehicle has been out of service for thirty or more business days (§ 45.45.320).

Affirmative defenses: The nonconformity does not substantially impair the use or market value of the vehicle, or is the result of the consumer's abuse or neglect; unauthorized modifications or alterations were made to the vehicle (§ 45.45.315).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable new vehicle, or refund the full purchase price less a reasonable use allowance (§ 45.45.305).

Other reimbursement: Reimbursement for costs incurred in shipping the vehicle to the repair facility (§ 45.45.350).

Other remedies: There is no limit on other remedies that may be available but no lemon law cause of action is created against dealer or repair agent (§ 45.45.340). Failure to refund or replace may be an unfair trade practice (§ 45.45.330).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 45.45.355).

Resale of lemon: Full disclosure required (§ 45.45.335).

ARIZONA

Ariz. Rev. Stat. Ann. §§ 44-1261 to 44-1267

Vehicles covered: Vehicles under 10,000 lbs. that are designed primarily for transportation of persons or property; excludes living portions of motor homes (§ 44-1261(A)(2), (B)). Includes used motor vehicles (§§ 44-1261(A)(3), 44-1267). No reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 44-1261(A)(1)).

Period covered: Whichever comes first: expiration of term of express warranty, two years, or 24,000 miles following the date of original delivery (§ 44-1262).

Disclosure requirements: None for manufacturer.

Required consumer notice: Written notification of the nonconformity to the manufacturer from or on behalf of the consumer (§ 44-1262).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity has been subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days (§ 44-1264(A)); opportunity to cure after required consumer notice (§ 44-1262).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 44-1263(B)); statute of limitations (§ 44-1265(B)).

Replace/refund: The manufacturer shall replace with a new motor vehicle, or refund the full purchase price less a reasonable use allowance (§ 44-1263(A)).

Other reimbursement: Collateral charges; reasonable costs and attorney fees (§§ 44-1263(A), 44-1265(B)).

Other remedies: No limit to remedies available under warranty that extends beyond lemon law limits (§ 44-1262(B)).

Informal dispute resolution: For remedies under this section, a consumer must use an informal dispute settlement procedure, provided the procedure complies with 16 C.F.R. pt. 703 (§ 44-1265(A)).

Resale of lemon: Full written disclosure to be attached to vehicle by manufacturer if ordered to replace or repurchase motor vehicle by judgment or decree, or if vehicle is repurchased or replaced pursuant to laws of Arizona or another state; dealer must provide the manufacturer's notice to subsequent purchaser (§ 44-1266).

ARKANSAS

JUST UPDATED

Ark. Code Ann. §§ 4-90-401 to 4-90-417

Vehicles covered: Self-propelled vehicle under 14,000 lbs. gross vehicle weight rating, licensed, purchased or leased in-state, and primarily designed for the transportation of persons or property; excludes mopeds, motorcycles, and the living quarter of motor homes (§ 4-90-403(11)). The 14,000 lbs. limit does not apply to motor homes or to vehicles over 10,000 lbs. gross vehicle weight rating that have been substantially altered after sale to the consumer.

Persons covered: Purchaser, lessee, or any person entitled to enforce the warranty (§ 40-90-403(4)).

Period covered: Ends two years (twenty-four months) after the vehicle is delivered to the consumer or after the first 24,000 miles attributable to the consumer is driven, whichever comes later (§ 4-90-403(12)).

Disclosure requirements: Manufacturer must provide a written state-approved notice to the consumer explaining the consumer's rights at the time of lease or purchase. Dealer must obtain and maintain for five years the consumer's acknowledgment of receipt of statement of rights (§ 4-90-404(b)).

Required consumer notice: Consumer must notify manufacturer by certified or registered mail of the need to repair the nonconformity.

Repair requirements: Three attempts to repair a nonconformity which "substantially impairs" the motor vehicle or one repair attempt for a nonconformity that is life threatening or which could cause bodily injury, plus one final opportunity to repair (§ 4-90-406(a)(1)).

Affirmative defenses: The nonconformity does not impair use, value or safety of the vehicle; the nonconformity is the result of an accident, abuse, neglect or unauthorized alteration; claim by consumer was not filed in good faith; other defenses allowed by law (§ 4-90-413); statute of limitations (§ 4-90-416).

Replace/refund: At the consumer's option, the manufacturer must replace with an identical or reasonably equivalent vehicle acceptable to the consumer, or refund the full purchase or lease price less a reasonable use and damage allowance (defined) (§§ 4-90-406, 4-90-407).

Other reimbursement: Collateral and reasonably incurred incidental charges (§ 4-90-406(b)(1)(B)), plus towing and rental costs (§ 4-90-408), attorney fees and costs (§ 4-90-415).

Other remedies: Violation of the statute is a deceptive trade practice (§ 4-90-417); there is no limit on other consumer remedies (§ 4-90-415(b)).

Informal dispute resolution: Consumer must first submit to informal proceedings unless the manufacturer allows otherwise or unless manufacturer failed to disclose as required an explanation of the consumer's rights and obligations (§ 4-90-406(a)(1)); the dispute procedure must comply with 16 C.F.R. § 703.1 (§ 4-90-414).

Resale of lemon: Full written disclosure signed by the consumer required for first resale to a retail customer; same express warranty offered to the original purchaser (except need only last for 12,000 miles or one year after date of resale) (§ 4-90-412).

CALIFORNIA

JUST UPDATED

Cal. Civ. Code §§ 1793.1 to 1795.8, 1793.22 to 1793.26 (West)

Vehicles covered: New motor vehicles used or bought primarily for personal, family or household purposes, including dealer-owned vehicles and demonstrators. Excludes motorcycles, the portion of motor homes used primarily for habitation and off-road vehicles. "New vehicle" includes demonstrator or other motor vehicle sold with new car warranty.

Includes vehicle with gross weight under 10,000 lbs. bought or used primarily for business use by a person, partnership, corporation or other legal entity that has no more than five vehicles registered in its name (§ 1793.22(e)(2)). Includes leased vehicles (§ 1795.4).

Persons covered: No definition; refers to buyer and lessee (§ 1793.22(e)(1)). Active duty military personnel stationed or residing in state at time of purchase or suit are covered even if vehicle purchased or registered elsewhere, as long as manufacturer sells vehicles in state (§ 1795.8).

Period covered: Whichever comes first: 18,000 miles or 18 months (§ 1793.22(b)).

Disclosure requirements: Manufacturer must give clear, conspicuous notice of statute to the buyer in the warranty or owner's manual, including the requirement that the buyer notify the manufacturer (§ 1793.22(b)).

Required consumer notice: Direct notice to the manufacturer only if manufacturer made required disclosures (§ 1793.22(b)).

Repair requirements: The same nonconformity is subjected to four or more repairs, the vehicle is out of service for a cumulative total of thirty or more calendar days; or, in the case of a nonconformity that results in a condition that is likely to cause death or serious bodily injury, the nonconformity is subject to two or more repair attempts and the consumer has notified the manufacturer directly of the need for repair (§ 1793.22(b)).

Affirmative defenses: None specifically set forth.

Replace/refund: Consumer may choose restitution instead of replacement. In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles. The manufacturer shall also pay for sales or use tax, license fees, and registration fees, plus any incidental damages that the buyer is entitled to under § 1794, including but not limited to reasonable repair, towing, and rental car costs actually incurred by the buyer (§ 1793.2(d)(2)).

Other reimbursement: Taxes, fees, collateral and incidental damages (§ 1793.2(d)(2)(B)); costs, expenses, and attorney fees (§ 1794(d)).

Other remedies: There is no limit on other consumer remedies; double damages (§ 1794).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 1793.22(c), (d)).

Resale of lemon: Manufacturer must reissue title with notation "Lemon Law Buyback" affixed thereon and affix a decal to the vehicle. Any person who resells such vehicle must give written notice to subsequent buyer, and must obtain buyer's written acknowledgment of the notice. Manufacturer must warrant for one year period that vehicle is free of problems reported by original owner (§§ 1793.23, 1793.24). Statute bars gag clauses in reacquisition agreements. Gag clauses void (§ 1793.26).

COLORADO

JUST UPDATED

Colo. Rev. Stat. §§ 42-10-101 to 42-10-107. See also Colo. Rev. Stat. §§ 44-20-124, 44-20-131

Vehicles covered: Passenger vehicles normally used for personal, family, or household use and sold in-state, including pick-up trucks and vans; excludes vehicles that carry more than ten persons, motor homes, and vehicles with three or fewer wheels (§ 42-10-101(2)). No reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 42-10-101(1)).

Period covered: Whichever comes first: expiry of term of warranty or one year from date of delivery (§ 42-10-102).

Disclosure requirements: Dealer shall have notification form with manufacturer's name and address inserted in owner's manual; form shall disclose clearly the notice requirements necessary before consumer can obtain remedies (§ 42-10-103(2)(d)).

Required consumer notice: Written notification by certified mail to manufacturer (§ 42-10-103(2)(c), (d)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days (§ 42-10-103(2)(a)).
Opportunity to cure after required notice from consumer (§ 42-10-103(2)).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 42-10-104); statute of limitations (§ 42-10-107).

Replace/refund: At the manufacturer's option, the manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 42-10-103(1)).

Other reimbursement: Taxes, fees, and charges (§ 42-10-103(1)); attorney fees (§ 42-10-103(3)).

Other remedies: There is no limit on other consumer remedies (§ 42-10-105). Any person has a cause of action for treble damages and attorney fees if a manufacturer willfully fails to perform written warranties (§§ 44-20-124, 44-20-131).

Informal dispute resolution: For remedies under this act, a consumer must first resort to the manufacturer's informal dispute settlement procedure, provided it complies with 16 C.F.R. pt. 703 (§ 42-10-106).

Resale of lemon: Written notice required before resale (§ 6-1-708(1)(b)).

CONNECTICUT

JUST UPDATED

Conn. Gen. Stat. §§ 42-179 to 42-184

Vehicles covered: Passenger motor vehicles or passenger and commercial vehicles (as defined in Conn. Gen. Stat. § 14-1) sold or leased in-state (§ 42-179(a)(2)).

Persons covered: Purchasers or lessees; transferees during express warranty period; or any person entitled to enforce the warranty (§ 42-179(a)(1)).

Period covered: Whichever comes first: two years following date of delivery or first 24,000 miles (§ 42-179(b)).

Disclosure requirements: Manufacturer shall provide a state approved form explaining warranty and dispute settlement program, and disclose in the warranty or owner's manual that written notice of nonconformity is required; must include name and address (§§ 42-179(c), 42-179(b)).

Required consumer notice: Written notification, if the manufacturer complied with notification requirements (§ 42-179(c)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to repair four times, or the vehicle is out of service for a cumulative total of thirty or more calendar days with at least one attempt to repair or refusal to repair (§ 42-179(e)); if the nonconformity is likely to cause death or serious bodily injury, then two repair attempts during earlier of one-year period or within express warranty term sufficient (§ 42-179(e), (f)).

Affirmative defenses: The nonconformity does not substantially impair the use, safety or value of the vehicle, or is the result of abuse, neglect, or unauthorized modifications or alterations (§ 42-179(d)).

Replace/refund: The manufacturer shall replace with a new motor vehicle acceptable to the consumer, or refund the contract price minus a reasonable allowance for use (defined) (§ 42-179(d)).

Other reimbursement: Collateral charges, incidental damages, and other charges and fees (defined) (§ 42-179(d)). Costs and attorney fees (§ 42-180).

Other remedies: There is no limit on other consumer remedies (§ 42-179(i)). Violation is unfair trade practice (§ 42-184).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure certified by the attorney general, if the manufacturer has established such a procedure (§ 42-179(j)); otherwise, state arbitration is available (§ 42-181).

Resale of lemon: Full disclosure required; title stamped with "Manufacturer Buyback – Lemon"; applies to vehicles returned in other states as well (§ 42-179(g)).

DELAWARE

JUST UPDATED

Del. Code Ann. tit. 6, §§ 5001 to 5009

Vehicles covered: Any passenger motor vehicle sold, leased or registered in-state; excludes living facilities of motor homes (§ 5001(1)).

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 5001(2)).

Period covered: Whichever comes first: expiry of term of warranty or within one year from date of delivery (§ 5002).

Disclosure requirements: None for manufacturer.

Required consumer notice: Written notice to the manufacturer by or on behalf of the consumer (§ 5004(b)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity has been subjected to four or more repairs, or the vehicle has been out of service for thirty or more calendar days (§ 5004(a); opportunity to cure after required notice from consumer (§ 5004(b)).

Affirmative defenses: The nonconformity does not substantially impair the use or value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 5006).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable new automobile acceptable to the consumer, or repurchase the automobile and give the consumer a full refund minus a reasonable allowance for use (§ 5003).

Other reimbursement: Incidental costs (explained), other charges and fees (§ 5003(b)); costs and attorney fees (§ 5005).

Other remedies: There is no limit on other consumer remedies (§ 5008); violation is unlawful trade practice (§ 5009).

Informal dispute resolution: For remedies under this section a consumer must first use an informal settlement procedure, if it is approved by the Division of Consumer Affairs (§ 5007).

Resale of lemon: No applicable provisions.

DISTRICT OF COLUMBIA

D.C. Code §§ 50-501 to 50-510

Vehicles covered: Passenger vehicles sold or registered in D.C.; excludes buses sold for public transportation, motorcycles, motor homes, and recreational vehicles (§ 50-501(9)).

Persons covered: Purchasers or lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 50-501(2)).

Period covered: Whichever comes first: 18,000 miles or two years (§ 50-502(a)).

Disclosure requirements: Manufacturer must give written notice to the prospective consumer of consumer rights (§ 50-504).

Required consumer notice: Must report the nonconformity to the manufacturer, its agent, or the authorized dealer (§ 50-502).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more days, or if a safety-related defect is subjected to one or more repair attempts (§ 50-502(d)).

Affirmative defenses: The nonconformity does not substantially impair the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 50-502(c)); statute of limitations (§ 50-507(b)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (defined) (§ 50-502(b)).

Other reimbursement: Taxes, fees, and charges (§ 50-502(b)).

Other remedies: There is no limit on other consumer remedies (§ 50-507(a)).

Informal dispute resolution: For remedies under this section, a consumer must first use the government-run arbitration board's informal dispute settlement procedure (§§ 50-502(f), 50-503).

Resale of lemon: Vehicle return for reason of nonconformity noted on title; dealer must disclose to prospective buyer (§ 50-502(g)).

FLORIDA

JUST UPDATED

Fla. Stat. §§ 681.10 to 681.118

Vehicles covered: Motor vehicles sold or leased in-state used primarily for personal, family or household purposes that transport persons or property, including demonstrators and lease-purchases with warranty; excludes off-road vehicles, mopeds, electric bicycles, trucks over 10,000 lbs., the living facilities of recreational vehicles, and motorcycles (§ 681.102(4), (14)).

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 681.102(4)).

Period covered: Two years after original delivery date (§ 681.102(9)).

Disclosure requirements: Manufacturer must provide list of service offices, written notice of claim procedure and all consumer rights under lemon law; itemized statement of repair if vehicle returned for defect (§ 681.103).

Required consumer notice: Notice to manufacturer by registered or express mail (§ 681.104(1)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three repairs plus a final attempt, or the

vehicle is out of service for a cumulative total of thirty or more working days, exclusive of maintenance and final ten day repair period (§ 681.104(1)(a), (3)).

Affirmative defenses: The nonconformity does not substantially impair the use, safety or market value of the vehicle; or is the result of an accident, abuse, neglect, or unauthorized modification or alteration by the consumer; or the claim is not filed in good faith (§ 681.104(4)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable or replacement automobile acceptable to the consumer, or repurchase the automobile and give the consumer a full refund minus a reasonable allowance for use (defined) (§ 681.104).

Other reimbursement: Collateral and incidental charges (§ 681.104(2)(a)); costs and attorney fees (§ 681.112(1)).

Other remedies: Misrepresentation by the manufacturer is an unfair and deceptive trade practice (§ 681.111); no limit to consumer remedies (§ 681.112(3)). No cause of action created against dealer; dealer may not be made a party to a lemon law suit except for claims under separate written express warranties made by dealer (§ 681.113).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 681.108). The consumer may also use the state arbitration board (§ 681.109).

Resale of lemon: Full disclosure required for resale or lease (§ 681.114(2)). Title must be stamped: "manufacturer's buy back" (Fla. Stat. § 319.14). Manufacturer must warrant nonconforming defect for one year or first 12,000 miles (§ 681.114(2)).

GEORGIA

JUST UPDATED

Ga. Code Ann. §§ 10-1-780 to 10-1-797

Vehicles covered: New vehicles purchased, leased or registered by the original buyer in-state; excludes those portions of motor homes used for dwelling, and office or commercial space (§ 10-1-782(15)). Excludes trucks with more than 12,000 lbs. gross vehicle weight rating, motorcycles, and golf carts (§ 10-1-782(15)).

Persons covered: Person who purchases or leases a new motor vehicle for personal, family or household use, and not for resale, or who purchases or leases ten or fewer new motor vehicles a year for business purposes other than limousine rental (§ 10-1-782(5)). "Person" includes natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity (§ 10-1-392).

Period covered: Two years from original delivery of new motor vehicle to a consumer, or first 24,000 miles, whichever occurs first. Period is extended by one day for each day repair services are unavailable because of strike, war, and so forth (§ 10-1-782(10)).

Disclosure requirements: Dealer must provide written explanation of consumer's rights; owner's manual published by the manufacturer must include a list of addresses, email

addresses, facsimile numbers, and toll-free telephone numbers to contact the manufacturer's customer service personnel (§ 10-1-783(a), (b)).

Required consumer notice: If the manufacturer fails to repair a nonconformity after a reasonable number of attempts, the consumer must notify the manufacturer by statutory overnight delivery or certified mail, return receipt requested, of the need to repair the nonconformity. The manufacturer then has twenty-eight days for a final repair attempt (§ 10-1-784(2)).

Repair requirements: The following are deemed a reasonable number of repair attempts: one unsuccessful attempt for a serious safety defect; three unsuccessful attempts for the same nonconformity; or if the vehicle is out of service by reason of repair of one or more nonconformities for a cumulative total of thirty days (§ 10-1-784(a)).

Affirmative defenses: Definition of "nonconformity" requires that condition substantially impair the use, value or safety of the vehicle, and is not the result of the consumer's abuse, neglect or unauthorized modification or alteration (§ 10-1-782(17)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a new identical or equivalent vehicle, or accept a return and refund the purchase price. In either case, the manufacturer is allowed a reasonable offset for use (§ 10-1-784(a), (b)).

Other reimbursement: All collateral and incidental charges less a reasonable offset for use (§ 10-1-784). Costs and attorney fees if consumer prevails upon manufacturer's appeal of arbitration decision (§ 10-1-787). Civil penalty of \$1000 per day if manufacturer does not comply with arbitration decision within forty days (§ 10-1-787).

Other remedies: Any violation is an unfair and deceptive practice, but consumer has private cause of action only for violation of lemon laundering provision. The lemon law does not displace other remedies (§ 10-1-793).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure, if available and administrator-certified. If no manufacturer settlement procedure is available, the consumer may apply to the new Motor Vehicle Arbitration Panel (§ 10-1-785).

Resale of lemon: Full disclosure required in writing. Manufacturer must give one-year/12,000 mile written warranty to correct the nonconformity for which the vehicle was repurchased (§ 10-1-790).

HAWAII

Haw. Rev. Stat. § 481I-1 to 481I-4

Vehicles covered: New motor vehicles bought or leased for personal, family, or household purposes, including demonstrators. Also includes individually registered vehicles, or a vehicle owned or leased by a sole proprietorship, corporation, or partnership which has purchased or leased no more than one vehicle per year, if the vehicle is used for personal, family, or household use in addition to business use. Excludes mopeds, motorcycles, motor scooters, and vehicles over 10,000 lbs. gross vehicle weight rating (§ 481I-2).

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 481I-2).

Period covered: Whichever comes first: expiry of term of express warranty, two years from date of delivery, or 24,000 miles (§ 481I-2).

Disclosure requirements: Manufacturer or dealer at time of purchase must provide written notice of provisions to the consumer (§ 481I-3(g)).

Required consumer notice: Written notice to the manufacturer, its agent, or its authorized dealer only if manufacturer has provided a written notice of terms of arbitration board and rights of consumer (§ 481I-3(a), (h)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity has been subjected to three or more repairs, or subjected to one repair if defect creates serious hazard, or the vehicle has been out of service for thirty or more business days (§ 481I-3(d)).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle or is the result of abuse, neglect, or unauthorized modifications or alteration (§ 481I-3(c)).

Replace/refund: Manufacturer shall replace with a comparable motor vehicle, or accept a return and refund the full purchase price less a reasonable allowance for use (§ 481I-3(b)).

Other reimbursement: Refund of the full purchase price including all collateral charges (§ 481I-3(b)).

Other remedies: A violation of provision regarding transfer of lemon after return to manufacturer is an unfair or deceptive act or practice (§ 481I-3(l)).

Informal dispute resolution: Consumer may use a state-funded arbitration procedure (§§ 481I-4, 481I-3(i)).

Resale of lemon: Full disclosure required; must provide one year or 12,000-mile warranty covering same defect or defects (§ 481I-3(k)).

IDAHO

Idaho Code § 48-901 to 48-913

Vehicles covered: Vehicles as defined in Idaho Code § 49-123, but not including motorcycles, farm tractors, house trailers, or vehicles over 12,000 lbs. (§ 48-901(7)).

Persons covered: Purchasers or lessees, other than for resale, of vehicles used for personal, family or household purposes, or for personal business use, and other transferees or individuals entitled to enforce the warranty (§ 48-901(1)).

Period covered: Whichever comes first: two years or 24,000 miles (§ 48-902(1)).

Disclosure requirements: Manufacturer must provide notice at time of purchase in written warranty (§ 48-903(7)).

Required consumer notice: Notice in writing to the manufacturer or dealer (§ 48-903(5)).

Repair requirements: It is presumed that a reasonable number of attempts have been undertaken when the same nonconformity has been subjected to four or more repair attempts (or at least one repair attempt if defect is likely to cause serious injury), or the vehicle has been out of service thirty or more business days (§ 48-903(2), (3)).

Affirmative defenses: Buyer's abuse, neglect, or unauthorized modifications; buyer's claim in bad faith; two year limitation period; alleged nonconformity does not impair the use or market value; other defenses allowed by law (§ 48-903(1)); statute of limitations (§ 48-910).

Replace/refund: Replacement with a comparable new motor vehicle or purchase price less the amount attributable to the buyer's use (§ 48-903(1)).

Other reimbursement: All collateral and incidental charges minus a reasonable use allowance (§ 48-903(1)); attorney fees and costs (§ 48-909).

Other remedies: All other remedies provided by law (§ 48-911). Violation is violation of consumer protection act (§ 48-909). Treble damages if finding of dealer's frivolous defense, delaying tactics, or bad faith in relation to an arbitration procedure (§ 48-908). No cause of action created against dealer (§ 48-913).

Informal dispute resolution: For remedies under this section a consumer must utilize a dispute resolution mechanism complying with 16 C.F.R. pt. 703, if such mechanism exists (§§ 48-906, 48-907).

Resale of lemon: No resale if extremely hazardous defect is uncorrected. Full disclosure required upon resale or re-lease; express warranty for earlier of 12,000 miles or twelve months (§ 48-905).

ILLINOIS

815 Ill. Comp. Stat. §§ 380/1 to 380/8

Vehicles covered: Passenger cars; motor vehicles of less than 8000 lbs. designed to carry more than ten people, to haul freight, or to be used as living quarters; certain vehicles purchased by fire departments; and recreational vehicles other than camping trailers or travel trailers (§ 380/2(c)).

Persons covered: Individual consumers who purchase or lease new cars to transport themselves and others, and their personal property, for primarily personal, household or family purposes (§ 380/2(a)).

Period covered: Whichever comes first: one year or 12,000 miles (§ 380/2(f)).

Disclosure requirements: Seller must inform the consumer of consumer rights (§ 380/7).

Required consumer notice: Written notification to the manufacturer from or on behalf of the consumer (§ 380/3(h)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity has been subjected to four or more repairs, or the vehicle has been out of service for thirty or more business days (§ 380/3(b)); opportunity to cure after required notice from consumer (§ 380/3(h)).

Affirmative defenses: Failure to conform is the result of abuse, neglect, or unauthorized modification or alterations (§ 380/3(d)); statute of limitations (§ 380/6).

Replace/refund: Manufacturers shall provide a new car of a like model line, if available, or a comparable vehicle, or accept a return and refund the full purchase price less a reasonable allowance for use (§ 380/3(a)).

Other reimbursement: Collateral charges (§ 390/3(a)).

Other remedies: A consumer may bring a civil action if dissatisfied with arbitration decision (§ 380/4(b)). Persons electing to proceed and settle under this act are barred from a separate cause of action under the UCC (§ 380/5).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 380/4).

Resale of lemon: Full written disclosure and warranty for defects required (625 Ill. Comp. Stat. § 5/5-104.2).

INDIANA

Ind. Code §§ 24-5-13-1 to 24-5-13-24

Vehicles covered: Vehicles that are sold, leased, transferred or replaced, and registered in-state, and are under 10,000 lbs.; excludes conversion vans, motorhomes, farm tractors and machines, road building equipment, truck and road tractors, motorcycles, motor driven vehicles, snowmobiles, and off-road vehicles (§ 24-5-13-5).

Persons covered: Buyers who enter into a contract to transfer, lease or purchase motor vehicles (§ 24-5-13-3).

Period covered: Whichever comes first: 18 months or 18,000 miles (§ 24-5-13-7).

Disclosure requirements: Manufacturer must describe in the warranty or buyer's manual that written notification is required for refund or replacement; disclose manufacturer's name and address (§ 24-5-13-9(b)).

Required consumer notice: Unless manufacturer failed to provide required disclosure, consumer must notify manufacturer (§ 24-5-13-9(a)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or if the vehicle is out of service for a cumulative total of thirty or more business days (defined) (§ 24-5-13-15).

Affirmative defenses: The nonconformity does not substantially impair the use, value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 24-5-13-18); statute of limitations (§ 24-5-13-23).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (defined) (§ 24-5-13-10).

Other reimbursement: Incidental costs (defined) (§ 24-5-13-11(c)). For a leased vehicle, the lessee may recover all deposits, lease payments, and credits for allowances less a reasonable use allowance (defined) (§ 24-5-13-11.5). If buyer accepts a replacement, manufacturer shall reimburse for transfer of registration and any sales tax (§ 24-5-13-12). Buyer also entitled to towing and storage fees (§ 24-5-13-13). Costs and attorney fees (§ 24-5-13-22).

Other remedies: There is no limit on other consumer remedies (§ 24-5-13-20). Consumer may bring civil enforcement action (§ 25-5-13-21). No cause of action created against dealer (§ 24-5-13-24). If vehicle was used to manufacture methamphetamine, dealer is required to make disclosure, and is subject to a special cause of action for noncompliance (§§ 24-5-13-4.1, 24-5-13-16.1, 24-5-13-16.2).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure, provided the procedure complies with 16 C.F.R. pt. 703 and the buyer has had notice (§ 24-5-13-19).

Resale of lemon: Full disclosure required; must give twelve month or 12,000 mile warranty (§§ 24-5-13.5-1 to 24-5-13.5-14).

IOWA

JUST UPDATED

Iowa Code §§ 322G.1 to 322G.15

Vehicles covered: Vehicles purchased or leased in-state and primarily designed for transportation of persons or property; excludes mopeds, motorcycles, autocycles, motor homes, or vehicles over 10,000 lbs. (§ 322G.2(13)).

Persons covered: Purchasers, lessees, or any other person entitled to enforce the warranty (§ 322G.2(3)).

Period covered: Whichever comes first: expiry of term of express warranty, two years from date of delivery, or 24,000 miles (§ 322G.2(8)).

Disclosure requirements: Manufacturer must provide written notice of warranty at time of sale (§ 322G.3(1)).

Required consumer notice: Written notice to manufacturer via certified, registered, or overnight service mail (§ 322G.4(1)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or after one attempt to repair a nonconformity likely to cause death or serious bodily injury, or if the vehicle is out of service for a cumulative total of thirty or more calendar days (§ 322G.4(3)).

Affirmative defenses: The nonconformity does not substantially impair the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations, or the claim was not raised in good faith; other defenses allowed by law (§ 322G.5).

Replace/refund: At consumer's option the manufacturer shall replace with a comparable new vehicle, or accept a return and refund the purchase price less a reasonable offset for use (§ 322G.4(2)).

Other reimbursement: Collateral charges (§ 322G.2(1)); Costs and attorney fees (§ 322G.8(3)).

Other remedies: There is no limit on other consumer remedies (§§ 322G.1, 322G.8(9)). No cause of action created against dealer, and dealer may not be made a party to a lemon law suit (§ 322G.11). Violation is unfair or deceptive trade practice (§ 322G.10).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 322G.6).

Resale of lemon: Full disclosure required; title must indicate vehicle previously returned under lemon law (§ 322G.12).

KANSAS

Kan. Stat. Ann. §§ 50-645 to 50-646

Vehicles covered: New motor vehicles that are under 12,000 lbs. and sold or leased and registered in-state; vehicles not modified by second stage manufacturers (§ 50-645(a)(2)).

Persons covered: Original purchasers or lessees (§ 50-645(a)(1)).

Period covered: Whichever comes first: expiry of term of all applicable warranties or one year from date of delivery (§ 50-645(b)).

Disclosure requirement: None for manufacturer.

Required consumer notice: Report the nonconformity to the manufacturer, its agent or an authorized dealer (§ 50-645(b)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days, or there have been ten or more attempts to repair any substantial nonconformities (§ 50-645(d)).

Affirmative defenses: The nonconformity does not substantially impair the use and value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 50-645(c)).

Replace/refund: The manufacturer shall replace with a comparable motor vehicle under warranty, or accept a return and refund the full purchase price less a reasonable use allowance (defined) (§ 50-645(c)).

Other reimbursement: Collateral charges; refund to the consumer and lienholder (§ 50-645(c)).

Other remedies: There is no limit on other consumer remedies (§ 50-646).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 50-645(e)).

Resale of lemon: Disclosure required (§ 50-659(a)(3)).

KENTUCKY

Ky. Rev. Stat. Ann. §§ 367.840 to 367.845; 367.860 to 367.870 (West)

Vehicles covered: Vehicles primarily for use on highways, required to be registered or licensed in-state prior to use; excludes any vehicle substantially altered after its initial sale from a dealer to an individual, motor homes, motorcycles, mopeds, and farm machinery including tractors or vehicles with more than two axles (§ 367.841(3)).

Persons covered: Residents who buy, contract to buy, or lease, a new motor vehicle in-state (§ 367.841(1)).

Period covered: Whichever comes first: 12,000 miles or twelve months from date of delivery (§ 367.842(3)).

Disclosure requirements: Manufacturer must notify the buyer of the arbitration system at the time the dispute arises (§ 367.865(4)).

Required consumer notice: In writing to the manufacturer (§ 367.842(1)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days, but the thirty-day time period is extended when the vehicle cannot be repaired due to an unavailability of parts due to natural disaster (§ 367.842(3)).

Affirmative defenses: The nonconformity does not substantially impair the use, value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 367.842(2)); statute of limitations (§ 367.842(8)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable motor vehicle, or accept a return and refund the full purchase price less a reasonable allowance for use (§ 367.842(2)).

Other reimbursement: Full purchase price, including amount paid, finance charge, sales tax, license fee, registration fee, other government fee, and all collateral charges; refunds to the consumer and lienholder (§ 367.842(2)). Attorney fees (§ 367.842(9)).

Other remedies: There is no limit on other consumer remedies (§ 367.842(6)). No cause of action created against dealer (§ 367.842(5)).

Informal dispute resolution: For remedies under this section a consumer must use the manufacturer's informal dispute settlement procedure, provided the procedure complies with 16 C.F.R. pt. 703 (§ 367.842(4)). The decision shall bind the manufacturer, but not bind the buyer (§ 367.865(2)).

Resale of lemon: No applicable provisions.

LOUISIANA

JUST UPDATED

La. Stat. Ann. §§ 51:1941 to 51:1948

Vehicles covered: Passenger motor vehicles sold in state; also covers all-terrain vehicles and personal watercraft sold in the state on or after Aug. 15, 1999; excludes vehicles that have a gross vehicle weight of 10,000 lbs. or more and commercial vehicles (§ 51:1941(6)). For motor home warranties see La. Stat. Ann. §§ 32:1270.31 to 32:1270.41.

Persons covered: Purchasers, transferees during express warranty period, any person entitled to enforce the warranty, and lessees when vehicle normally used for personal, family, or household purposes (§ 51:1941(2)).

Period covered: Whichever comes first: expiry of the warranty term or one year from date of delivery (§§ 51:1943(A)(1), 51:1942).

Disclosure requirements: None for manufacturer.

Required consumer notice: Report the nonconformity to the manufacturer or any authorized dealer (§ 51:1942). Special provisions for notice to manufacturer in the case of a motor home (§ 51:911.24.1(A)(1)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of forty-five or more calendar days (§§ 51:1943(A), 51:1944(A)). Opportunity to cure after required notice from consumer (§ 51:1942).

Affirmative defenses: Statute of limitations (§ 51:1944(E)).

Replace/refund: At the manufacturer's option, the manufacturer shall replace with a comparable new vehicle, or accept a return and refund the full purchase price minus a reasonable use allowance (defined) (§ 51:1944(A)). For leases, see § 51:1944(B).

Other reimbursement: Any amounts paid by the consumer at the time of sale and collateral costs (§ 51:1944(A)(2)). Temporary replacement (§ 51:1948). Attorney fees (§§ 51:1947, 51:1948(C)). For leases, see § 51:1944(B).

Other remedies: There is no limit on other consumer remedies (§ 51:1946).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 51:1944(D)).

Resale of lemon: Full disclosure required. Certificate of Title must include notice that car was returned because it did not conform to its warranty (§ 51:1945.1).

MAINE

Me. Stat. tit. 10, §§ 1161 to 1169

Vehicles covered: Vehicles sold or leased in-state to convey passengers or property; excludes vehicles over 8500 lbs. gross vehicle weight used primarily for commercial purposes (§ 1161(3)).

Persons covered: Purchasers or lessees, transferees during express warranty period, or any person entitled to enforce the warranty. Excludes government, business or commercial enterprises with three or more vehicles (§ 1161(1)).

Period covered: Whichever comes first: expiry of term of express warranty, three years from date of delivery, or 18,000 miles (§ 1163(1)).

Disclosure requirements: Manufacturer must disclose in the warranty or owner's manual that written notification of a nonconformity is required; include name and address (§ 1163(6)).

Required consumer notice: Written notification to the manufacturer, its agent, or authorized dealer, if the manufacturer complied with disclosure requirement (§ 1163(1), (3-A), (6-A)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or if the vehicle is out of service for a cumulative total of fifteen or more business days (§ 1163(3)). If the nonconformity has resulted in a serious failure of the braking or steering system, the presumption applies if the vehicle has been subject to one or more repair attempts (§ 1163(A-2)). Final opportunity to cure within seven days of receipt of required notice from consumer (§ 1163(3-A)).

Affirmative defenses: Lack of impairment—the nonconformity does not substantially impair the use, safety or value of the vehicle (§ 1164(1)); abuse—the nonconformity is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 1164(2)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a new, comparable vehicle, or refund the full purchase price less a reasonable use allowance (defined) (§ 1163(2)).

Other reimbursement: Refund of the purchase price, or if a lease, payments made to date, collateral charges (defined), and costs (§ 1163(2)). Attorney fees and costs (§ 1167).

Other remedies: There is no limit on other consumer remedies (§ 1162(1)). Violation considered unfair and deceptive trade practice (§ 1166).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703, or state-certified arbitration (defined in § 1169) (§ 1165).

Resale of lemon: Subsequent purchaser must be given clear and conspicuous disclosure that vehicle was returned to manufacturer because of nonconformity with warranties, with a specification of the particular nonconformities (§ 1163(7)). In addition, Me. Stat. tit. 29-A, § 670 requires manufacturer receiving returned vehicle to apply for new title that will include brand "Lemon Law Buyback"; brand must be included on all subsequent titles. Me. Stat. tit. 10, §§ 1163(7), 1163(8) requires disclosure to purchaser if vehicle has been returned to the

manufacturer pursuant to a lemon law decision or a lemon law settlement agreement in another state.

MARYLAND

JUST UPDATED

Md. Code Ann., Com. Law §§ 14-1501 to 14-1504 (West)

Vehicles covered: Vehicles registered as passenger vehicles, trucks that are $\frac{3}{4}$ ton or less, and multipurpose vehicles; motorcycles are explicitly covered; excludes motor homes (§ 14-1501(c)). No reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 14-1501(b)).

Period covered: Whichever comes first: 18,000 miles or twenty-four months from date of delivery (§ 14-501(e)(1)).

Disclosure requirements: Notice of procedure for reporting defect must be conspicuously disclosed to consumer in writing at time of sale or delivery of vehicle (§ 14-1502(b)). Dealer must notify the manufacturer of the existence of a nonconformity, defect, or condition within seven days after the fourth attempt at the same repair, or when the vehicle is out of service for one or more nonconformities for a cumulative total of twenty days (§ 14-1502(f)(1)).

Required consumer notice: Written notice by certified mail, return receipt requested, to the manufacturer or factory branch (§ 14-1502(b)(1)). Note also the dealer's obligation to report nonconformities to the manufacturer under § 14-1502(f)(1).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days, or a braking or steering system failure is subjected to at least one repair attempt which is not successful (§ 14-1502(d)). Opportunity to cure after required notice from consumer (§ 14-1502(b)).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 14-1502(c)(3)); statute of limitations (§ 14-1502(k)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle acceptable to the consumer, or refund the full purchase price less a reasonable use allowance (§ 14-1502(c)(1), (2)).

Other reimbursement: Collateral costs including taxes and fees (§ 14-1502(c)(1)(ii)). Attorney fees (§ 14-1502(k)).

Other remedies: There is no limit on other consumer remedies (§ 14-1502(h)). A violation is an unfair and deceptive trade practice (§ 14-1504(a)). Punitive damages up to \$10,000 (§ 14-1504(b)).

Informal dispute resolution: For remedies under this section a consumer may use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 14-1502(i)).

Resale of lemon: Full disclosure required (§ 14-1502(g)).

MASSACHUSETTS

Mass. Gen. Laws ch. 90, § 7N½

Vehicles covered: Vehicles sold, leased, or replaced, including motorcycles; excludes auto homes, off-road vehicles, and vehicles used for business purposes (§ 7N½(1)).

Persons covered: Consumer buyers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 7N½ (1)).

Period covered: Whichever comes first: one year or 15,000 miles from date of delivery (§ 7N½(1)).

Disclosure requirements: Notice of consumer's rights must be on the window sticker, and in the owner's manual (§ 7N½(6A)).

Required consumer notice: Notice to manufacturer, its agent or an authorized dealer (§ 7N½(2)), but the consumer does not need to provide notice prior to arbitration (§ 7N½(5)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or the vehicle is out of service for a cumulative total of fifteen or more business days, plus a final cure attempt (§ 7N½(4)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's negligence, or is caused by an accident, vandalism, or unauthorized repair or modification (§ 7N½(3)).

Replace/refund: At the consumer's option, the manufacturer shall replace the vehicle, or refund the full purchase price less a reasonable use allowance (defined) (§ 7N½ (3)).

Other reimbursement: Incidental costs, fees and charges (§ 7N½ (3)).

Other remedies: There is no limit on other consumer remedies (§ 7N½ (5)). The manufacturer's failure to comply with the statute is an unfair or deceptive act (§ 7N½ (7)). No cause of action created against dealer.

Informal dispute resolution: The manufacturer shall submit to state-certified arbitration if it is requested by the consumer (§ 7N½ (6)).

Resale of lemon: Full disclosure required (§ 7N½(5)). See also 940 Mass. Code Regs. § 5.04(19), (20) (form of notice).

MICHIGAN

JUST UPDATED

Mich. Comp. Laws §§ 257.1401 to 257.1410

Vehicles covered: Passenger vehicles or sport utility vehicles, purchased or leased in-state or by a resident of the state; excludes motor homes, buses or trucks other than pick-ups or vans, and vehicles with less than four wheels (§ 257.1401(f), (g)).

Persons covered: Purchasers for personal, family or household use, or persons entitled to enforce the warranty, including lessors (§ 257.1401(a)(b), (c)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 257.1402).

Disclosure requirements: Upon notice manufacturer must notify consumer as to accessible repair facility (§ 257.1403(5)). Secretary of state's notice of consumer rights to accompany title to new car as specified in § 257.1408.

Required consumer notice: Must notify manufacturer by return receipt service (§ 257.1403(5)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more days or parts of days (§ 257.1403(5)).

Affirmative defenses: Defect is the result of unauthorized modification, abuse, neglect or damage due to an accident (§ 257.1406).

Replace/refund: At the consumer's option the manufacturer shall replace with a comparable vehicle in production, acceptable to the consumer, or accept the return and refund the full purchase price less a reasonable use allowance (defined) (§ 257.1403(1), (2)).

Other reimbursement: Cost of options, modifications, manufacturer's charges, towing costs, and rental replacement (§ 257.1403(1), (2)). Costs, expenses and attorney fees (§ 257.1407).

Other remedies: No limit on other consumer remedies (§ 257.1404). Rights and remedies may not be waived (§ 257.1407).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 257.1405(5)).

Resale of lemon: No applicable provisions.

MINNESOTA

JUST UPDATED

Minn. Stat. § 325F.665

Vehicles covered: Passenger automobiles, including pickup trucks and vans, and motor or van portions of recreational equipment, that are sold or leased in-state (§ 325F.665(1)(f)). Similar but separate statutory provisions apply to farm tractors (Minn. Stat. §§ 325F.6651 to 325F.6659).

Persons covered: Purchasers or lessees for personal, family or household purposes for at least 40% of the time, transferees, or any other person entitled to enforce the warranty (§ 325F.665(1)(b)).

Period covered: Whichever comes first: expiry of term of express warranty or two years from date of delivery (§ 325F.665(2)).

Disclosure requirements: Manufacturer must provide specific written statement to the consumer at the time of purchase (§ 325F.665(3)(g)).

Required consumer notice: Written notice to the manufacturer, its agent or an authorized dealer (§ 325F.665(3)(e)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days; or a braking or steering system failure that is likely to cause death or serious injury is subjected to one or more repairs (§ 325F.665(3)(b), (c)). Opportunity to cure after required consumer notice (§ 325F.665(3)(e)).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of consumer's abuse, neglect, or unauthorized modifications or alterations (§ 325F.665(3)(a)); statute of limitations (§ 325F.665(10)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (defined) (§ 325F.665(3)(a)). A lessee is not entitled to a replacement, but to a refund (§ 325F.665(4)).

Other reimbursement: Costs of options or modifications, fees, costs of towing and rental expenses (§ 325F.665(3)(a)). Costs and attorney fees (§ 325F.665(9)).

Other remedies: A consumer may bring a civil action to redress a violation of this section (§ 325F.665(9)). No limit on other consumer remedies (§ 325F.665(11)). No lemon law cause of action created against dealer except for separate written express warranties made by dealer (§ 325F.665(13)). Treble damages for bad-faith appeal (§ 325F.665(8)).

Informal dispute resolution: For remedies under this section a consumer must first use the manufacturer's informal dispute settlement procedure, if it complies with 16 C.F.R. pt. 703, unless the manufacturer allows the consumer to commence an action (§ 325F.665(6)(a)).

Resale of lemon: Full disclosure required, twelve month/12,000 mile warranty (§ 325F.665(5)(a)). No sale of a vehicle with a serious defect returned pursuant to lemon law in this or any other state (§ 325F.665(5)(b)).

MISSISSIPPI

Miss. Code Ann. §§ 63-17-151 to 63-17-165

Vehicles covered: Vehicles sold in-state, including lease-purchases and demonstrators, if warranty is issued; excludes off-road vehicles, motorcycles, mopeds, and add-on parts of motor homes (§ 63-17-155(f)).

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty if vehicle primarily used for personal, family or household purposes (§ 63-17-155(c)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 63-17-157).

Disclosure requirements: Manufacturer must provide list of service office addresses in the owner's manual; notice of accessible repair facility and informal dispute settlement procedure after consumer's notice, if not given prior to complaint (§ 63-17-159(5)).

Required consumer notice: Notice of nonconformity to the manufacturer (§ 63-17-159(5)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if substantively same nonconformity is subjected to three or more repairs, or the vehicle is out of service for a cumulative total of fifteen or more working days (§ 63-17-159(3)). After post-notification delivery of vehicle to designated dealer, ten days to cure (§ 63-17-159(5)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations; claim is not filed in good faith; any other defenses allowed by law (§ 63-17-159(2)); statute of limitations (§ 63-17-159 (6)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle or refund the full purchase price less a reasonable use allowance (§ 63-17-159(1)); "comparable" is defined as identical or reasonably equivalent (§ 63-17-155(b)).

Other reimbursement: Collateral charges (defined at § 63-17-155) (§ 63-17-159(1)). Costs, expenses and attorney fees (§ 63-17-159(7)).

Other remedies: There is no limit on other consumer remedies (§ 63-17-153). Violations considered unfair and deceptive trade practices (§ 63-17-165).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 63-17-163).

Resale of lemon: No applicable provisions.

MISSOURI

JUST UPDATED

Mo. Rev. Stat. §§ 407.560 to 407.579

Vehicles covered: Vehicles, including lease-purchases and demonstrators, transferred for the first time from the manufacturer/dealer which have not been registered or titled; excludes commercial and off-road vehicles, mopeds, electric bicycles, motorcycles, and non-motor parts of recreational vehicles (§ 407.560(6)).

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty if vehicle primarily used for personal, family, or household purposes (§ 407.560(3)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 407.565).

Disclosure requirements: Manufacturer must inform the consumer about complaint remedies; after receiving consumer notice, must inform consumer of accessible repair facility and whether arbitration procedure is available (§ 407.573).

Required consumer notice: Written notification to the manufacturer (§ 407.573).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more working days (§ 407.571). Ten days to cure after post-notice delivery of vehicle to repair facility (§ 407.573(2)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle; or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations; claim is not filed in good faith; any other defenses allowed by law (§ 407.569); statute of limitations (§ 407.573).

Replace/refund: At the manufacturer's option, the manufacturer shall replace with a new comparable vehicle, acceptable to the consumer, or refund the full purchase price less a reasonable use allowance (§ 407.567).

Other reimbursement: Collateral charges (defined in § 407.560(1)) (§ 407.567(1)). Costs, expenses and attorney fees (§ 407.577(1)).

Other remedies: There is no limit on other consumer remedies (§ 407.579(1)).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 407.575).

Resale of lemon: No applicable provisions.

MONTANA

Mont. Code Ann. §§ 61-4-501 to 61-4-533

Vehicles covered: Passenger vehicles used for personal, family, or household purposes and sold or registered in-state to transport persons and property, including nonresidential portions of motor homes; excludes trucks over 15,000 lbs. (§ 61-4-501(5)). Leased vehicles included.

Persons covered: Purchasers, lessees, and transferees during express warranty period, or any person entitled to enforce the warranty (§ 61-4-501(2)).

Period covered: Whichever comes first: two years after date of delivery or 18,000 miles (§ 61-4-501(7)).

Disclosure requirements: Clear and conspicuous disclosure of necessity of consumer's written notification of nonconformity must be provided by the manufacturer in the warranty or owner's manual, including its name and address (§ 61-4-502(3)).

Required consumer notice: Enforceability of a warranty extends beyond the warranty period if the consumer gives written notification to the manufacturer of a defect before the expiration of the period but the manufacturer does not complete the repairs within that time (§ 61-4-502(1)). However, notice is not required as a precondition of a lemon law claim.

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days (§ 61-4-504).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 61-4-506(3)).

Replace/refund: Manufacturers shall replace with new motor vehicle of same model, style, and value, if available, or of comparable market value (§ 61-4-503(1)); or the manufacturer shall accept return of a motor vehicle from the consumer and give a full refund of the purchase price less a reasonable use allowance (defined in § 61-4-501(6)) (§ 61-4-503).

Other reimbursement: Collateral and incidental charges (§ 61-4-503(2)).

Other remedies: There is no limit on other consumer remedies (§ 61-4-506(1)). Violation is unfair trade practice (§ 61-4-533). No cause of action created against dealer (§ 61-4-505(1)).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§§ 61-4-507, 61-4-511, 61-4-515 to 61-4-520).

Resale of lemon: Full disclosure required (§ 61-4-525).

NEBRASKA

JUST UPDATED

Neb. Rev. Stat. §§ 60-2701 to 60-2709

Vehicles covered: Vehicles, as defined in Neb. Rev. Stat. § 60-1401.30, sold in-state; excludes recreational vehicles (§ 60-2701(2)). No reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 60-2701(1)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 60-2702).

Disclosure requirements: None for manufacturers.

Required consumer notice: Certified mail to the manufacturer from or on behalf of the consumer (§ 60-2704).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of forty or more days; opportunity to cure after receipt of consumer notice (§ 60-2704).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 60-2703); statute of limitations (§ 60-2706).

Replace/refund: The manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 60-2703).

Other reimbursement: Taxes, fees, and charges (§ 60-2703). Attorney fees (§ 60-2707).

Other remedies: There is no limit on other consumer remedies (§ 60-2708).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 60-2705).

Resale of lemon: Title must be branded "manufacturer buyback" (Neb. Rev. Stat. §§ 60-171 to 60-177).

NEVADA

JUST UPDATED

Nev. Rev. Stat. §§ 597.600 to 597.688

Vehicles covered: Vehicles, as defined in Nev. Rev. Stat. § 482.075; excludes motor homes, off-road vehicles, and electric bicycles and scooters (§ 597.600(2)). No reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty if vehicle normally used for personal, family, or household purposes (§ 597.600(1)).

Period covered: Whichever comes first: expiry of term of express warranty or within one year from date of delivery (§ 597.610).

Disclosure requirements: None for manufacturer.

Required consumer notice: In writing to the manufacturer (§ 597.610). Must notify manufacturer of any address change (§ 597.675).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days (§ 597.630(2)).

Affirmative defenses: The nonconformity does not substantially impair the use and value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 597.630(1)); statute of limitations (§ 597.650).

Replace/refund: The manufacturer shall replace with a comparable motor vehicle of the same model with the same features; if unavailable, it shall replace with a comparable or substantially similar motor vehicle, or refund the full purchase price less a reasonable use allowance (§ 597.630(1)).

Other reimbursement: Taxes, fees, and charges (§ 597.630(1)(b)).

Other remedies: There is no limit on other consumer remedies (§ 597.670).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 597.620).

Resale of lemon: Title must be branded, a decal must be attached to the doorframe, and buyer must be given a written disclosure (§ 597.682).

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. §§ 357-D:1 to 357-D:12

Vehicles covered: Four-wheel motor vehicles with gross weight up to 9000 lbs., except tractors and mopeds; motorcycles; off highway recreational vehicles; and, as of July 1, 2006, snowmobiles.

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 357-D:2(III)).

Period covered: Period of express warranty (§ 357-D:3(III)).

Disclosure requirements: Manufacturer must provide written notice of consumer's rights at time of delivery of vehicle along with form to report defects (§ 357-D:9). If vehicle is repaired, manufacturer must provide a written repair order and summary of all work performed (§ 357-D:3(IV)).

Required consumer notice: Must report the nonconformity to the manufacturer, agent, or authorized dealer in writing on specific forms provided by the manufacturer (§§ 357-D:3(III), 357-D:4(I)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days (§ 357-D:3(VII)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 357-D:3(VI)); statute of limitations (§ 357-D:11(I)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a new vehicle, or refund the full purchase price less a reasonable use allowance (§ 357-D:3(V)).

Other reimbursement: Collateral charges (listed in § 357-D:3(V)). Legal fees and costs (§ 357-D:10).

Other remedies: Violation is an unfair and deceptive act (§ 357-D:7). No limit on other consumer remedies (§ 357-D:11(II)). No cause of action created against dealer, and dealer may not be made a party to a lemon law suit except for claim based on written express warranties made separately by dealer (§ 357-D:8).

Informal dispute resolution: Consumer must elect whether to use the dispute settlement mechanism or arbitration provisions established by the manufacturer (§ 357-D:4(I)).

Resale of lemon: Manufacturer or agent may not resell vehicle determined as having a defect that is life-threatening, that creates a risk of fire or explosion, or that impedes a consumer's ability to control or operate a motor vehicle for ordinary use or reasonable, intended purposes (§ 357-D:12).

NEW JERSEY

JUST UPDATED

N.J. Stat. Ann. §§ 56:12-29 to 56:12-49.1 (West)

Vehicles covered: Passenger vehicles, farm tractors, or motorcycles as defined in N.J. Stat. Ann. § 39:1-1 (West), purchased, leased or registered in-state; excludes living facilities of motor homes (§ 56:12-30). Also applies to authorized emergency vehicles, and makes co-manufacturer and post-manufacturing modifier responsible along with manufacturer for defects in those vehicles.

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 56:12-30).

Period covered: Whichever comes first: 24,000 miles or two years from date of delivery (§ 56:12-31). Consumer must pay for repairs made after 12,000 miles or one year after delivery unless covered by a manufacturer's warranty; these payments are recoverable if consumer prevails in action pursuant to lemon law (§ 56:12-31).

Disclosure requirements: Manufacturer must provide specific written notice upon sale or lease and also notice of applicability of lemon law statement of repair each time vehicle serviced within lemon law period (§ 56:12-34).

Required consumer notice: Written notice by certified mail, return receipt requested, to the manufacturer by or on behalf of the consumer; opportunity to cure within ten days of receipt of notice (§ 56:12-33(b)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or the vehicle is out of service for a cumulative total of twenty or more calendar days (forty-five or more for motor homes) within the shorter of two years or 24,000 miles (§ 56:12-33(a)). If nonconformity is likely to cause death or serious bodily injury, only one repair attempt is necessary if the nonconformity continues to exist. Opportunity to cure within ten days of receipt of consumer notice (§ 56:12-33(b)).

Affirmative defenses: The nonconformity does not substantially impair the use, value or safety of the vehicle, or is the result of abuse, neglect, or unauthorized modifications or alterations (§ 56:12-40).

Replace/refund: At consumer's option, the manufacturer shall replace with a new comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 56:12-32(a)).

Other reimbursement: Taxes, fees and various charges (§ 56:12-32(A)). Attorney fees, fees for expert witnesses and court costs (§ 56-12-42).

Other remedies: There is no limit on other consumer remedies (§ 56:12-47). No cause of action created against dealer (§ 56:12-46).

Informal dispute resolution: There is no requirement to arbitrate, but there is a right to an administrative hearing (§§ 56:12-37, 56:12-39), or an informal dispute settlement procedure (§ 56:12-36).

Resale of lemon: Full disclosure required (§ 56:12-35(a)). Resale violation is unfair and deceptive practice (compare § 56:8-2) (§ 56:12-35(c)).

NEW MEXICO

JUST UPDATED

N.M. Stat. Ann. §§ 57-16A-1 to 57-16A-9. See also N.M. Stat. Ann. §§ 57-16-4, 57-16-13

Vehicles covered: Passenger vehicles sold and registered in-state, whose gross vehicle weight is less than 10,000 lbs., including automobiles, pick-up trucks, motorcycles and vans (§ 57-16A-2(F)). No reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty if vehicle normally used for personal, family, or household purposes (§ 57-16A-2(C)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 57-16A-3(A)).

Disclosure requirements: Manufacturer must provide written notice and instruction, in the warranty or separate notice, of the consumer's obligation to file a written notice to the manufacturer (§ 57-16A-3(C)(2)).

Required consumer notice: Direct written notice from or on behalf of the consumer (§ 57-16A-3(C)(2)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days; opportunity to cure after receipt of consumer notice (§ 57-16A-3(C)).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations; the claim is not filed in good faith; any other defenses allowed by law (§ 57-16A-4); statute of limitations (§ 57-16A-8).

Replace/refund: Less a reasonable use allowance (defined), the manufacturer shall replace with a comparable vehicle, or refund the full purchase price (§ 57-16A-3(B)).

Other reimbursement: Collateral charges (defined in § 57-16A-2(A)). Attorney fees and costs (§ 57-16A-9).

Other remedies: A consumer who seeks enforcement under this act is foreclosed from pursuing any UCC remedy (§ 57-16A-5). A consumer has a private cause of action for damages and attorney fees, plus punitive damages of up to three times actual damages when malice is shown, if a dealer fails to perform its obligations under a manufacturer's warranty (§§ 57-16-4, 57-16-13).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 57-16A-6).

Resale of lemon: Full disclosure required (§ 57-16A-7).

NEW YORK

JUST UPDATED

N.Y. Gen. Bus. Law § 198-a (McKinney); N.Y. Veh. & Traf. Law § 417-a (McKinney)

Vehicles covered: Vehicles sold, leased, or registered; excludes off-road vehicles; includes motor homes except living quarters (§ 198-a(a)(2)).

Persons covered: Purchasers or lessees, transferees during express warranty period, or any person entitled to enforce the warranty if vehicle primarily used for personal, family, or household purposes (§ 198-a(a)(1)).

Period covered: Whichever comes first: 18,000 miles or two years from date of delivery (§ 198-a(b)(1)).

Disclosure requirements: Manufacturer must provide specified notice for consumer at time of sale or lease (§ 198-a(m)(2), (o)).

Required consumer notice: Must report nonconformity to the manufacturer, its agent or dealer; if notice to dealer, dealer's notice to the manufacturer must include a statement indicating whether any repairs have been undertaken (§ 198-a(b)(1)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days (§ 198-a(d)). Twenty day opportunity to cure for manufacturer if consumer chooses to inform manufacturer of dealer's refusal to cure as required within seven days after consumer's notice to dealer (§ 198-a(b)(2)). Special warranty and repair provisions for motor homes.

Affirmative defenses: The nonconformity does not substantially impair the value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 198-a(c)(3)); statute of limitations (§ 198-a(j)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (defined) (§ 198-a(b)(2), (c)(1)).

Other reimbursement: All fees and charges; sales tax refunds by a government agency (§ 198-a(c)(1)). Attorney fees (§ 198-a(k), (l)).

Other remedies: There is no limit on other consumer remedies (§ 198-a(f), (h)).

Informal dispute resolution: For remedies under this section a consumer may use an informal dispute settlement procedure established by manufacturer, provided the procedure complies with statutory requirements (§ 198-a(g), (m)). An alternative procedure is the N.Y. Lemon Law Arbitration Program. Attorney fees are available to prevailing consumers. N.Y. Comp. Codes R. & Regs. tit. 13, §§ 300.1 to 300.18.

Resale of lemon: Full disclosure required (§ 417-a(2)). Resale violation may result in treble damages and fines (§ 417-a(4)).

NORTH CAROLINA

N.C. Gen. Stat. §§ 20-351 to 20-351.10

Vehicles covered: Vehicles, as defined in N.C. Gen. Stat. § 20-4.01, sold or leased in-state; excludes house trailers and vehicles over 10,000 lbs. (§ 20-351.1(3)).

Persons covered: Purchaser, lessee, transferee or any person entitled to enforce the warranty (§ 20-351.1(1)).

Period covered: Consumer entitled to repairs for defects reported within the first twelve months or 12,000 miles (§ 20-351.2).

Disclosure requirements: Manufacturer must provide in warranty or owner's manual clear and conspicuous notice of consumer's obligation to provide written notice before exercising lemon law rights to refund or replacement (§ 20-351.5(a)); to establish arbitration requirement clear and conspicuous notice of arbitration process is required in the warranty (§ 20-351.7).

Required consumer notice: Must report the nonconformity to the manufacturer, its agent or an authorized dealer (§ 20-351.2(a)); written direct notice to manufacturer (§ 20-351.5(a)); written notice ten days prior to filing a civil suit (§ 20-351.7).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of twenty or more business days (§ 20-351.5(a)). Manufacturer has fifteen day opportunity to cure following receipt of consumer notice (§ 20-351.5(a)).

Affirmative defenses: The nonconformity is the result of abuse, neglect, odometer tampering by the consumer, or unauthorized modifications or alterations (§ 20-351.4).

Replace/refund: At the consumer's option, the manufacturer shall replace with a new comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 20-351.3(a)).

Other reimbursement: Collateral charges (defined), finance charges, and incidental and consequential damages (§ 20-351.3(a)); attorney fees (20-351.8).

Other remedies: There is no limit on other consumer remedies (§ 20-351.10). Injunctive relief, monetary damages (trebled for unreasonable non-compliance) (§ 20-351.8). No cause of action created against dealer (§ 20-351.9).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 15 U.S.C. § 2301 and provided consumer was given notice of required procedure in warranty (§ 20-351.7).

Resale of lemon: Full disclosure required (§ 20-351.3(d)).

NORTH DAKOTA

JUST UPDATED

N.D. Cent. Code §§ 51-07-16 to 51-07-22

Vehicles covered: Passenger motor vehicle as defined in N.D. Cent. Code § 39-01-01, or trucks weighing 10,000 lbs. or less, sold or leased in-state; excludes house cars (§ 51-07-16(2)).

Persons covered: Purchasers, transferees and lessees during express warranty period, or any person entitled to enforce the warranty (§ 51-07-16(1)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 51-07-17).

Disclosure requirements: None.

Required consumer notice: Report of the nonconformity to the manufacturer from or on behalf of the consumer (§ 51-07-19(3)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days during one year; manufacturer has opportunity to cure after notice from consumer (§ 51-07-19).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 51-07-18(2)); statute of limitations (§ 51-07-21).

Replace/refund: The manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 51-07-18(1)).

Other reimbursement: Collateral charges (§ 51-07-18(1)).

Other remedies: Exclusive remedy; if proved under this section, a consumer may not pursue other remedies (§ 51-07-20).

Informal dispute resolution: For remedies under this section a consumer must first use the manufacturer's informal dispute settlement procedure, provided it complies with 16 C.F.R. pt. 703 (§ 51-07-18(3)).

Resale of lemon: Must provide full disclosure and a twelve month or 12,000 mile warranty for vehicles sold in-state; may not ship to another state unless full disclosure is made (§ 51-07-22).

OHIO

JUST UPDATED

Ohio Rev. Code Ann. §§ 1345.71 to 1345.78 (West)

Vehicles covered: Passenger cars, noncommercial vehicles, and parts of motor homes not used for living; excludes manufactured homes and recreational vehicles (§ 1345.71(D), (H)). Includes leased vehicles (§ 1345.71(A)).

Persons covered: Purchasers, lessees, transferees, or any person entitled to enforce the warranty (§ 1345.71(A)).

Period covered: Whichever comes first: one year from the date of delivery or 18,000 miles (§ 1345.72(A)).

Disclosure requirements: Manufacturer must provide specific, separate notice of right to replacement or compensation for nonconforming vehicle; upon return of vehicle from repair, itemized written statement of work done (§ 1345.74).

Required consumer notice: Must report nonconformity to the manufacturer, its agent or an authorized dealer (§ 1345.72(A)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the substantially same nonconformity is subjected to three or more repairs, the vehicle is out of service for a cumulative total of thirty or more calendar days; there have been eight or more attempts to repair any nonconformity; or there has been at least one attempt to repair a condition likely to cause death or serious bodily injury if the vehicle is driven (§ 1345.73). Period to meet thirty days out of service requirement shall be extended by any period of time during which the vehicle could not be reasonably repaired due to war, invasion, civil unrest, strike, fire, flood, or natural disaster; if an extension of time is necessitated due to any of these conditions, the manufacturer shall arrange for use of a replacement vehicle at no cost to the consumer (§ 1345.73).

Affirmative defenses: The nonconformity is the result of abuse, neglect, or unauthorized modification or alteration (§ 1345.75(D)); statute of limitations (§ 1345.75(C)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a new vehicle, or refund the full purchase price (defined) (§ 1345.72(B)).

Other reimbursement: Incidental damages (defined) (§ 1345.72(B)). Costs and attorney fees (§ 1345.75(A)).

Other remedies: There is no limit on other consumer remedies (§ 1345.75(B)). A violation is an unfair and deceptive act or practice (§ 1345.78). No cause of action created against dealer (§ 1345.72(C)).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the attorney general (§ 1345.77).

Resale of lemon: Full disclosure required (§ 1345.76(A)). Twelve month or 12,000 mile warranty, or remainder of manufacturer's warranty if greater, required on resale (§ 1345.76(A)(1)). If the vehicle is returned under any state law for a nonconformity likely to cause death or serious bodily injury, it may not be sold in-state (§ 1345.76(B)). "Buyback" to be stamped on any future certificate of title issued (§ 1345.76(C)). Buyer has unconditional right to rescind purchase of used vehicle if title shows that it is a buyback vehicle but this fact was not disclosed in written purchase agreement (Ohio Rev. Code Ann. § 4505.181 (West)).

OKLAHOMA

JUST UPDATED

Okla. Stat. tit. 15, § 901

Vehicles covered: Vehicles registered under Oklahoma Motor Vehicle License and Registration Act; excludes vehicles over 10,000 lbs. and living facilities of motor homes (§ 901(A)(2)). No specific reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 901(A)(1)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 901(B)).

Disclosure requirements: None for manufacturer.

Required consumer notice: Direct written notification from or on behalf of the consumer (§ 901(C)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty business days (§ 901(D)). Opportunity for manufacturer to cure after receipt of consumer's notice (§ 901(C)).

Affirmative defenses: The nonconformity does not substantially impair the use and value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 901(C)).

Replace/refund: The manufacturer shall replace with a comparable new model acceptable to the consumer, or refund the full purchase price less a reasonable use allowance (§ 901(C)). If a comparable model vehicle cannot be agreed upon, the purchase price shall be refunded less a reasonable use allowance calculated by a statutory formula.

Other reimbursement: Taxes and fees, excluding interest; refunds to the consumer and lienholder (§ 901(C)). Attorney fees (§ 901(J)).

Other remedies: There is no limit on other consumer remedies (§ 901(E)).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 901(F)).

Resale of lemon: Vehicles returned under the state lemon law may not be resold in state unless manufacturer provides express warranty for 12,000 miles or twelve months after the date of resale, and manufacturer, through the licensed dealer, provides written disclosure of reasons manufacturer reacquired vehicle. However, vehicle may not be resold if it was returned under Oklahoma or another state's lemon law because of complete failure of brakes or steering likely to cause death or serious bodily injury. Manufacturer that reacquires or assists dealer in reacquiring vehicle must retitle vehicle in its own name and obtain "Lemon Law Buyback" brand before it is sold in state or exported to another state for sale, lease, or transfer. Branding of title as a buyback shall remain permanently on the title (§§ 901(H), (I), 901.1).

OREGON

JUST UPDATED

Or. Rev. Stat. §§ 646A.400 to 646A.418

Vehicles covered: Passenger motor vehicles, as defined in Or. Rev. Stat. § 801.360, purchased in-state or purchased elsewhere but registered in-state, including leased vehicles and motorcycles (§ 646A.400(4)).

Persons covered: Purchaser or lessee, or transferee during express warranty period, of new motor vehicle normally used for personal, family, or household purposes, or any person entitled to enforce the warranty (§ 646A.400(2)).

Period covered: Whichever comes earlier: two years from date of delivery or 24,000 miles (§ 646A.402).

Disclosure requirements: Manufacturer must notify the consumer of the informal settlement procedure—otherwise, consumer need not comply with the requirement (§ 646A.408).

Required consumer notice: Direct written notice to the manufacturer from, or on behalf of, the consumer (§ 646A.402(3)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs and the manufacturer or agent or authorized dealer has had an opportunity to cure the defect alleged; the vehicle is out of service for a cumulative total of thirty or more calendar days (sixty if vehicle is a motor home); or a defect likely to cause death or serious injury has been subjected to at least one repair or attempt and the manufacturer, agent, or authorized dealer has made a final attempt to repair it (§ 646A.406). Opportunity for manufacturer to cure after notice received (§ 646A.402(3)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value, or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 646A.404(4)); statute of limitations (§ 646A.416).

Replace/refund: The manufacturer shall replace with a new motor vehicle, or refund the full purchase price less a reasonable use allowance (§ 646A.404).

Other reimbursement: Taxes, fees, finance charges, prepayment penalties, charges for undercoating, rustproofing, or other dealer-installed options, and charges for after-market items purchased within twenty days after delivery (§§ 646A.400(1), 646A.404(1), (2)). Attorney fees, expert witness fees, and costs to prevailing consumer, but to prevailing party if case involves motor home; treble damages not to exceed \$50,000 over amount of refund due (§ 646A.412).

Other remedies: The lemon law does not limit other consumer remedies (§ 646A.418). No cause of action created against dealer (§ 646A.414).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 and the manufacturer gives notice to the consumer (§ 646A.408).

Resale of lemon: Title must be branded, and buyer must be provided notice (§ 646A.405).

PENNSYLVANIA

JUST UPDATED

73 Pa. Stat. and Cons. Stat. Ann. §§ 1951 to 1963 (West)

Vehicles covered: New and unused vehicles purchased or leased and registered in-state, or purchased or leased elsewhere and registered for the first time in-state, including demonstrator or dealer cars which convey fewer than fifteen persons; excludes motorcycles, motor homes, off-road, and commercial vehicles (§ 1952). Leased vehicles covered effective Feb. 11, 2002.

Persons covered: Purchasers, persons, successors or assigns, who purchased or received by transfer a new motor vehicle (§ 1952).

Period covered: Whichever comes first: one year from date of delivery, 12,000 miles, or end of warranty's term (§ 1954(a)).

Disclosure requirements: At time of sale, manufacturer must provide a written statement of attorney general's bulletin explaining rights under this law (§ 1953). Fully itemized statement as to work done required upon return of vehicle to consumer (§ 1957).

Required consumer notice: If delivery for repair is impossible, written notice to the manufacturer (§ 1954(b)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repair attempts, or the vehicle is out of service for a cumulative total of thirty or more calendar days, but the time limit is extended when repair cannot be completed because of natural disaster or other catastrophes, but in no case for more than ninety days (§ 1956).

Affirmative defenses: The nonconformity does not substantially impair the use, value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 1955).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle of equal value, or refund the full purchase price less a reasonable use allowance (defined) (§ 1955).

Other reimbursement: Collateral charges and refunds to the consumer and lienholder (§ 1955). Costs and attorney fees (§ 1958).

Other remedies: There is no limit on consumer remedies (§ 1962). Civil action for manufacturer's noncompliance (§ 1958). Noncompliance is deemed a violation of the Unfair Trade Practices and Consumer Protection Act (§ 1961).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided such procedure complies with 16 C.F.R. pt. 703 (§ 1959).

Resale of lemon: Title must be branded as repurchase, and buyer must also be given separate disclosure (§ 1960(a)). If vehicle sold without disclosure, seller liable to state for civil penalty of \$2000 and buyer may opt for refund or replacement. Vehicle that was returned because of nonconformity resulting in complete failure of braking or steering system likely to cause death or serious bodily injury may not be resold in the state (§ 1960(b)). Manufacturer must provide an express warranty lasting for the first 12,000 miles, or the first twelve months after resale (§ 1960(a)).

RHODE ISLAND

JUST UPDATED

R.I. Gen. Laws §§ 31-5.2-1 to 31-5.2-14

Vehicles covered: Automobiles, motorcycles, vans or trucks, under 10,000 lbs., sold, leased or replaced; excludes certain firefighting apparatus, motorized campers (§ 31-5.2-1(8)).

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 31-5.2-1(1)).

Period covered: Whichever comes first: one year from date of delivery or 15,000 miles (§ 31-5.2-1(10)).

Disclosure requirements: For arbitration procedure to be applicable, manufacturer must provide notice of arbitration proceeding to the buyer at the time of delivery (§ 31-5.2-7).

Required consumer notice: Report the nonconformity to the manufacturer, its agent or dealer (§ 31-5.2-2).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days plus one additional attempt to cure within seven days of manufacturer's learning of failed repair efforts (§ 31-5.2-5).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or substantial unauthorized modifications or alterations (§ 31-5.2-4); statute of limitations (§ 31-5.2-12).

Replace/refund: At the consumer's option, the manufacturer shall replace with a new comparable vehicle or refund the full purchase price less a reasonable use allowance (defined) (§ 31-5.2-3).

Other reimbursement: Incidental costs, including sales tax, registration fees, finance charges, and towing and rental costs (§ 31-5.2-3). If informal dispute resolution award for consumer is upheld on appeal, \$25 for each day the vehicle was out of use due to a nonconformity after vehicle was returned to manufacturer, unless manufacturer provided a loaner vehicle (§ 31-5.2-7.1). Attorney fees (§ 31-5.2-11).

Other remedies: There is no limit on other consumer remedies (§ 31-5.2-6). Right to bring civil action (§ 31-5.2-10). Manufacturer's failure to comply with the statute is a deceptive trade practice (§ 31-5.2-13).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 or is approved by the FTC or by the state (§ 31-5.2-7), or the state's motor vehicle arbitration board (§ 31-5.2-7.1).

Resale of lemon: Full disclosure required (§ 31-5.2-9).

SOUTH CAROLINA

JUST UPDATED

S.C. Code Ann. §§ 56-28-10 to 56-28-110. See also S.C. Code Ann. §§ 56-15-40(B), 56-15-110

Vehicles covered: Passenger motor vehicles as classified by S.C. Code Ann. § 56-3-630, including demonstrators; excludes living portion of recreational vehicles, motorcycles, motor-driven cycles, and off-road vehicles sold and registered in state (§ 56-28-10(4), (5)).

Persons covered: Purchasers or lessors, other than for resale, of vehicles normally used for personal, family or household purposes, and any other person entitled to enforce the warranty (§ 56-28-10(1)).

Period covered: Defect must arise within first twelve months or 12,000 miles, whichever occurs first, and must be reported to manufacturer during warranty term. If manufacturer is unable to conform vehicle to warranty within the term, it must give the consumer a replacement or refund.

Disclosure requirements: Manufacturer must provide information about consumer complaint remedies and dispute resolution procedure; manufacturer has ten days to notify consumer of accessible repair facility after receiving consumer's notice; notices must be sent by certified, registered or express mail (§ 56-28-50(B), (C), (E)).

Required consumer notice: Written notice to the manufacturer or agent by registered, certified or express mail (§ 56-28-50(B), (C), (E)).

Repair requirements: It is presumed a reasonable number of attempts have been made if there have been three or more repair attempts, or the vehicle is out of service for a cumulative total of thirty calendar days (§ 56-28-50(A)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value, or safety of the vehicle, or is the result of consumer's abuse, neglect, or alterations (§ 56-28-40); three year limitations period (§ 56-28-70).

Replace/refund: At the manufacturer's option, replacement or refund of the purchase price, including finance charges, sales taxes, license fees and registration fees, less a use allowance (§ 56-28-40).

Other reimbursement: Collateral charges (defined) (§ 56-28-40); costs and expenses, including attorney fees, and all other costs attributed to the nonconformity (§ 56-28-50(D)).

Other remedies: No cause of action created against dealer (§ 56-28-80). A consumer has a cause of action for double damages and attorney fees (plus treble damages if malice is shown) against a dealer or manufacturer that engages in any arbitrary, bad faith, or unconscionable action; this statute has also been applied to warranty cases (§§ 56-15-40(B), 56-15-110).

Informal dispute resolution: A consumer must first utilize an alternative dispute resolution established by the manufacturer, provided that procedure complies with 16 C.F.R. pt. 703 (§ 56-28-60).

Resale of lemon: Manufacturer must provide twelve month or 12,000 mile warranty. Full disclosure to both wholesale and consumer purchasers is required (§§ 56-28-100, 56-28-110).

SOUTH DAKOTA

JUST UPDATED

S.D. Codified Laws §§ 32-6D-1 to 32-6D-11

Vehicles covered: Self-propelled vehicles under 15,000 lbs. intended primarily for use on public highways; includes certain all-terrain vehicles with four or more wheels; excludes electric bicycles, motor homes (§ 32-6D-1(5)). No reference to leased vehicles.

Persons covered: Purchasers of new or untitled vehicles used in substantial part for personal, family or household purposes, who are entitled to enforce the warranty (§ 32-6D-1(1)).

Period covered: Whichever comes first: one year from date of delivery or 12,000 miles (§ 32-6D-1(3)).

Disclosure requirements: Manufacturer has none.

Required consumer notice: Written statement to the manufacturer which describes the vehicle, the nonconforming condition, all previous repair attempts, and the identities of

those who made repair attempts (§§ 32-6D-1(8), 32-6D-2). Notice by certified mail prior to final (seven days) opportunity to cure which must precede commencement of civil action (§ 32-6D-6).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity has been subjected to four or more repair attempts, or the vehicle has been out of service for a cumulative total of thirty days (§ 32-6D-5). Final opportunity to cure within seven days after manufacturer receives notice prior to commencement of civil action.

Affirmative defenses: The nonconformity does not significantly impair the use, market value or safety of the vehicle, or is the result of neglect, abuse, or unauthorized modification or alteration (§ 32-6D-7); statute of limitations (§ 32-6D-11).

Replace/refund: At the option of the consumer, replace the vehicle with a comparable new vehicle or refund the full contract price less a reasonable allowance for use (defined by statute) (§§ 32-6D-3, 32-6D-4).

Other reimbursement: Charges for undercoating, dealer preparation and transportation, plus nonrefundable portions of extended warranties and service contracts; all collateral charges including excise tax, license and registration fees, all finance charges incurred after consumer notice to the manufacturer, all incidental charges including reasonable cost of alternative transportation; attorney fees if the manufacturer has breached any of its obligations (§§ 32-6D-3, 32-6D-8).

Other remedies: No cause of action created against dealer (§ 32-6D-10).

Informal dispute resolution: Consumer must use an informal dispute settlement procedure established by the manufacturer before bringing suit if such procedure complies with federal regulations (§ 32-6D-6).

Resale of lemon: Full disclosure required; the manufacturer must return the vehicle title to the state motor vehicle department of revenue to be branded with a statutory notice (§ 32-6D-9).

TENNESSEE

Tenn. Code Ann. §§ 55-24-101 to 55-24-112

Vehicles covered: Vehicles, as defined in Tenn. Code Ann. § 55-1-103, sold and subject to registration and titling in Tennessee or another state; excludes motorized bicycles, motor homes, lawn mowers or garden tractors, recreational vehicles, off-road vehicles and vehicles over 10,000 lbs. (§ 55-24-101(4)).

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty; excludes government or business entity with three or more vehicles (§ 55-24-101(1), (2)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from the date of delivery (§ 55-24-101(7)).

Disclosure requirements: Manufacturer must notify the consumer of the arbitration procedure for it to be binding on consumer (§ 55-24-106). Copies of detailed repair orders required each time vehicle returned to consumer (§ 55-24-109).

Required consumer notice: Written notice by certified mail to the manufacturer by the consumer or consumer's representative (§ 55-24-105(c)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, and the nonconformity continues to exist, or the vehicle is out of service for a cumulative total of thirty or more calendar days; final ten day period for manufacturer to repair after receipt of consumer notice (§ 55-24-105).

Affirmative defenses: The nonconformity does not substantially impair the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 55-24-103(e)); statute of limitations (§ 55-24-107).

Replace/refund: The manufacturer shall replace with a comparable vehicle (defined), or refund the full purchase price less a reasonable use allowance (defined) (§ 55-24-103). For leases, see § 55-24-104.

Other reimbursement: Collateral charges (defined) (§ 55-24-103(b)(1)). Costs, expenses and attorney fees (§ 55-24-108).

Other remedies: There is no limit on other consumer remedies (§ 55-24-110(a)). No lemon law suit allowed against dealer unless it is also the manufacturer, or manufacturer is insolvent or cannot be served (§ 55-24-111).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 55-24-106).

Resale of lemon: No applicable provisions.

TEXAS

JUST UPDATED

Tex. Occ. Code Ann. §§ 2301.601 to 2301.613 (West)

Vehicles covered: A fully self-propelled vehicle having two or more wheels whose primary purpose is transporting persons or property on public highways; also includes some other vehicles that meet the requirements for a certificate of title, towable recreational vehicles, and certain heavy vehicle components, see Tex. Occ. Code Ann. § 2301.002 (West).

Persons covered: Persons who are entitled to enforce a manufacturer's warranty, provided that they meet one of several alternative requirements regarding connection to the state; active members of the United States armed forces who are stationed in the state at the time a proceeding is commenced under the statute meet the requirement of connection to the state. The definition specifically includes persons who lease covered vehicles from entities licensed under the Texas motor vehicle sales laws (§ 2301.601).

Period covered: Expiration of warranty, or whichever comes first: twenty-four months or 24,000 miles (§ 2301.605).

Disclosure requirements: Manufacturer must provide notice of complaint procedures and rights (§ 2301.613).

Required consumer notice: Buyer must mail written notice of defect to manufacturer, converter, or distributor before board may issue order for refund or replacement (§ 2301.606). To extend duty to repair beyond warranty period, consumer must report the nonconformity to the manufacturer, converter, distributor, agent, or dealer (§ 2301.603).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity continues to exist after four or more repair attempts that were made before the earlier of (1) the date the express warranty expires, or (2) 24 months or 24,000 miles, whichever occurs first, after the date of delivery. If the defect creates a serious safety hazard, the presumption applies if the defect continues to exist after two or more repairs that were made before the earlier of (1) the date the express warranty expires, or (2) 24 months or 24,000 miles, whichever occurs first, after the date of delivery. Presumption also applies if defect still exists and vehicle is out of service for thirty or more days during first twenty-four months or 24,000 miles and at least two repair attempts were made before the earlier of (1) the date the express warranty expires, or (2) 24 months or 24,000 miles, whichever occurs first, after the date of delivery (§ 2301.605). Board may not issue order for refund or replacement unless manufacturer, converter, or distributor has been given an opportunity to cure the alleged nonconformity (§ 2301.606).

Affirmative defenses: The nonconformity does not substantially impair the use or market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alteration (§ 2301.606); statute of limitations (§ 2301.606).

Replace/refund: The manufacturer shall replace with a comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 2301.604).

Other reimbursement: Reasonable incidental costs (§ 2301.604).

Other remedies: There is no limit on other consumer remedies (§§ 2301.603, 2301.607).

Informal dispute resolution: For remedies under this section, a consumer must use an informal dispute settlement procedure established by the commission (§ 2301.607).

Judicial review is available (§ 2301.609).

Resale of lemon: Full disclosure including toll-free telephone number; new twelve-month, 12,000 mile warranty; restoration to factory specifications (§ 2301.610).

UTAH

Utah Code Ann. §§ 13-20-1 to 13-20-7, 41-3-406 to 41-3-414 (West)

Vehicles covered: Motor vehicles and motorcycles designed primarily for use and operation on paved highways, as defined in Utah Code Ann. § 41-1a-102 (West), and the self-propelled vehicle and chassis of a motor home. Must be sold in state. Excludes motorcycles designed primarily for use on unimproved terrain; electric assisted bicycles; mopeds; motor scooters; motor-driven cycles; living portions of motor homes; road or truck tractors; manufactured

homes; and motor vehicles with gross laden weight of over 12,000 lbs. except motor homes and farm tractors (§ 13-20-2).

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§§ 13-20-2(1), 41-3-407(2)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 13-20-3).

Disclosure requirements: None for manufacturer.

Required consumer notice: Report the nonconformity to the manufacturer, its agent or an authorized dealer (§ 13-20-3).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days (§ 13-20-5).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 13-20-4(4)).

Replace/refund: The manufacturer shall replace with a new comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 13-20-4).

Other reimbursement: Collateral charges (§ 13-20-4(1)); attorney fees (§ 13-20-6(4)).

Other remedies: No lemon law liability imposed on dealer except for its separate express written warranties (§ 13-20-6(2)). Civil action available pursuant to lemon law only after investigation by division of consumer protection (§ 13-20-6(1)). There is no limit on consumer remedies under other laws (§ 13-20-6(3)). Lemon resale violation is an unfair or deceptive practice (§ 41-3-412).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 13-20-7). Special mediation requirements for cases involving recreational vehicle trailers (Utah Code Ann. § 13-20-8 (West)).

Resale of lemon: Full written disclosure and branding of title required (§§ 41-3-408, 41-3-409).

VERMONT

JUST UPDATED

Vt. Stat. Ann. tit. 9, §§ 4170 to 4181

Vehicles covered: New vehicles purchased, leased or registered, including demonstrators (§ 4171(9)). Excludes tractors, highway building equipment, road-making appliances, snowmobiles, motorcycles, mopeds, living portion of recreational vehicles and trucks over 10,000 lbs. (§ 4171(6)). For the portions of a recreational vehicle other than the living portion, "manufacturer" refers to the final stage assembler, but the warrantor of the chassis is responsible for any refund (§§ 4171(7), 4172(e)(2)).

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty; excludes government entities and businesses with three or more vehicles (§ 4171(2)).

Period covered: Term of express warranty or written warranties (§ 4172(a)).

Disclosure requirements: Manufacturer must provide form for notice of defect at time the vehicle is delivered (§§ 4173(a), 4180); display written notice of consumer rights at time of sale (§ 4180).

Required consumer notice: Notify the manufacturer in writing on form provided by manufacturer after the third repair attempt or out of service for thirty days (§ 4173(a)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or the vehicle is out of service for a cumulative total of thirty or more calendar days; the first repair attempt must be within the express warranty period (§ 4172(g)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 4172(f)); consumer has discontinued payments (§ 4173(b)); statute of limitations (§ 4179).

Replace/refund: At the consumer's option, within thirty days the manufacturer shall replace with a new vehicle of comparable worth, or refund the full purchase price less a reasonable use allowance (defined) (§ 4172(e)).

Other reimbursement: Credits, allowances, fees, charges, and incidental and consequential damages (§ 4172(e)).

Other remedies: A consumer cannot pursue a remedy under this chapter if it has discontinued payment due to the manufacturer's breach (§ 4173(b)). The manufacturer's failure to comply with the statute is an unfair or deceptive act or practice (§ 4177). No cause of action created against dealer (§ 4178). Non-disclosure agreements and waivers of rights are void except in settlement agreements (§ 4173(a)(2)).

Informal dispute resolution: For remedies under this section, consumer must notify manufacturer whether consumer elects to use arbitration procedure established by manufacturer's procedure or the Vermont motor vehicle arbitration board's (§ 4173(c)).

Resale of lemon: Full disclosure required and notice printed on title (§ 4181).

VIRGINIA

JUST UPDATED

Va. Code Ann. §§ 59.1-207.9 to 59.1-207.16:2

Vehicles covered: Passenger cars, pick-up or panel trucks, motorcycles, autocycles, motorized portions of motor homes and mopeds, demonstrators, and lease-purchase vehicles (§ 59.1-207.11).

Persons covered: Purchasers, lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 59.1-207.11).

Period covered: Eighteen months from date of delivery (§ 59.1-207.11).

Disclosure requirements: Manufacturer must provide in the warranty or owner's manual clear and conspicuous disclosure that consumer must give notice before lemon law rights can be exercised (§ 59.1-207.13(D)).

Required consumer notice: Written notification by the consumer or their representative to the address the manufacturer specifies in the warranty or owner's manual, unless factory representative has inspected or been consulted as to the nonconformity (§§ 59.1-207.13(E), 59.1-207.11).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or if the nonconformity is a serious safety defect subjected to one or more repairs, or if the vehicle is out of service for a cumulative total of thirty or more calendar days (§ 59.1-207.13(B)).

Affirmative defenses: The nonconformity does not substantially impair the use, market value or safety of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 59.1-207.13(G)); statute of limitations (§ 59.1-207.16).

Replace/refund: At the consumer's option, the manufacturer shall replace with a comparable vehicle acceptable to the consumer, or refund the full purchase price less a reasonable use allowance (defined) (§ 59.1-207.13(A)).

Other reimbursement: Collateral charges and incidental damages (§ 59.1-207.13(A)(2)). Attorney fees, costs and expert witness fees (§ 59.1-207.14). Triple damages and attorney fees if manufacturer fails to comply with arbitration decision (§ 59.1-207.15(C)).

Other remedies: There is no limit on other consumer remedies (§ 59.1-207.13(F)).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with state and federal laws (§ 59.1-207.15).

Resale of lemon: Full written disclosure required (§ 59.1-207.16:1).

WASHINGTON

JUST UPDATED

Wash. Rev. Code §§ 19.118.005 to 19.118.904

Vehicles covered: Leases or purchases made in state, including demonstrators, motorcycles, and lease-purchases; excludes business fleets with ten or more vehicles, non-motor portions of motor homes, and trucks over 19,000 lbs. (§ 19.118.021(11)).

Persons covered: Consumers under agreement or contract for transfer, lease, or purchase of a new vehicle (§ 19.118.021(4)).

Period covered: Whichever comes first: two years or 24,000 miles (§ 19.118.021(6), (22)).

Disclosure requirements: Dealer must provide written statement of lemon law rights at time of purchase in paper or electronic form and a written statement of repairs after vehicle's return; manufacturer must provide owner's manual and addresses and phone numbers of its regional offices or customer aid division, all of which are to be delivered by dealer to buyer at time of sale (§ 19.118.031).

Required consumer notice: Written request for replacement or refund (§ 19.118.041(1)).

Repair requirements: For a serious safety defect: two or more repair attempts; same nonconformity: four or more repair attempts; or out of service for a cumulative total of thirty or more calendar days, with at least fifteen days during first year or first 12,000 miles (§ 19.118.041(2)). Special provisions for motor home repair attempts.

Affirmative defenses: The nonconformity does not substantially impair the use, value or safety of the vehicle, or is the result of abuse, neglect, or unauthorized modifications or alterations (§ 19.118.090(5)). Time limit in which to appeal arbitration decision to superior court (§ 19.118.090(8)).

Replace/refund: At the consumer's option, the manufacturer shall replace with an identical or reasonably equivalent vehicle, or refund the full purchase price less a reasonable use allowance (§ 19.118.041(1)).

Other reimbursement: Collateral and incidental costs as defined in § 19.118.021(2), (7). If the board awards replacement or repurchase and the manufacturer does not comply, continuing damages of \$25 per day for each day beyond the forty calendar days after the manufacturer's receipt of the consumer's acceptance of the board's decision, except days on which the manufacturer provides a free loaner vehicle. Attorney fees and costs (for both arbitration and judicial proceedings); if appeal without good cause and for harassment purposes, damages shall be doubled and possibly tripled (§§ 19.118.080(6), 19.118.100).

Other remedies: There is no limit on other consumer remedies (§§ 19.118.140, 19.118.070). Violation of the chapter is an unfair or deceptive trade practice (§ 19.118.120). No lemon law cause of action created against dealer, but dealer commits UDAP violation if it violates any duty imposed on it by lemon law (§ 19.118.041(4)). Dealer is treated as a manufacturer if dealer, without disclosure to the consumer, modifies a vehicle in a way that voids the manufacturer's warranty.

Informal dispute resolution: For remedies under this section a consumer may use an informal dispute settlement procedure, provided the procedure complies with 16 C.F.R. pt. 703 or with the new motor vehicle arbitration board procedure (§ 19.118.150).

Resale of lemon: Full disclosure required; new title to include title brand indicating return and correction of non-conformity. Vehicle must display window sticker, and buyer must be given lemon buyback disclosure form. (§ 19.118.061).

WEST VIRGINIA

JUST UPDATED

W. Va. Code §§ 46A-6A-1 to 46A-6A-9

Vehicles covered: Passenger automobiles purchased in state or registered and titled there, including pick-up trucks, vans registered as Class A motor vehicles, any self-propelled motor vehicle chassis of a motor home registered as a Class A or Class B motor vehicle, and self-propelled farm vehicles with thirty-five or more horsepower (§ 46A-6A-2(4)).

Persons covered: Purchasers, other than for purposes of resale, of new motor vehicles for personal, family, or household purposes; transferees during express warranty period; or any person entitled to enforce the warranty (§ 46A-6A-2(1)).

Period covered: Whichever comes later: expiry of term of express warranty or one year from date of delivery (§ 46A-6A-3(a)).

Disclosure requirements: Manufacturer must provide separate statement of rights as specified (§ 46A-6A-6); dealer must provide notice if repairs have been made to a vehicle after receipt from the manufacturer if repairs have a retail value of five percent of the manufacturer's suggested retail price (§ 46A-6A-3a).

Required consumer notice: Report nonconformity to manufacturer, agent or authorized dealer (§ 46A-6A-3(a)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, if the vehicle is out of service for a cumulative total of thirty or more calendar days, or if there has been one repair and the nonconformity is likely to cause death or serious bodily harm (§ 46A-6A-5(a), (b)).

Affirmative defenses: The nonconformity does not substantially impair the use or market value, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 46A-6A-4(c)); statute of limitations (§ 46A-6A-4(d)).

Replace/refund: The manufacturer shall replace the nonconforming vehicle with a comparable new motor vehicle (§ 46A-6A-3(b)).

Other reimbursement: In a civil action, a consumer may be awarded refund of the purchase price, including taxes, fees, and expenses, plus damages for loss of use and attorney fees (§ 46A-6A-4(b)).

Other remedies: There is no limit on other consumer remedies (§ 46A-6A-9). Liability under lemon law limited to manufacturer (§ 46A-6A-4(e)).

Informal dispute resolution: For remedies under this section a consumer must use an informal dispute settlement procedure, provided the procedure complies with 16 C.F.R. pt. 703, as determined by the attorney general (§ 46A-6A-8(a)).

Resale of lemon: Full disclosure required (§ 46A-6A-7).

WISCONSIN

Wis. Stat. § 218.0171. See also Wis. Stat. § 218.0163(2)

Vehicles covered: Vehicles registered and purchased or leased in state, including demonstrator or executive vehicles; excludes mopeds, semitrailers and trailers used with trucks (§ 218.0171(1)(d)).

Persons covered: Purchasers or lessees, transferees during express warranty period, or any person entitled to enforce the warranty (§ 218.0171(1)(b)).

Period covered: Whichever comes first: expiry of term of express warranty or one year from date of delivery (§ 218.0171(2)(a)).

Disclosure requirements: None for manufacturer.

Required consumer notice: To trigger repair obligation, consumer must report nonconformity to manufacturer or authorized dealer on a state transportation department form. To obtain a refund or a replacement vehicle consumer must notify manufacturer, using state transportation department form, after reasonable attempt to repair (§ 218.0171(2b)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to four or more repairs, or the vehicle is out of service for thirty or more calendar days; the time during which repair services are not available because of flood or other natural disaster, war, invasion, fire, or strike are not included in the thirty day period (§ 218.0171(1)(h)).

Affirmative defenses: The nonconformity is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 218.0171(1)(f)). Statute of limitations is 36 months after first delivery of vehicle to a consumer (§ 218.0171(7)(a)).

Replace/refund: At the consumer's option, the manufacturer shall replace with a new comparable vehicle, or refund the full purchase price less a reasonable use allowance (defined) (§ 218.0171(2)(b)).

Other reimbursement: Collateral costs and charges; refund to the consumer and lienholder; other damages (§ 218.0171(2)(b)). Double damages, costs, and attorney fees (§ 218.0171(7)); but note that Wis. Stat. § 814.045 presumes that reasonable attorney fees do not exceed three times compensatory damages unless court determines, after considering a set of factors, that a greater amount is reasonable). Sales tax to be returned by department of revenue (§ 218.0171(2)(f)).

Other remedies: There is no limit on other consumer remedies (§ 218.0171(5)). No cause of action created against dealer by virtue of exclusion of dealers from definition of manufacturer and its agents (§ 218.0171(1)(c)). A consumer has a private cause of action for pecuniary loss caused by a licensed dealer's willful failure to perform any written agreement, plus costs and attorney fees (§ 218.0163(2)).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with 16 C.F.R. pt. 703 (§ 218.0171(3), (4)).

Resale of lemon: Full disclosure required (§ 218.0171(2)(d)).

WYOMING

JUST UPDATED

Wyo. Stat. Ann. § 40-17-101

Vehicles covered: Every vehicle under 10,000 lbs. sold or registered in-state which is self-propelled (§ 40-17-101(a)(ii)). No reference to leased vehicles.

Persons covered: Purchasers, transferees during express warranty period, or any person entitled to enforce the warranty (§ 40-17-101(a)(i)).

Period covered: One year from the date of delivery (§ 40-17-101(b)).

Disclosure requirements: Manufacturer has none.

Required consumer notice: Nonconformity must be reported to the manufacturer by or on behalf of the consumer (§ 40-17-101(h)).

Repair requirements: It is presumed that a reasonable number of attempts have been made if the same nonconformity is subjected to three or more repairs, or the vehicle is out of service for a cumulative total of thirty or more business days (§ 40-17-101(d)); manufacturer must have a reasonable opportunity to cure (§ 40-17-101(h)).

Affirmative defenses: The nonconformity does not substantially impair the use and market value of the vehicle, or is the result of the consumer's abuse, neglect, or unauthorized modifications or alterations (§ 40-17-101(g)). No statute of limitations specified.

Replace/refund: The manufacturer shall replace with a new or comparable vehicle, or refund the full purchase price less a reasonable use allowance (§ 40-17-101(c)).

Other reimbursement: Collateral charges; refund to the consumer and lienholder (§ 40-17-101(c)(ii)). Attorney fees (§ 40-17-101(k)).

Other remedies: There is no limit on other consumer remedies (§ 40-17-101(e)). Civil suit for violation of the statute (§ 40-17-101(k)).

Informal dispute resolution: For remedies under this section a consumer must first use an informal dispute settlement procedure established by the manufacturer, provided the procedure complies with state and federal laws (§ 40-17-101(f)).

Resale of lemon: No applicable provisions.

State Service Contract Laws and Regulations (as of 2022)

ALABAMA

Ala. Code §§ 8-32-1 to 8-32-12

Service contract does not constitute insurance, Ala. Code § 5-19-32. Provider shall register with the Commissioner, and insure all service contracts under a reimbursement insurance policy or maintain a reserve account for its obligation under its service contracts or maintain a net worth of \$100,000,000 (§ 8-32-3). Holder has right to return the service contract within 10 to 20 days (depending upon whether contract was mailed), after which contract is void. Holder of contract may make written demand for refund of unearned portion of any premium paid (§ 8-32-3). The provider must give a receipt and copy of service contract to service contract holder (§ 8-32-3). The provider must include contact information for all relevant parties (§ 8-32-5). The provider must also disclose the procedure for reimbursement for repair work performed by third parties and, if prior approval of repair work is required, the procedure for obtaining such approval (§ 8-32-5). The provider must also disclose: any deductible; a description of the property; any exclusions; whether use of non-original manufacturer's parts is allowed; restrictions on transferability, terms, restriction or conditions governing early termination by either party; the obligations and duties of the service contract holder; and whether or not the service contract provides for or excludes consequential damages or preexisting conditions (§ 8-32-5). The provider shall not use in its name the word "insurance" or any words descriptive of the insurance business and must disclose that the contract is not an insurance contract (§ 8-32-6). The provider shall not require the purchase of a service contract. Commissioner may issue cease and desist orders; seek injunctions and civil penalties (\$500 per violation up to maximum of \$10,000 for violations of similar nature) for violations (§ 8-32-10).

ALASKA

Alaska Stat. § 45.25.620

Service contracts not governed by insurance law, Alaska Stat. § 21.03.021. A motor vehicle service contract must be in writing and contain all essential provisions regarding the contract's administration (§ 45.25.620). If included in motor vehicle sale, service contract must disclose the difference between a service contract and a warranty; the maker of or obligor on the contract; the relationship between the contract's maker and seller; for used vehicles, a notification that the seller cannot disclaim implied warranties if the seller is the maker or obligor of the service contract; all other disclosures required by law (§ 45.25.620).

Alaska Stat. §§ 21.59.110 to 21.59.290

Motor vehicle service contracts. Contracts must be clear and understandable, and include: contact information for the provider and administrator; amount of fee; any deductible; services and materials to be provided; holder's duties; whether aftermarket parts are allowed; any transferability restrictions; cancellation procedure; and claims procedure for reimbursement insurance (§§ 21.59.110, 21.59.180). Providers must be licensed and either have acceptable reimbursement insurance or provide other assurance of financial responsibility (§§ 21.59.140, 21.59.180). Consumer may cancel within 10 days if contract

was provided at time of sale, or 30 days (or longer if the contract so provides) if contract was mailed, and receive a full refund. For later cancellation, consumer must receive a prorated refund (§ 21.59.170). Consumer has private right of action for damages, injunctive relief, restitution, or other appropriate relief for a threatened or existing violation relating to the motor vehicle service contract (§ 21.59.200(f)).

ARIZONA

JUST UPDATED

Ariz. Rev. Stat. Ann. §§ 20-206, 20-356, 20-357, 20-1095 to 20-1095.10, 20-1110.01

Motor vehicle service contracts under which the party seeks to indemnify another or to pay a specified amount upon determinable contingencies are insurance (57 Op. Ariz. Att’y Gen. 147 (1950); *Jim Click Ford, Inc. v. City of Tucson*, 739 P.2d 1365 (Ariz. Ct. App. 1987) (vehicle service contract is insurance); *Guaranteed Warranty Corp., Inc. v. State ex rel. Humphrey*, 533 P.2d 87 (Ariz. Ct. App. 1975)). Where regulated as insurance: service contractors must be authorized by the director of insurance (§ 20-206). Service contracts subject to the statute are defined to include home protection contracts and agreements for repair or replacement of damaged tires, paintless dent repair, and replacement of keys or key fobs (§§ 20-1095(7), 20-1095.10). Exempted from all provisions except those allowing the state to revoke a license or issue a cease and desist order are, inter alia, service contract programs for which a motor vehicle manufacturer or dealer has financial responsibility for performance; some warranties and service contracts issued by manufacturer affiliates; service contracts for appliances, electronic equipment, residential heating, cooling, and air conditioning systems, or other mechanical equipment (other than motor vehicles) sold or serviced by the service contract provider; service contracts for some cell phones and personal communications devices; and certain scheduled maintenance agreements (§ 20-1095.02). Products that fall within these exemptions are also defined not to be insurance (§ 20-1095.02(C)). Disclosures required (§ 20-1095.06). Motor vehicle service contract program approved by director if insured by mechanical reimbursement insurance, statutorily specified surety bond, or cash or securities equal to bond (§§ 20-1095.04, 20-1095.06). The service contract language must be on file for 30 days and not disapproved by the insurance director; grounds for disapproval are set out. The contract itself must be provided to the consumer within a reasonable time (§ 20-1095.06). Contract forms must meet standard of readability (§ 20-1110.01). Consumer can request contract terms prior to sale (§ 20-1095.01(D)). Insurers must disclose rating systems upon request of the consumer (§ 20-357). Service contract program must be bonded (§ 20-1095.04).

ARKANSAS

JUST UPDATED

Ark. Code Ann. §§ 4-90-501 to 4-90-512

A “motor vehicle service contract” is separate from “mechanical breakdown insurance.” Both perform the same function but the latter includes all such contracts issued by an insurer licensed to do business in the state and is excluded from the statute. Both are defined as agreements in which the service provider undertakes to repair, replace, or indemnify the operational or structural failure of a motor vehicle due to a defect or normal

wear and tear. "Motor vehicle service contract" includes a contract that provides for tire repair, paintless dent removal, windshield repair, replacement of keys or key fobs, and other services approved by the commissioner (§ 4-90-502). The statute also provides for theft protection programs, defined as a device or system that is installed on or applied to a motor vehicle that is designed to prevent loss or damage to the vehicle from theft, and that includes a theft protection program warranty (§ 4-90-502(11)). Providers of motor vehicle service contracts or theft protection programs must be insured by a motor vehicle service contract reimbursement insurance policy (§ 4-90-505), and no such contract may be issued which does not comply with the statutory terms, conditions, and disclosures for a consumer's benefit including terms governing transferability, if any (§ 4-90-506). The contract must conspicuously disclose the name and address of the provider's insurer, a list of the insurer's obligations and the procedure for filing claims (§ 4-90-505). Among the contract terms which must be conspicuously disclosed are the consumer's right to terminate the agreement within the first 30 days upon payment of a modest fee, or anytime and receive a pro rata refund for the remaining term of the contract (§ 4-90-507). The statute provides that the state unfair insurance practices statute, Ark. Code Ann. §§ 23-66-201 to 23-66-213, applies to motor vehicle service contracts and theft protection warrantors to the extent appropriate (§ 4-90-511).

Ark. Code Ann. §§ 4-114-101 to 4-114-112

Arkansas Service Contracts Act applies to consumer transactions; it does not apply to motor vehicle service contracts as defined in and regulated by Ark. Code Ann. §§ 4-90-501 to 4-90-512 (§ 4-114-102). The Act specifies requirements for doing business (§ 4-114-104); disclosures as to reimbursement policy, notices, terms, refunds, and penalties (§§ 4-114-105, 4-114-106); prohibited acts (§ 4-114-107); recordkeeping requirements (§ 4-114-108); and enforcement provisions (§ 4-114-111).

CALIFORNIA

Cal. Civ. Code §§ 1794.4, 1794.45 (West)

A service contract may be sold in addition to or in lieu of an express warranty if that contract fully and conspicuously discloses in simple and readily understood language the terms, conditions, and exclusions of that contract including terms of transferability (§ 1794.4(a)). Except as otherwise expressly provided in the service contract, every service contract shall obligate the service contractor to provide to the buyer all the services and parts necessary to maintain proper operation of the product for the duration of the service contract and without additional charge (§ 1794.4(b)). No service contract may be offered for sale unless the following elements exist: disclosure of the buyer's cancellation and refund rights; the contract shall be available for inspection by the buyer before purchase, and delivered to the buyer within 60 days; and the contract is applicable only to items, costs, and time periods not covered by the express warranty (§ 1794.41(a)). Buyers of new vehicles may cancel within 60 days of receipt of contract. Buyers of used vehicles may cancel within 30 days of receipt of contract (§ 1794.41(a)(4)(B)). Refund is pro rata, based on either elapsed time or an objective measure of use, such as mileage (§ 1794.41(a)(4)(A)). Notice of cancellation must be in writing (§ 1794.41(a)(4)(B)). Seller may also assess a cancellation fee of 10% of service contract price or \$25, whichever is less (§ 1794.41(a)(4)(B)). Also includes service contracts covering home appliances or home electronic products purchased for use in state

(§ 1794.41). Retailers that sell service contracts (except motor vehicle service contracts) must either maintain contract information and provide it to purchasers on request or, upon request from a purchaser, obtain a copy of the contract and provide it to the purchaser within 10 days of the request (§ 1794.45). Private actions for damages, costs, and expenses—including attorney fees—authorized.

COLORADO

JUST UPDATED

Colo. Rev. Stat. §§ 42-11-101 to 42-11-109

A service contract is an agreement between a provider and buyer given for consideration over and above the lease or purchase price of a motor vehicle or power sports vehicle that provides repair service for operational failure of a motor vehicle due to a defect in materials or skill but does not include mechanical breakdown insurance or a prepaid maintenance agreement (§§ 42-11-101(3), 42-11-109). A service contract shall not be issued unless the provider is insured by a motor vehicle service contract reimbursement insurance policy (§ 42-11-102). Service contract must state conspicuously that the obligations of the provider are guaranteed under a service contract reimbursement insurance policy and provides information about how to file a claim (§ 42-11-104). Failure to comply with this provision is a deceptive trade practice under the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101 to 6-1-116 (§ 42-11-106). Service contract holder may sue service contract provider for violations in a civil action and recover reasonable attorney fees and costs (§ 42-11-108).

Colo. Rev. Stat. §§ 10-4-1601 to 10-4-1609

Consumer goods service contracts are not insurance (§ 10-4-1601). Providers must have acceptable reimbursement insurance, or provide certain other evidence of financial stability (§ 10-4-1603). Provider must give consumer a copy of the agreement within a reasonable time after purchase; upon request, provider must furnish consumer a sample contract before sale (§ 10-4-1603). Contracts must disclose: contact information for the provider, seller, and administrator, if any; the purchase price; the goods covered; any deductible; services and merchandise to be provided; whether aftermarket parts may be used; cancellation provisions; any restrictions on transferability; holder's duties; and any provisions or exclusions for consequential damages and preexisting conditions (§ 10-4-1606). Original purchaser may cancel contract by returning it to provider within 10 days after purchase if contract was provided at time of sale, or within 20 days (or longer if contract so provides) if contract was mailed. Upon such cancellation, provider must give a full refund if no claims have been made. For a cancellation made after that period has expired, if no claims have been made, provider must give a prorated refund (§ 10-4-1603). Provider may not use words descriptive of the insurance business or deceptively similar to the name of an insurance company, make false or misleading statements, or omit material statements, and purchase of a service contract may not be a condition for the sale of any property (§ 10-4-1607). The insurance commissioner may impose civil penalties, issue cease and desist orders, or seek injunctive or other relief, including restitution to persons aggrieved by a violation (§ 10-4-1609).

CONNECTICUT

Conn. Gen. Stat. § 42-260

Extended warranties must include: a clear description and identification of the product; the date the extended warranty commences and its duration; description of the limits on transfer or assignment if enforceability of the extended warranty is limited to the original buyer; a statement of the obligation of the extended warranty provider; a step-by-step explanation of the procedure which the buyer shall follow in order to obtain performance of any obligation under the extended warranty; a description of the services covered; statement of the right to cancel; the name and address of insurers insuring the obligations of such warranty and instructions on how the buyer or successor of the buyer's rights may file a claim with the insurer if the provider fails to perform according to the extended warranty's terms (§ 42-260). Extended warranties shall not be issued unless the provider is insured under an extended warranty reimbursement insurance policy or the provider can demonstrate certain net worth (§ 42-260). See also Conn. Gen. Stat. § 38a-816(17), which makes it an unfair and deceptive act or practice in the business of insurance for an extended warranty provider to violate § 42-260, and Conn. Agencies Regs. §§ 42-260-1 to 42-260-5 for insurance regulations implementing an arbitration process to settle disputes between extended warranty providers and buyers arising from extended warranty contracts.

DELAWARE

JUST UPDATED

Del. Code Ann. tit. 18, §§ 917, 918

Defines service contract, maintenance agreement, warranty, and vehicle theft protection product warranty (§ 918). None of these are insurance, unless the insurance laws are "made expressly applicable thereto" (§ 917).

DISTRICT OF COLUMBIA

D.C. Code § 28-3904

It shall be an unlawful trade practice, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to fail to supply to a consumer a copy of a service contract which the consumer executes (§ 28-3904(q)).

D.C. Code §§ 31-2351.01 to 31-2351.13

Motor vehicle manufacturers are subject to regulation by the insurance commissioner, but are exempt from registration requirements and are required to follow only disclosure requirements, restrictions on automatic renewals, prohibitions on misrepresentation, and prohibitions on making a service contract a condition for a loan or sale (§ 31-2351.02). Providers must register with the insurance commissioner, and either have acceptable reimbursement insurance or provide other specified evidence of financial security (§ 31-2351.03). They must provide a sample copy of the contract before sale, and a copy of the contract within a reasonable time thereafter. The contract must disclose: the name and contact information for the provider, administrator (if any), and reimbursement insurance provider; purchaser price; any deductibles; merchandise and service to be provided, and any limitations or exclusions thereof; any transferability restrictions; cancellation procedures; holders' duties; any exclusion for consequential damages or preexisting conditions; and, for

motor vehicles, whether aftermarket parts may be used (§§ 31-2351.03, 31-2351.05). Original purchaser may cancel contract within 30 days after mailing of the contract or delivery of the contract, if contract was delivered at time of sale (or longer period if provided for in the contract), and must be given a full refund. For later cancellations, purchaser must receive a prorated refund, less a 10% cancellation fee (§ 31-2351.03). Misrepresentations are forbidden, explicitly including deception regarding provider's affiliation with a manufacturer or insurance company. Purchase of a service contract may not be a requirement for a loan or sale (§ 31-2351.06). Any automatic renewal provision must be clear and conspicuous, and provide space for a consenting signature in close proximity to the provision (or, for a telephone sale, the request for consent must be made in temporal proximity to the renewal provision) (§ 31-2351.06). The insurance commissioner may impose civil penalties or cease and desist orders, or seek an injunction or other relief, including restitution (§ 31-2351.10).

FLORIDA

JUST UPDATED

Fla. Stat. §§ 634.011 to 634.288

Motor vehicle service agreement companies are not governed by the insurance code except as provided by this part (§ 634.023). "Motor vehicle service agreement" is defined as any agreement providing indemnification against loss caused by the failure or malfunction of a component part of a motor vehicle. The term includes protection that is provided in connection with an additive product such as a fuel supplement that is applied to the vehicle; theft protection; tire protection; and indemnification for paintless dent correction and key or key fob replacement (§ 634.011). Motor vehicle service agreements with an annual premium of less than \$50 are exempted from insurance regulation (§ 624.125). Companies selling motor vehicle service agreements must be licensed by the department of insurance and must meet detailed financial requirements (§§ 634.031, 634.041). Prior to sale of service contract, written notice is required that purchase of the contract is not required to obtain vehicle financing. Contract must include specified notices, including that contracts are assignable under certain conditions to subsequent purchaser, that contract may be canceled by purchaser within 60 days, that seller may cancel after 60 days only under specified circumstances, that refunds are due as described upon cancellation and, in clear and conspicuous type, what restrictions to benefits apply and what used parts will be used or required as replacements. Buyer may cancel contract within 60 days of purchase and receive a full refund of charges paid, less a reasonable administrative fee of no more than five percent (§ 634.121(3)(a)). Extensive list of prohibited practices (§ 634.282). Service contract company or agents must maintain a copy of specified documents to demonstrate refund was made. A copy of the application form must be delivered to purchaser within 45 days after purchase (§ 634.121). Buyer may sue for performance of the contract and receive actual damages or \$500, whichever is greater (§ 634.271(1)). If the buyer has complied with all dispute resolution mechanisms prior to commencing the suit, the buyer can also recover attorney fees and costs (§ 634.271(2), (3)). Unfair Trade Practices Act applies to service agreement companies and salespeople (§§ 634.2815, 634.282).

GEORGIA

JUST UPDATED

Ga. Code Ann. § 33-7-6

Vehicle service agreements, in which parties not licensed under insurance law assume the risk of mechanical breakdown or specified repairs, are regulated under property insurance law. Holder may cancel at any time and receive the appropriate refund. Contract must provide name and address of insurer or surety which has guaranteed or underwritten agreement. Provisions do not apply to registered retail installment sellers of vehicles if they post a bond or security deposit, maintain a certain net worth, and file a copy of the agreement with the state commissioner.

Ga. Code Ann. §§ 13-12-1 to 13-12-5

Automatic renewal provisions in service contracts for a specified period of 12 months must be clearly disclosed in contract or contract offer (§ 13-12-2). Consumer must be given notice not less than 30 nor more than 60 days before the automatic renewal date, including contact information for the provider and the procedure for cancellation; for service contracts that automatically renew for a specified period of more than 24 months, seller shall also obtain written or electronic acknowledgement of receipt of the notice, and an affirmative written or electronic response that the consumer does not intend to terminate the service contract (§ 13-12-3). Violation of these provisions makes the automatic renewal provision void and unenforceable (§ 13-12-5).

HAWAII

Haw. Rev. Stat. § 431:1-209(14)

Included in definition of casualty insurance and thus subject to insurance regulations is any contract of warranty or guaranty which promises service maintenance, parts replacement, repair, money, or any other indemnity in the event of loss of or damage to a motor vehicle or any part thereof, if made by a party conducting an insurance business; provided that service contracts, as defined and meeting the requirements of Haw Rev. Stat. ch. 481X, shall not be subject to Haw Rev. Stat. ch. 431.

Haw. Rev. Stat. §§ 481X-1 to 481X-12

Service contract providers must register with state commissioner (§ 481X-3); they must meet specified fiscal standards, maintain security deposits, and insure all contracts under a contractual liability insurance policy (§ 481X-4). Contract shall be clear and readable and include the specified information and notices. If sale is made by a means other than telephone, mail, or electronic means, a copy of the contract must be made available at the point of sale (§ 481X-6). Cancellation and refund rights as specified must be included in contract (§ 481X-7). Certain deceptive practices are prohibited including conditioning the sale of any property on purchase of a service contract (§ 481X-10). Violations are considered UDAP violations (§ 481X-12(d)).

IDAHO

Idaho Code §§ 41-506(b), 41-1812, 41-6201 to 41-6211

Casualty insurance includes “Automobile guaranty,” defined as insurance of the mechanical condition or freedom from defective or worn parts or equipment of motor vehicle (§ 41-506(b)). Insurance forms must be filed with director (§ 41-1812). Rates are not subject to approval. Sections 41-6201 to 41-6211 apply to all motor vehicle service contracts offered by persons other than the manufacturer and do not apply to customary warranties (§ 41-6202). A motor vehicle service contract is an agreement for separately stated consideration that undertakes to perform repairs or replacement for operational failure of a motor vehicle due to a defect in materials or workmanship or normal wear and tear, or to indemnify for such services. It includes agreements that provide for repair or replacement of tires or wheels, paintless dent removal, windshield repair, or replacement of key fobs, but does not include mechanical breakdown insurance which performs same function but is issued by insurance company authorized to do business in state (§ 41-6203). A service contract shall not be issued unless provider is insured and the policy conspicuously states that the issuer shall pay all sums provider is legally obligated to pay (§ 41-6204) and that the obligations of the provider are guaranteed (§ 41-6205). May not make purchase of service contract a requirement for purchase or financing of vehicle; may not use a contract that is printed or otherwise reproduced in a way that makes any material provision “substantially illegible” (§ 41-6206). Full refund if buyer cancels within 30 days, less cancellation fee not to exceed \$50; if buyer cancels any other time then pro rata refund based on number of lapsed months, miles, or other measure clearly stated in contract, less cancellation fee not to exceed \$50 (§ 41-6205). False, deceptive, or misleading statements in the sale of service contracts are prohibited (§ 41-6207).

ILLINOIS

215 Ill. Comp. Stat. §§ 152/1 to 152/99

Service contract providers covered by this act are not subject to state insurance code (§ 152/10). Providers must register with state director of insurance, must meet specified fiscal standards, maintain security deposits, and insure all contracts under a contractual liability insurance policy (§§ 152/15, 152/25). Contract shall be clear and readable and include the specified information and notices (§ 152/30). Cancellation and refund rights as specified must be included in contract; provisions for cancellation before 30 days and after are specified, as well as cancellation fees allowed (§ 152/35).

INDIANA

Ind. Code §§ 27-1-43.2-1 to 27-1-43.2-19

These provisions are effective November 26, 2018. A service contract is not insurance (§ 27-1-43.2-10(a)). Other than for a motor vehicle service contract, the contract company must provide proof of financial solvency (§§ 27-1-43.2-11(a), 27-1-43.2-14). For any contract, the contractor must make disclosures to the consumer (§ 27-1-43.2-12).

IOWA

JUST UPDATED

Iowa Code §§ 523C.1 to 523C.24

Service contract owners must be licensed by insurance commissioner (§ 523C.2). Licensee must either have an acceptable reimbursement insurance policy, or maintain a prescribed amount of reserves and place a security deposit with the commissioner (§§ 523C.5, 523C.6). Exempt from requirements are motor vehicle service contracts issued by the manufacturer or importer of the vehicle; service contracts offered or sold to any person other than the consumer; and maintenance agreements (§ 523C.16). Must provide a sample copy of contract before purchase, and a copy of the actual contract within a reasonable time after purchase. Contract must be in clear and understandable language, and disclose: the price of the contract; the contact information for the reinsurance company, or the fact that no reinsurance exists; contact information for the service company and the administrator; the existence of any pre-approval process, including a toll-free number and a procedure for obtaining emergency service; any deductibles; any limitations or exclusions; whether aftermarket parts may be used; purchasers' duties; any preexisting condition restrictions; any fee for a service call; conditions or restrictions on transferability; and cancellation procedures (§ 523C.7). A service company that denies a claim must give prompt written notice explaining its reasons, and referring to specific provisions of the contract (§ 523C.22). Consumer may cancel for full refund within 10 days after receiving contract, if contract was provided at time of sale, or within 20 days after mailing of contract. After that time, refund amount calculated on a pro rata basis and provider may charge a fee of up to 10% of purchase price. False or misleading statements about affiliation with manufacturer or importer, validity or expiration of warranty, and contract coverage are prohibited (§ 523C.13). Lending institution may not require purchase of a service contract as a condition of a loan (§ 523C.17). Violation of this chapter is an unlawful practice pursuant to Iowa Code § 714.16 (Iowa's UDAP statute). Contract sold by an unlicensed person is void (§ 523C.9, 523C.13, 523C.19).

KANSAS

Kan. Stat. Ann. § 40-201a

Service contracts exempt from insurance regulation.

KENTUCKY

Ky. Rev. Stat. § 304.5-070(1)(p)

Establishes certain service contracts as not regulated as insurance, as long as the contractor has purchased reimbursement insurance or is an automobile manufacturer or distributor.

LOUISIANA

La. Stat. Ann. §§ 51:3161 to 51:3166

This chapter does not cover warranties, maintenance agreements, mechanical breakdown insurance, and service contracts on a single product sold to a consumer within one year of the product's purchase. With the exception of certain mechanical breakdown insurance, the products and motor vehicle service contracts are not to be treated as insurance (§§ 51:3161(C), 51:3163(H)). The motor vehicle service contractor must register with the secretary of state and provide the consumer with a copy of the agreement within a

reasonable period of time (§ 51:3163(A)). The motor vehicle service contractor must protect the consumer's interests by purchasing a reimbursement insurance policy (§ 51:3163(E)). A number of disclosures are required (§ 51:3164) and certain practices are prohibited in connection with motor vehicle service contracts (§ 51:3166). The consumer has the right to cancel the contract within 20 days (10 days if the contract is provided to the consumer at the time of purchase) for a full refund (§ 51:3165).

La. Stat. Ann. §§ 22:361 to 22:373, 51:3141 to 51:3146

Mechanical breakdown insurance, and insurance against certain damage caused by road hazards, are regulated by the insurance commission. Insurers must be licensed (§ 22:362), deposit a bond of \$150,000 (§ 22:365(A)) and meet financial requirements for solvency (§ 22:364). License may be suspended or revoked for failure to pay a judgment in favor of a policy holder or failure to meet financial requirements; or commissioner may levy a fine of no more than \$1000 per violation (§ 22:369). The insurance commissioner can also issue cease and desist orders; willful violation of such orders entails a fine of up to \$5000 (§ 22:371(B)). The statute is silent regarding the availability of private rights of action. Insurers licensed under § 22:362 are exempt from all other requirements of the Insurance Code (§ 22:373). Home service contracts are regulated by La. Stat. Ann. §§ 51:3141 to 51:3146. Certain unsolicited offers to sell extended service agreements for motor vehicles must disclose that they are advertisements. La. Stat. Ann. § 51:1422.

MAINE

Me. Stat. tit. 24-a, §§ 7101 to 7112

Service contract providers covered by this act are not subject to state insurance code; excluded types of contracts include road service agreements, warranties, maintenance agreements, and when goods are purchased for less than \$100; service contracts connected with vehicle purchases are excluded from some requirements (§ 7101). Providers must register with state superintendent of insurance and must provide purchaser with receipt and copy of contract within a reasonable time; providers also must meet specified fiscal standards and maintain security deposits or must insure all contracts under a contractual liability insurance policy (§ 7103). Contracts shall be clear and readable and include the specified information and notices, including reimbursement insurance information, cancellation and refund rights, deductible amount if any, and transferability (§ 7105). Prohibited deceptive acts are specified (§ 7110).

MARYLAND

Md. Code Ann., Com. Law §§ 14-401 to 14-410 (West); Md. Code Ann., Transp. § 15-311.2 (West)

Md. Code Ann., Transp. § 15-311.2 (West) covers mechanical repair contracts sold by licensed vehicle dealers but not by manufacturers. Mechanical repair contracts can be offered only in addition to the express warranty and must conspicuously state the date when the contract begins and the date or odometer reading when the contract ends. Dealers must maintain adequate insurance reserves to cover claims on contracts. Excludes mechanical repair contracts issued by the manufacturer or distributor. Purchase of contract must be optional to the consumer.

Md. Code Ann., Com. Law §§ 14-401 to 14-410 (West) is the Maryland Service Contracts and Consumer Products Guaranty Act. Its provisions regarding service contracts include: disclosures and a twenty-day right to cancel (§ 14-403); a requirement that the service contract be extended if the provider does not repair the product successfully (§ 14-404); requiring service contract providers to fulfill their obligations (§ 14-404); and providing a private cause of action for a wrongful breach of a service contract (§ 14-407). This Act excludes mechanical breakdown insurance issued by an authorized insurer (§ 14-401(k)(3)(iv)). Although this Act's definition of "service contract" excludes mechanical repair contracts governed by Md. Code Ann., Transp. § 15-311.2 (West), subsection § 15-311.2(i) of that statute makes Act applicable to them.

MASSACHUSETTS

Mass. Gen. Laws ch. 175, §§ 149M to 149X

Does not cover mechanical breakdown insurance, warranties, service contracts, or other agreements concerning automobiles (§ 149V). Provider must register with insurance commissioner, and have acceptable reimbursement insurance, or other specified evidence of financial stability (§ 149N). Provider must give holder a copy of the contract within a reasonable time after the sale (§ 149N). Contracts must be clear and understandable and disclose: information about reimbursement insurance, including contact information for the insurer; total purchase price; any deductibles; property and services to be provided and any limitations or exclusions; any restrictions on transferability; cancellation procedure; and holders' duties (§ 149P). Original purchaser may cancel within 20 days of mailing of contract, or 10 days if contract was provided at time of sale, and receive a full refund (§ 149N). Misrepresentations prohibited. Purchase of a contract may not be a requirement for a loan or sale (§ 149Q). Insurance commissioner may issue cease and desist orders, impose civil penalties, or bring court action for injunction or other relief, including restitution (§ 149U).

Mass. Gen. Laws ch. 175, §§ 2B, 54C

Motor vehicle service contracts are regulated as a form of insurance. Forms must be approved by the commissioner and meet standards of readability (§ 2B). Rates are not regulated by the commissioner. Insurers required to maintain surplus including guaranty capital of not less than \$600,000.

MICHIGAN

Mich. Comp. Laws §§ 445.903a, 500.125

Service contracts as defined excluded from insurance regulation (§ 500.125). Home appliance service contract terms shall be extended while the contract is interrupted because of a strike or work stoppage at the company's place of business (§ 445.903a).

MINNESOTA

Minn. Stat. §§ 59B.01 to 59B.11

Service contract providers covered by this act are not subject to state insurance code (§ 59B.03). Excluded types of contracts include road service agreements, warranties,

maintenance agreements, and when goods are purchased for less than \$250; service contracts connected with vehicle purchases are excluded from some requirements (§ 59B.01). All warranty service contracts are deemed to be made in Minnesota for purposes of arbitration (§ 59B.01). Providers must register with state commissioner of commerce; providers also must meet specified fiscal standards, maintain security deposits, and insure all contracts under a contractual liability insurance policy (§ 59B.03). Contracts shall be clear and readable and include the specified information and notices, including reimbursement insurance information, cancellation and refund rights, exclusions, deductible amount if any, and transferability (§§ 59B.04, 59B.05, 59B.06). Prohibited acts include deceptive names or statements; purchase of contract shall not be required for sale or loan (§ 59B.07).

MISSISSIPPI

Miss. Code Ann. §§ 83-65-101 to 83-65-125

Vehicle service contracts regulated within insurance provisions. Statute does not apply to manufacturer's warranties. Providers of vehicle contracts must be the named insured under a reimbursement insurance policy issued by an insurer (§ 83-65-105). Such insurers must file a copy of the vehicle service contract and the providers' reimbursement policy and rates for the providers' policy with the insurance commissioner (§ 83-65-107). Contract must state that the obligations of the provider to provide services are guaranteed under a reimbursement insurance policy (§ 83-65-109). Must conspicuously state the name and address of the insurer, the contract provider and the seller. Must state the procedure for making a claim. Contract shall be in clear understandable language (§ 83-65-111). Provider must not make any false or misleading statements in connection with sale or offer to sell a contract. If there is a deductible, the amount must be clearly stated. Contract must state the merchandise or services to be provided as well as any terms, restrictions or conditions governing transferability of the contract (§ 83-65-111). Provider may be an insurance company. Provider may not charge for services covered by state or federal law or any express or implied warranty (§ 83-65-113). Provider must keep records, including copies of the contracts, for two years after the term of the contract has expired (§ 83-65-115). Complaints regarding contracts are made to the insurance commissioner and, if required, on specific forms promulgated by the insurance commissioner (§ 83-65-119). Lending institutions may not make financing contingent on the buyer's purchase of a vehicle service contract (§ 83-65-113(8)). A provider with a net worth of at least \$100 million that complies with certain requirements is not required to be a named insured under a reimbursement insurance policy for purposes of issuing, selling, or offering for sale a vehicle service contract, and is exempt from a number of statutory requirements (§ 83-65-125). Service contracts related to home repairs are not regulated as insurance, but are subject to the Mississippi Consumer Protection Act (Miss. Code Ann. § 75-24-91).

MISSOURI

JUST UPDATED

Mo. Rev. Stat. §§ 385.200 to 385.220 (motor vehicle service contracts)

Missouri statute applies only to motor vehicle extended service contracts, defined as those with a separately stated consideration and for a specific duration to repair, replace, or

maintain a motor vehicle or provide indemnification therefor, for operational or structural failure due to a defect in materials, workmanship, or normal wear and tear (§ 385.200(9)). It includes agreements to repair or replace tires, wheels, and windshields damaged by road hazards, to repair dings with a paintless dent removal process, to replace inoperable or stolen keys or key fobs, and to perform other services approved by state insurance department, as long as the agreement is for a separately stated consideration and a specific duration (§ 385.200(9)). It does not apply to mechanical breakdown insurance issued by an authorized insurer, warranties (defined to include only those made without charge as part of the sale of the product), maintenance agreements (contracts of limited duration that provide for scheduled maintenance), commercial transactions, sales to non-consumers, or motor club contracts (§§ 385.200(9), 385.220). Missouri also has separate statutes governing service contracts on property other than motor vehicles: Mo. Rev. Stat. §§ 385.300 to 385.321.

The provider of a service contract, in other words the person contractually obligated to the buyer, must register and insure the service contracts under a reimbursement insurance policy, maintain a funded reserve account, and place a security deposit of not less than five percent of the gross consideration received (not less than \$25,000) in trust with the director of the department of insurance, financial institutions, and professional registration, or maintain a net worth of \$100 million and submit financial statements (§ 385.202).

The provider or its designee must provide a receipt to the service contract holder on the date of purchase and a copy of the extended service contract (§ 385.202). The provider must deliver a fully executed contract to the consumer within a commercially feasible time period, but no more than 45 days from the date the consumer's initial payment is processed. The provider must also, upon request, give the consumer an unsigned copy of the written contract, or direct the consumer to a website where it can be found, prior to the time the consumer's initial payment is processed (§ 385.205).

Service contracts must contain a number of disclosures and must allow a twenty-day free look period during which the consumer can cancel the contract if no claims have been made (§ 385.206). Various misrepresentations are prohibited. A person shall not require the purchase of a service contract as a condition of a loan or sale of property (§ 385.208). Director may issue cease and desist orders and injunctions, and may impose civil penalties (not to exceed \$1000 per violation) for violations of these sections. An action filed pursuant to this section may also seek restitution on behalf of persons aggrieved by violations of these sections or of the director's orders (§ 385.216; Mo. Rev. Stat. § 374.048).

Mo. Rev. Stat. §§ 385.300 to 385.320 (other property service contracts)

Covers contract for specified duration and consideration for repair, replacement, or maintenance, or indemnification for repair, replacement, or maintenance, required by operational or structural failure of any residential or other property due to a defect in materials, workmanship, or normal wear and tear (§ 385.300). Motor vehicle extended service contracts and certain other contracts are excluded (§ 385.320). Service contract providers are not deemed to be engaged in the business of insurance (§ 385.300). Service contractors must register with the state and meet financial responsibility requirements (§ 385.302). Insurers who issue insurance policies to service contract providers must agree to perform the service contractor's obligations to consumers if the contractor fails to perform

(§ 385.304). The law sets forth requirements for the form and content of service contracts, and prohibits names that imply that the service contract is insurance (§§ 385.306, 385.308). It prohibits financial institutions from requiring purchase of a service contract as a condition of a loan or other financing transaction, and prohibits manufacturers and retailers from requiring the purchase of a service contract as a condition to the sale of goods or services (§ 385.308). The law provides for state enforcement and promulgation of rules (§§ 385.316, 385.318), but does not explicitly provide for a private cause of action.

MONTANA

Mont. Code Ann. §§ 30-14-1301 to 1304, 33-1-102(10)(b)

Requires measures to ensure financial solvency sufficient to meet obligations; exempts service contracts from insurance regulations; and specifies required disclosures; applies to service contracts as defined in § 33-1-102.

NEBRASKA

JUST UPDATED

Neb. Rev. Stat. §§ 44-3520 to 44-3527

Regulates all motor vehicle service contracts, including those for repair of tires, cosmetic damage, windshields, keys and key fobs, except contracts provided by a manufacturer or retailer who maintains service facilities, or insurers licensed under the general insurance code (§§ 44-3521, 44-3526). Contractors are required to be insured (§ 44-3522). When appropriate, the director of insurance may issue a cease and desist order preventing contractors from selling motor vehicle service contracts (§ 44-3524). If contractor fails to comply, the Attorney General may commence action to enjoin their sale or offering of contracts (§ 44-3527).

NEVADA

Nev. Rev. Stat. §§ 690C.010 to 690C.330

Applicable if provider is obligated to repair, replace, or maintain goods or indemnify holder for costs, including towing and emergency service (§ 690C.080). Inapplicable to non-consumer contracts, maintenance agreements, or warranties (§ 690C.100). Requires registration (§ 690C.150) and liability insurance, or one of various specified alternatives to ensure ability to meet liabilities (§ 690C.170). Prohibits requiring purchase of service contract as condition of loan or purchase (690C.220). Requires clear, specific and understandable contract terms (690C.260). Contract voidable upon customer's return within certain period (690C.250). Limits grounds for cancellation by provider (690C.270). Providers' ability to transfer liability relating to a service contract to another person or entity is restricted (§ 690C.215).

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. §§ 415-C:1 to 415-C:12

Service contracts as to vehicles, homes, and consumer products are included under Consumer Guaranty Contract law (§ 415-C:1), and are mostly exempt from state insurance

law (§ 415-C:2); they do not include road service agreements, warranties, and maintenance agreements (§ 415-C:1). Providers must register with state commissioner of insurance (§ 415-C:3), must meet specified fiscal standards and maintain security deposits, or must insure all contracts under a contractual liability insurance policy (§ 415-C:4). Contracts must be provided to purchaser (with receipt and copy of contract) within a reasonable time; they shall be clear and readable and include the specified information and notices, including complaint and claim procedures, deductibles if any, and transferability (§ 415-C:6). Prohibited acts include discrimination, failure to respond promptly to claim communications, and misleading or deceptive practices; purchase of contract shall not be required for sale (§ 415-C:7).

NEW JERSEY

N.J. Stat. Ann. §§ 56:12-1 to 56:12-13 (West)

Consumer contract law covers written agreements to provide services for personal, family or household purposes (§ 56:12-1). Service contracts must be written in clear, simple and understandable language (§ 56:12-2). Contracts may be submitted to the attorney general for approval (§ 56:12-8). No consumer contract shall contain a waiver of any right under this act. A violation of this act will not render a consumer contract void or voidable, or serve as a defense to enforce the consumer contract for breach (§ 56:12-11). Private right of action and class action are allowed, as are attorney fees for prevailing consumers (§§ 56:12-3, 56:12-4).

N.J. Stat. Ann. §§ 56:8-67 to 56:8-68 (West)

Used motor vehicle service contracts are written agreements to refund, repair, replace, maintain, or take other action regarding the vehicle for any period of time or any specific mileage or provided at an extra charge beyond the sale price (§ 56:8-67). It is unlawful to misrepresent the existence or terms of service contracts (§ 56:8-68).

N.J. Stat. Ann. §§ 56:12-87 to 56:12-98 (West)

Service contracts are not insurance (§ 56:12-88(c)). Service contracts must be insured or funded by a reserve account unless the provider maintains a net worth of \$100 million or more (§ 56:12-90). Statute limits third-party administrator's role to maintaining books and records, handling payments, and participating in processing or adjusting of claims (§ 56:12-91). Statute requires plain language and specified disclosures (§ 56:12-93). Statute specifies consumer's cancellation rights (§ 56:12-93(k), (l)). Victims of domestic violence can opt out of direct broadcast satellite service contracts (§ 56:12-98). Consumer must be given a copy of the contract and a receipt (§ 56:12-94). Division of consumer affairs has authority to examine providers (§ 56:12-96(b)). A violation is a UDAP violation (§ 56:12-96(a)). Seller who sells a service contract that does not comply with the law or is issued by a non-compliant provider is jointly and severally liable with the provider for the contractual obligations (§ 56:12-90(c)).

NEW MEXICO

N.M. Stat. Ann. §§ 59A-58-1 to 59A-58-18

Statute applies to service contracts regarding property used primarily for personal, family, or household purposes, but not to maintenance agreements, warranties, or contracts costing less than \$25 for goods sold for less than \$250 (§§ 59A-58-2, 59A-58-3). Providers must register and provide specified security deposit with state insurance superintendent (§§ 59A-58-4 to 59A-58-6), and are not subject to state insurance code (§ 59A-58-8). Original buyer has right to cancel and receive refund in certain specified circumstances; contract must contain notice of such (§ 59A-58-9). Provider has right to cancel if certain specified conditions apply (§ 59A-58-12). Purchase or loan cannot be conditioned on purchase of contract (§ 59A-58-14). Provider must provide purchaser with receipt and copy of contract within a reasonable time (§ 59A-58-11). Contracts shall be clear and readable, without any deceptive statements, and include specified information and notices, including deductibles, restrictions, and transferability (§ 59A-58-10). Provider must clearly disclose any automatic renewal provisions and give timely notice of how to prevent renewal (§ 59A-58-10.1). Superintendent may assess civil penalties for violations (§ 59A-58-17).

NEW YORK

JUST UPDATED

N.Y. Gen. Bus. Law § 198-b (McKinney)

The statute distinguishes between service contracts (provided at extra charge beyond the price of the used vehicle), repair insurance (regulated by the insurance department) and warranties (provided at no extra cost) (§ 198-b(a)(4)–(6)). Warranties are extended by any time during which a used vehicle is in possession of the dealer for repair under the service contract or when repair service is not available because of war or natural disaster (§ 198-b(c)(3)–(4)).

N.Y. Ins. Law §§ 7901 to 7913 (McKinney)

Service contracts are exempt from other provisions of the insurance law (§ 7903). Providers must register with the superintendent of insurance (§ 7907). Provider must have acceptable reimbursement insurance, or provide other specified assurances of financial stability (§ 7903). Provider must provide a copy of the contract at the time of sale, if sale takes place in a retail store or other place of business; otherwise must provide a copy within a reasonable time after sale (§ 7903(b)(1)). Contract must be clear and understandable, and disclose: whether contract is backed by reimbursement insurance or by the faith and credit of the provider; total purchase price; any pre-approval requirements; any deductibles; goods or services to be provided and any limitations or exclusions; holder's duties; cancellation rights; whether preexisting conditions are covered; any restrictions on transferability; and for motor vehicle contracts, whether aftermarket parts may be used (§ 7905). Misrepresentations prohibited. Purchase of contract may not be requirement for a loan or sale (§ 7906). Original purchaser may cancel within 20 days after mailing if contract was mailed, or within 10 days if contract was provided at time of sale (longer cancellation period may be provided by contract), and receive a full refund (§ 7903(e)). The superintendent may issue cease and desist orders, impose civil penalties, or bring court action for injunction or other relief including restitution (§ 7910).

N.Y. Gen. Oblig. Law § 5-903 (McKinney)

Automatic renewal provision in any contract for service, maintenance, or repair of personal property is enforceable only if provider gives notice, personally or by certified mail, not less than 15 nor more than 30 days before renewal, advising holder of the upcoming renewal.

NORTH CAROLINA

N.C. Gen. Stat. §§ 58-1-15, 66-370 to 66-374

Any warranty made by a manufacturer, distributor, or seller of goods or services without charge, or an extended warranty made by a manufacturer, distributor, or seller of goods or services for charge, that guarantees indemnity for defective parts, mechanical or electrical breakdown, labor, or any other remedial measure, is not insurance; but warranties or extended warranties made by other persons are insurance (§ 58-1-15). Service agreements regarding vehicles and household goods are governed by §§ 66-370 to 66-374 and those on home appliances are governed by §§ 66-371, 66-373 (§ 58-1-15). Section 66-370 applies to motor vehicle service agreement companies, but excludes performance guarantees, warranties, and motor vehicle service agreements made by manufacturers, distributors, or certain related companies, and also does not apply to motor vehicle dealers meeting certain requirements. Motor vehicle service agreement is defined as indemnifying holder against loss caused by failure of a mechanical or other component part of the covered motor vehicle (§ 66-370). Before sale of motor vehicle, customer must be given written notice that purchase of agreement not required to purchase or obtain financing for motor vehicle (§ 66-372). Service agreement may not have any title or heading or indicator in its provisions that is misleading, and may not contain provisions allowing for cancellation at company's discretion except for nonpayment. Company must keep records. Failure to comply with provisions is a misdemeanor (§ 66-372). Each service company must be insured or, in lieu of maintaining contractual liability insurance, company may maintain a funded reserve account for purpose of meeting its obligations under contracts issued in the state (§ 66-373). Insurance forms must be approved by the commissioner on the basis of readability, see N.C. Gen. Stat. §§ 58-38-1 to 58-38-40. Sections 66-371 and 66-374, respectively, include special provisions for home appliance service agreement companies and mechanical breakdown service agreement companies.

NORTH DAKOTA

JUST UPDATED

N.D. Cent. Code §§ 26.1-40-18 to 26.1-40-22

Automobile service contract issuers must obtain an insurance policy backing their obligations (§ 26.1-40-18). Violation of the statute is a misdemeanor (§ 26.1-40-22).

N.D. Cent. Code § 9-01-21

Property service contracts and vehicle theft protection product warranties are not subject to the provisions of N.D. Cent. Code tit. 26.1 (insurance).

OHIO

JUST UPDATED

Ohio Rev. Code Ann. § 3905.423 (West)

Statute regulates “consumer goods service contracts,” defined as agreement to perform or pay for repairs, replacement, or maintenance of consumer goods due to a defect in materials or workmanship, normal wear and tear, power surges, or accidental damage from handling, that is effective for a specified duration and is paid for by means other than purchase of the goods. Definition excludes motor vehicle service contracts, vehicle protection products, home service contracts, motor vehicle ancillary product protection contracts, and contracts for prepaid, routine scheduled maintenance (§ 3905.423(A)(3)). Provider must have a reimbursement insurance policy and must make disclosures about it to the consumer (§ 3905.423(B)–(D)). The sale of a covered service contract is a consumer transaction for purposes of the state UDAP statute (§ 3905.423(E)). Unless issued by a licensed insurer, a covered service contract is not insurance (§ 3905.423(F)).

Ohio Rev. Code Ann. § 3905.426 (West)

Motor vehicle ancillary product protection. Contract for separate consideration and a specified duration to carry out or pay for repair or replacement of glass for damage caused by road hazard (defined), paintless removal of dents or dings, repair of interior components necessitated by wear and tear, repair or replacement of tires or wheels damaged by road hazard, replacement of lost or inoperable keys or key fobs. Ancillary vehicle protection contracts must be covered by a reimbursement insurance policy (§ 3905.426(B)). Certain agreements provided by tire manufacturers are exempt from the reimbursement insurance requirement, if contract discloses that it is not insurance and provides contact information for making claims (§ 3905.426(J)). Disclosures required: contract is not insurance but is backed by reimbursement insurance; claims procedure, including contact information for insurer (§ 3905.426(C)–(E)). Sale of ancillary protection product is a consumer transaction for purposes of Ohio UDAP statute (§ 3905.426(F)).

OKLAHOMA

Okla. Stat. tit. 15, §§ 141.1 to 141.35

Service warranty is defined as a contract for separately stated consideration for repair or replacement of property, or indemnification therefor, for operational or structural failure due to a defect in materials or workmanship; may also include incidental payment of indemnification due to certain causes including normal wear and tear, towing, and rental and emergency road service (§ 141.2(17)). There are several significant exemptions, including contracts issued solely by a manufacturer, distributor, importer, or seller that has 100% contractual liability insurance in place. Service warranties are not insurance (§ 141.2(17)(f)), and no special relationship with the consumer is created that would give rise to the tort of breach of the duty of good faith and fair dealing (§ 141.24), but providers must be licensed by state insurance commissioner and must meet financial standards (§§ 141.3 to 141.20). Contract must disclose that it is not insurance (§ 141.21). Misrepresentation, false advertisements, defamatory statements, unfair claim settlement practices, and discrimination are prohibited (§ 141.26). Any person damaged by a violation may bring civil action for actual damages or \$500, whichever is greater, plus attorney fees (§ 141.24).

OREGON

Or. Rev. Stat. §§ 646A.150 to 646A.172

Service contract providers must register with state commissioner, must meet specified fiscal standards and maintain security deposits or must insure all contracts under a contractual liability insurance policy, and are exempt from state insurance code if in compliance with this section (§ 646A.154). Contracts shall be clear and readable and include the specified information and notices including claim procedures, termination terms, transferability, exclusions, deductibles, and restrictions (§ 646A.156). Fraudulent and deceptive practices are prohibited as well as failing to act in good faith in providing services and responding to buyer's communications (§ 646A.158). Violations may result in civil fines and cease and desist orders issued by the director of the Dept. of Consumer and Business Services or suspension of registration (§§ 646A.162, 646A.166). Buyer has right of action under the required surety bond (§ 646A.154(6)(d)).

Or. Rev. Stat. §§ 72.8150, 731.102

The statute requires that a service contract on motor vehicles “duly and conspicuously discloses in simple and readily understood language the term, duration, and conditions of the contract.” The statute is silent on right of action and sanctions (§ 72.8150). Service contracts other than those offered by the manufacturer or seller are insurance and contracts subject to all insurance regulations (§ 731.102). There are no specific requirements that rates or contract forms be approved.

PENNSYLVANIA

12 Pa. Cons. Stat. §§ 6221, 6222

Prior to execution of a motor vehicle installment sale contract, the seller shall provide to the buyer both an oral and written disclosure in plain language separate from the installment sale contract, advising the buyer that the buyer's purchase of a service contract (defined in 12 Pa. Cons. Stat. § 6202), warranty, debt cancellation or suspension agreement, or optional insurance product is voluntary and not required as a condition of obtaining a loan (§ 6221). Service contract charges must be itemized (§ 6222).

40 Pa. Cons. Stat. § 477f

Service contracts are not insurance, except for automobile club contracts and mechanical breakdown insurance, which are regulated as insurance.

PUERTO RICO

P.R. Stat. tit. 10, §§ 113 to 113d

Service warranty for domestic goods, appliances, or electronic devices must be executed as a separate document and shall only be effective upon expiration of the seller's or manufacturer's warranty. Service warranty shall pay for labor when such payment is covered by the manufacturer's warranty. Service warranty may coexist with original warranty if its coverage extends beyond that of the original (§ 113). Contracts or service insurance shall be optional and the seller shall so state clearly and expressly to the buyer (§ 113a). The seller shall not coerce or otherwise influence a buyer to execute a service contract on goods or domestic appliances (§ 113b). Violators of these sections shall be guilty of a misdemeanor and punished by a fine of \$100–\$500 or by imprisonment not exceeding six months, or

both (§ 113c). Aggrieved persons may file complaints with Dep't of Consumer Affairs which shall investigate and take corrective action (§ 113d).

RHODE ISLAND

R.I. Gen. Laws §§ 31-5.4-1 to 31-5.4-6

The term of any service contract shall be extended by any time period during which the used motor vehicle is in the possession of the dealer or their duly authorized agent for the purpose of repairing the used motor vehicle under the terms of the service contract and at any time during which repair services are unavailable due to war, invasion or strike, fire, flood, or other natural disaster (§ 31-5.4-3).

R.I. Gen. Laws §§ 6-57-1 to 6-57-2

Service contracts, maintenance agreements, and vehicle protection product warranties are not subject to the insurance laws unless those laws are expressly made applicable to them (§ 6-57-2).

SOUTH CAROLINA

S.C. Code Ann. §§ 38-78-10 to 38-78-120

Service contracts governed by insurance law (§ 38-78-10). Provider shall register with the Director of Insurance, and insure all service contracts under a reimbursement insurance policy, or maintain a reserve account for its obligation under its service contracts, or maintain a net worth of \$100,000,000 (§ 38-78-30). Holder of contract has right to return the service contract within 10 to 20 days (depending upon whether contract was mailed), after which contract is void and the provider shall refund or credit the holder the full price of the service contract (§ 38-78-30). The right to void the service contract is not transferable and shall apply only to the original service contract purchaser and only if no claim was made prior to its return (§ 38-78-30). The provider must give a receipt and copy of service contract to service contract holder (§ 38-78-30). The provider must state whether the contract is guaranteed by a reimbursement insurance policy or the provider itself and must include contact information for all relevant parties (§ 38-78-50). The provider must also disclose the procedure for reimbursement for repair work performed by third parties and, if prior approval of repair work is required, the procedure for obtaining such approval (§ 38-78-50). The provider must also disclose: any deductible; a description of the property; any exclusions; whether use of non-original manufacturer's parts is allowed; restrictions on transferability, terms, restriction or conditions governing early termination by either party; the obligations and duties of the service contract holder; whether or not the service contract provides for or excludes consequential damages or preexisting conditions; and the right of the service contract holder to return the contract and receive a full refund (§ 38-78-50). The provider shall not use in its name the word "insurance" or any words descriptive of the insurance business and must disclose that the contract is not an insurance contract (§ 38-78-60). The provider shall not require the purchase of a service contract (§ 38-78-60). A provider shall not in its service contracts or literature make, permit, or cause to be made any false or misleading statement or deliberately omit any material statement that would be considered misleading if omitted, in connection with the sale, offer to sell, or advertisement of a service contract (§ 38-78-60). Director may issue cease and desist orders; seek

injunctions and civil penalties (\$1000 per violation up to maximum of \$10,000 for violations of similar nature) for violations (§ 38-78-100). Contract must advise holder that in case of dispute they may contact the insurance commission, and must provide commission's contact information (§ 38-78-50).

SOUTH DAKOTA

S.D. Codified Laws §§ 58-1-3, 58-30-144

Motor vehicle service contracts offered by the manufacturer or dealer are exempt from application of the insurance code (§ 58-1-3(3)). License as insurance producer is not required of any party engaged in the sale of or issuance of vehicle service contracts (§ 58-30-144(9)).

TENNESSEE

Tenn. Code Ann. §§ 56-2-126, 47-18-1401 to 47-18-1404

Service contracts are exempt from insurance regulation (§ 56-2-126). The term of a service contract other than a motor vehicle service contract is extended by the number of days the consumer is deprived of the product while it is being repaired, plus two (§§ 47-18-1401 to 47-18-1404).

TEXAS

Tex. Occ. Code Ann. §§ 1304.001 to 1304.205 (West)

Service contract providers must register with state commissioner, must meet specified fiscal standards, must maintain security deposits, and must obtain contractual liability insurance (§§ 1304.101 to 1304.105, 1304.151 to 1304.1521). Statute does not apply to warranties and maintenance agreements or to licensed vehicle dealers who cover contract obligations with a reimbursement insurance policy (§ 1304.004(b)). Providers are exempt from insurance law (§ 1304.005). Consumer may cancel contract and receive full refund if cancelled within 30 days, or a pro rata refund calculated considering time or mileage if cancellation occurs later (§§ 1304.1581, 1304.159). Contracts shall be clear and readable and include the specified information and notices including the method by which obligations are guaranteed, conditions as to terminations, transferability, exclusions, deductibles, and restrictions (§ 1304.156). Deceptive practices are prohibited; purchase of service contract may not be required for sale or loan (§ 1304.161). Injunctions, administrative sanctions and civil penalties may apply for violations (§§ 1304.201 to 1304.205).

UTAH

JUST UPDATED

Utah Code Ann. §§ 31A-6a-101 to 31A-6a-110 (West)

Service contract providers must register with state commissioner and must obtain contractual liability insurance; other insurance law will not apply if so registered (§ 31A-6a-103). Statute applies to service agreements for goods or property; it does not apply to mechanical breakdown insurance or scheduled maintenance agreements (§ 31A-6a-101). Cancellation and refund terms are governed by insurance law (§ 31A-6a-104(3)(vii)); Utah

Code Ann. §§ 31A-21-303 to 31A-21-305 (West)). Contracts shall conspicuously state the specified information and notices, including claim procedures, that liability insurance guarantees provider's obligations, any conditions as to cancellations, transferability, exclusions, deductibles, and restrictions, and that purchase of product is optional and not required to acquire motor vehicle (§ 31A-6a-104). Deceptive names or descriptions are prohibited; purchase of service contract may not be required for loan (§ 31A-6a-105). Insurance commissioner may assess fines for violations or enjoin provider from business activities (§ 31A-6a-109).

Utah Code Ann. §§ 41-3-404 to 41-3-405 (West)

Any dealer who sells a third party warranty or service contract to a consumer must remit the fee paid by the consumer to the warranty/service provider within 15 days. A failure to remit such moneys makes the dealer liable for damages that would have been covered by the warranty (§ 41-3-405). Any consumer injured by a motor vehicle dealer or body shop may sue for a loss caused by fraud, a violation of any law respecting commerce in motor vehicles, or a violation of any rule respecting commerce in motor vehicles made by a licensing or regulating authority (§ 41-3-404).

VERMONT

Vt. Stat. Ann. tit. 8, §§ 3301, 4247 to 4256

Automobile guarantees are insurance (§ 3301(a)(3)(B)). Forms must be approved by the commissioner. There is no requirement that rates be filed or approved. Contractor must purchase a bond or display other evidence of financial security (§ 4249). Disclosures to the consumer are required (§ 4251); certain practices and contract terms are prohibited (§§ 4253, 4254); and a violation constitutes an unfair or deceptive practice enforceable under the state's deceptive practices statute (§ 4255(b)).

VIRGINIA

JUST UPDATED

Va. Code Ann. § 59.1-435 to 59.1-441

Extended service contract is not an insurance contract and is not subject to insurance regulations; it is defined as a written agreement for a specified duration, in return for payment of a segregated charge, to repair or replace any consumer product, including a motor vehicle, or to indemnify consumer for these costs, covering defects or normal wear and tear; may cover towing, rental, emergency road service, and road hazard protection (§§ 59.1-435, 59.1-436). Licensed motor vehicle dealers, as defined in Va. Code Ann. § 46.2-1500, are not subject to this statute (§ 59.1-436(D)). Extended service contractors and employees who comply with registration and fee requirements are not subject to Va. Code Ann. tit. 38.2, which relates to insurance (§ 59.1-436). Service contract obligors must register and demonstrate financial stability by showing a net worth of at least \$100,000,000, or a liability insurance policy covering 100 percent of obligor's service contract liabilities (§ 59.1-437). Enforcement provisions of state consumer protection law apply to violations (§ 59.1-441).

WASHINGTON

Wash. Rev. Code §§ 48.110.010 to 48.110.904

Statute applies to service contracts for tangible personal property that is used primarily for personal, family, or household purposes; it does not apply to warranties, vehicle mechanical breakdown insurance, maintenance agreements, and service contracts for products having less than \$50 value (§§ 48.110.010, 48.110.015, 48.110.020). Provisions specific to motor vehicle service contracts require reimbursement insurance and specified notices to buyers (§§ 48.110.073, 48.110.075). The provider must show security through either: a reimbursement insurance policy, a funded reserve, or a parent company having a net worth exceeding \$100 million (§§ 48.110.050, 48.110.060). The consumer can cancel the contract within 20 days after receiving the written contract and obtain a full refund. For motor vehicle service contracts, cancellation after 10 days but within the first 30 days requires a full refund less \$25; after that the refund is pro rata less \$25 (§ 48.110.075). The contract must be in clear, understandable language that is easy to read, stating all relevant terms as enumerated in the statute (§§ 48.110.070, 48.110.075). Special disclosures apply to motor vehicle service contracts, and limits on grounds to deny a claim are specified. Violations are remedied under the state deceptive practices statute (§ 48.110.140).

WEST VIRGINIA

W. Va. Code § 33-4-2

Warranties, maintenance agreements, and service contracts (defined) are excluded from insurance regulation.

WISCONSIN

Wis. Stat. §§ 616.50 to 616.62

Statute applies to service contracts for property primarily for personal, family, or household use, it does not apply to warranties or maintenance agreements; also certain provisions do not apply to vehicle service contracts (§§ 616.50, 616.52). For all contracts, forms must be approved by insurance commissioner (§ 616.56). For all contracts, sale or loan may not be conditioned on purchase of contract; deceptive or misleading terms or statements are also prohibited (§ 616.58).

WYOMING

Wyo. Stat. Ann. §§ 26-37-101 to 26-37-128, 26-49-101 to 26-49-111

Mechanical breakdown insurers must be authorized by state commissioner (§ 26-37-103), deposit trust securities to assure performance of obligations in case of insolvency (§ 26-37-108), and are barred from any misrepresentation of terms or benefits or privileges (§ 26-37-112). Providers of service contracts must register with commissioner, must provide purchaser with receipt and copy of contract within a reasonable time, and must allow cancellation under specified conditions; provider must also meet specified fiscal standards and maintain security deposits or must obtain contractual liability insurance for all contracts (§ 26-49-103). Providers of consumer service contracts are required to provide easy to read, written disclosures of terms such as deductibles, coverage, prices, terms, restrictions on transferability, consumer's duties, and cancellation terms (§ 26-49-105). Prohibited acts

include misrepresentation and requiring purchase of service contract as condition for sale (§ 26-49-106). Enforcement by commissioner, including civil penalties (§ 26-49-110).