ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

CONSUMER LAW DESKBOOK

2018

The Judge Advocate General's School

United States Army

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ADMINISTRATIVE AND CIVIL LAW DEPARTMENT
CONSUMER LAW DESKBOOK
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CONSUMER LAW OVERVIEW

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CHAPTER A

CONSUMER LAW OVERVIEW

I. WHAT IS CONSUMER LAW?[1]

A. Resources.

1. NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (7th ed. 2008 & Supp. 2010).

2. Howard J. Alperin & Roland F. Chase, Consumer Law: Sales Practices and Credit Regulation (1986 & Supp. 2008-2009).

3. AMERICAN BAR ASSOCIATION, CONSUMER PROTECTION HANDBOOK (2005).

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 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 Consumer Statutes being enacted in the 1960's and 1970's, most consumer transactions were governed by the principal of *caveat emptor* (buyer beware).

(2) Common law fraud was extremely hard to prove and rarely resulted in significant damages, making attorneys reluctant to represent consumers in pursuing personal claims.

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. prohibition on disclaimer of warranties).

D. The players.

1. State and federal legislatures.

2. State and federal administrative agencies.

a) Attorney General's Office.

(1) Conducting rule-making, supervision and enforcement for Federal consumer financial protection laws;

(2) Restricting unfair, deceptive, or abusive acts or practices;

(3) Taking consumer complaints;

(4) Promoting financial education;

(5) Researching consumer behavior;

(6) Monitoring financial markets for new risks to consumers;

(7) Enforcing laws that outlaw discrimination and other unfair treatment in consumer finance.

b) Federal Reserve Board.

(1) Promulgates banking rules in the Code of Federal Regulations (CFR).

(2) Consult Code of Federal Regulations (CFR).

c) Federal Trade Commission (FTC).

(1) Rules.

(a) Interprets and enforces Federal Reserve Board Rules.

(b) Develops its own rules & “standards” for interpretation and enforcement of certain federal consumer protections statutes.

(2) Enforcement of FTC Act (and others).

(a) Investigation.

(b) Adjudication.

(3) The FTC provides consumers practical information about the law and how to identify and avoid fraud and deception in the marketplace. Consumers can file a complaint with the FTC by calling 1-877-FTC-HELP or by using the online complaint form at www.complaintassist.gov. Please note that 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 are able to view millions of consumer complaints via a free subscription to the Consumer Sentinel Network. On August 15, 2011, the Consumer Financial Protection Bureau (CFPB) (see subparagraph (e) below) became a member of the Consumer Sentinel Network. While the FTC will still manage the network, both the FTC and CFPB will feed data into the Consumer Sentinel Network. See, e.g., http://www.consumerfinance.gov/coordinating-consumer- complaints/.

d) Consumer Financial Protection Bureau (CFPB).

(1) Created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, H.R. 4173 (2010). Officially operational as of July 21, 2011.

(2) The CFPB's central mission is to "make markets for consumer financial products and services work for Americans." The CFPB states, "Above all, this means ensuring that consumers get the information they need to make the financial decisions they believe are best for themselves and their families – that prices are clear up front, that risks are visible, and that nothing is buried in fine print." CFPB Website, http://www.consumerfinance.gov/the-bureau/ (last visited 29 August 2012).

(3) The CFPB' strategic vision is three-pronged:

(a) Educate.

(b) Enforce.

(c) Study.

(4) The CFPB accomplishes its statutory mission of carrying out Federal consumer financial laws by doing the following (*See* http://www.consumerfinance.gov/the-bureau/ (last visited 29 August 2012):

(a) Conduct rule-making, supervision, and enforcement for Federal consumer financial protection laws;

(b) Restrict unfair, deceptive, or abusive acts or practices;

(c) Take consumer complaints;

(d) Promote financial education;

(e) Research consumer behavior;

(f) Monitor financial markets for new risks to consumers; and

(g) Enforce laws that outlaw discrimination and other unfair treatment in consumer finance.

(5) The CFPB, FTC, and other agencies may have overlapping statutory enforcement authority over various consumer protection laws. Because the CFPB is a new agency and enforcement responsibilities are still shifting, attorneys should research the latest developments and laws when using these agencies to assist a client.

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, we offer the following as areas to think through in each case.

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. Except as noted, these areas are covered in the chapters of this guide.

1. State Unfair and Deceptive Acts and Practices (UDAP) laws (Chap. 2 and Appendix B).

2. FTC Door-to-Door Sales Rule (Chap. 3).

3. FTC Telemarketing Rule (Chap. 3).

4. Mail Order and Telephone Merchandise Rule (Chap. 3).

5. Consumer Leasing Act (Chap. 3).

6. Truth-in Lending Act Cooling Off Period (Chap. 5).

7. 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. 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 1968

2. Fair Credit Billing Act 1974

3. Electronic Funds Transfer Act 1970 and 1974

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 1974

2. Fair Credit Reporting Act 1970

E. Other Specific Protections. Federal and state consumer protection laws govern a wide range of other transactions not included in the federal statutes listed above. While this Guide will not attempt to cover every scenario in which the consumer may benefit from consumer protection law, it will address some specific areas of particular interest to military legal assistance attorneys, including landlord-tenant law, credit discrimination, credit repair, identity theft, and military specific remedies.

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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 (7th ed. 2008 & Supp. 2011). The majority of this outline is from the National Consumer Law Center (NCLC) resources.

B. Federal Trade Commission Act, 15 U.S.C. § 45.

C. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, [hereinafter Dodd-Frank Act], tit. X, Subtitle C, § 1031 *et. seq*. (2010).

D. State UDAP Statutes (listed by state at Appendix B).

II. INTRODUCTION.

A. The UDAP Statutes are very state specific so this outline is prepared only to give you a general idea of the substance and application of common provisions of UDAP statutes.

B. Practitioners **must** research individual state law on any specific question in the area of UDAP.

C. Recent developments have possibly enhanced UDAP enforcement at the federal level. While the FTC has and will transfer certain rulemaking and other functions to the CFPB, the FTC and CFPB have concurrent and/or reciprocal jurisdiction over many potential UDAP issues. See Dodd-Frank Act, § 1061. Because the practical aspects of this arrangement are relatively untested and are still under development as of the time of this outline's publication, attorneys should consult with a CFPB attorney to determine specifics related to a particular case.

D. Attorneys must consult any new laws, regulations, and interpretations from the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC). Additionally, attorneys must be aware that prior case law and legal interpretations and oinions issued prior to July 21, 2010 (the day the Dodd-Frank

Act was passed) and July 21, 2011 (the day the CFPB achieved staturory fully operational status) may now have differing applicability. Always consult a CFPB attorney within the CFP Enforcement Division or the Office of Servicemember Affairs with any questions or concerns. As of the time of publication, the single point-of-contact at the CFPB for military attorneys is:

Ms. Angela Martin 1700 G Street NW
Washington, DC 20006-4702
Angela.Martin@cfpb.gov

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

A. General label for a variety of statutes with broad applicability to consumer transactions aimed at preventing deception and abuse 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. The term is a somewhat imprecise because it includes a wide range of consumer protection statutes.

C. History. The impetus behind many of the current UDAP statutes is the Federal Trade Commission Act (described below). Other authors attribute the rise in consumer protection acts to the work of Ralph Nader and other consumer advocates.

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).

E. Enforcement - only by the FTC. This can be a severe limitation on the utility of the FTC Act. Therefore, state statutes become very important to the consumer law practitioner, since these statutes will, at a

minimum, give state agency enforcement. In addition, many allow for private causes of action as a remedy. Dodd-Frank Act. Pub. L. No. 111-203 (2010).

1. The Dodd-Frank Act has the potential to noticeably change the UDAP landscape. According to the 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." Dodd-Frank Act, § 1031(a). The Enforcement Powers in Subtitle E include:

    a) Investigation (§ 1052(a));

    b) Subpoena (§ 1052(b));

    c) Civil Investigative Demand (§ 1052(c));

    d) Hearing and Adjudication (§ 1053);

    e) Civil Litigation and Standing (§§ 1052, 1054);

    f) Referral to Department of Justice for Criminal Proceedings (§ 1056).

2. Rulemaking. Congress has given the CFPB the authority to "prescribe rules applicable to a covered person or service provider indentifying 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, § 1031(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,

§ 1041(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

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.[1] 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. 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.[1]

2. 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]

3. The state statutes supplement the FTC Act; they do not displace it in any fashion.

4. "Legislatures and courts have been careful to guarantee that UDAP statutes are broad and flexible, so that they can apply

[1] NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 1.1(7th ed. 2008 & Supp. 2011) [hereinafter NCLC UDAP]. .For a state-by-state guide to these statutes, see id. at Appendix B

[2] *Id*.

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. States will usually authorize enforcement by state authorities (usually the Attorney General), as well as private enforcement, thus allowing

6. Many of the statutes include awards of private damages, attorney's fees as well as punitive, treble, or minimum damage awards. This is often a critical aspect of a consumer statute for the legal assistance practitioner. Absent an Expanded Legal Assistance Program (ELAP) at their installation or CFPB enforcement, legal assistance attorneys will have to refer many of these cases to private practitioners if the parties do not resolve the situation out of court. Private practitioners, whose livelihood depends on getting paid, may hesitate to take a case if the potential for the court awarding attorney's fees is not present.

   Recent Development: As of August 2011, attorneys from the CFPB's Enforcement Division may be able to assist a legal assistance attorney with particular types of cases. Prior to referring a case to a civilian attorney, legal assistance attorneys should contact the CFPB Enforcement Division to determine whether the CFPB will be able to assist with the case. As of the time of publication, the single point-of- contact at the CFPB for military attorneys is:

   Ms. Angela Martin
   Angela.Martin@cfpb.gov
   1700 G Street NW
   Washington, DC 20006-4702

7. May provide a source of counter-claims. Many cases in the consumer area come to light as counterclaims to actions 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 counter-claims against the creditor. In addition,

[3] *Id*.

some state statutes provide a mandatory counterclaim provision. If the consumer has a claim against the merchant, it must be resolved in the same suit as the underlying action against the consumer.

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 statues should be interpreted liberally to affect their object, to eradicate deception, protect consumers, and to correct marketplace imbalances. UDAP Statutes are generally considered remedial in nature. Thus, courts often construe them liberally in favor of consumers. *See* e.g., *Boubelik v. Liberty State Bank*, 527 N.W.2d 589 (Minn. App. 1995); *Iadanza v. Mather*, 820 F. Supp. 1371 (D.Utah 1993); *Smith v. Commercial Banking Corp.*, 866 F.2d 576 (3d Cir. 1989), *Schnall v. Hertz Corp*., 78 Cal.App.4th 1144, 93 Cal. Rptr. 2d 439 (2000); *Dressel v. Ameribank*, 247 Mich. App. 133, 635 N.W. 2d 328 (2001); *Helton v. Glenn Enterprises, Inc.*, 209 S.W.3d 619 (Tenn. Ct. App. 2006); *McCollough v. Johnson, Rodenber, & Lauinger*, 610 F. Supp. 2d 1247 (D. Mont. 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 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., *Williamson v. Amrani*, 152 P.3d 60 (Kan. 2007). But see *Shelton v. Duke Univ. Health System, Inc.*, 633 S.E.2d 133 (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) Some apply UCC definition from sections 2-105 and 9-105, rather than their own definition.

   b) Case law has generally found that the following:

      (1) Are NOT Goods: money, 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). Goods: Living property like a horse; construction of a house on land (although the real estate is not)

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 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, removing snow and trash, 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) use the phrase "personal, family, or household use," making cases decided under those statutes persuasive precedent.

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. A pyramid scheme has been considered a consumer transaction, even though it is a "business" opportunity. Where a use is part personal and part commercial, courts generally find the transaction to be covered by UDAP statutes.[4]

d) Courts have found numerous transactions not to be for personal, family or household use. For example, the purchase of a hay bailer to be used on family farm; ownership of a house for use as rental property; 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."

b) When credit and banking activities are not covered, the UDAP statute will generally use express language to exempt these activities.

2. Debt collection.

a) Usually INCLUDED where UDAP statute applies to

"Trade or Commerce." A Florida Court and Tenn. 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.[4]Thus, sweepstakes offers, 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. However, it may be an issue in a minority of states.

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 Statue 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.

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[4] *See, e.g.*, Marascio v. Campanella, 298 N.J. Super.491, 689 A.2d 852 (App. Div. 1997) (commercially owned, unoccupied property that is part residential and part commercial still covered by UDAP statute).

c) Some states include real estate transactions but have special provisions; for example Indiana's UDAP statue 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 have held that comprehensive landlord-tenant regulation occupies the field and prevents UDAP action. (KS, OH, & WA).

d) Rental of real property is explicitly included in UDAP statutes in MD, MI and NJ.

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.

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.

(2) Detrimental reliance on the fact at issue. Damages as a result of the reliance.

(3) Scienter-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, scienter, 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 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 engaged in 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.[5]

(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, 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 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 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) Contracts 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 the Governor 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 statutorily purport to prohibit unconscionable practices. AR, D.C., FL, ID, IN, NY, and UT are some states with such laws. 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.

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 pricing.

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.

2. Unavailability of advertised items. 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.

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.

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.

8. Offering goods and services to consumers without disclosing all conditions and limitations on the offer is deceptive.

C. General Misrepresentation.

1. Uniqueness. Making false claims about a product’s uniqueness, exclusiveness, or originality.

2. Safety. Failure to disclose latent safety risks associated with a product.

3. Quality and comparison. Misrepresenting “a product’s quality,

style, nature, composition, identity or ingredients." (NCLC UDAP at § 4.7.3.)

4. Size. Misrepresenting a product's size or weight usually by using oversized containers, slack fill in the container, etc.

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 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. Products method of manufacture such as made by handicap persons.

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, must be 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.

3. Damaged and defective goods. Failure to disclose defects or damages known to the seller, even if the sale is "as is." 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.

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) Or 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.

5. A mere breach of contract without anything else does not necessarily lead to a UDAP violation.

6. Systematic breech 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.).

7. It is an unfair practice not to provide disclosures in the same language as the advertisement.

8. Misrepresentation as to cancellation rights.

9. Confusing contract terms may even be unfair. *See, e.g., Michaels v. Amway Corp.*, 206 Mich. App. 644, 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*, 459 Pa. 450 (1974); *Oldendorf v. Gen. Motors Corp*, 322 Ill. App. 3d 825 (2001); *Gonsalves v. First Ins. Co*. 55 Haw. 155 (1973).

10. Entering into a contract with no intention to fulfill obligations is a UDAP violation.

11. UDAP violation to conceal breach of contract as long as possible.

12. 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.

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.

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.)

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 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 uniformed 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 statues 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 marketplaces 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 B of the Consumer law guide for state UDAP statutes

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CHAPTER C

PROTECTIONS BASED ON THE TRANSACTION

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CHAPTER C

PROTECTIONS BASED ON THE TRANSACTION

I. COOLING OFF PERIOD FOR DOOR-TO-DOOR SALES (a.k.a. Rule Concerning Cooling-Off Period For Sales Made At Homes Or At Certain Other Locations).

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, Unfair and Deceptive Acts and Practices, § 9.2 (7th ed. 2008 and Supp. 2010).

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) The problem, as we shall see below is that the rule contains no explicit enforcement mechanism for the consumer. Enforcement is left to the FTC.

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).

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 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, Presidents Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's 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 Sears and saw a kiosk 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 your old one gives out.

d) Solicitations by mail or telephone, but the Mail and Phone Order Rule or the Telemarketing Rule may apply. The FTC has adopted telemarketing rules that include disclosure requirements and include cooling off rules for certain transactions.

e) Buyer initiated visit for repairs of personal property. This eliminates the appliance repairman and the like from 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. 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 it is applicable to the new seller.

2. Oral and written notice of the rescission right.

a) One easily detachable, fully completed copy for consumer, one copy for consumer to send to seller to cancel the contract;

Here is another place where some of the scam artists blow it - although these errors are getting rare. They print the rescission form on the back of the Truth in Lending disclosures. When the consumer sends in the rescission form they tear off part of the TILA disclosures. Or alternatively, they do not leave enough copies of the form for the consumer.

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.

- This becomes a problem of proof. The rule requires oral notice. The legal assistance client frequently denies it. The company rarely has proof, but some tape a verification call and may then 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.

- 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 use telegraph, fax etc - get some sort of proof of transmission.

   b) State law may provide for a continuing right to cancel beyond the three days if the notice is defective. See *Pinnacle Energy 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, use any written form, to include a telegram, that communicates the desire to rescind to the seller.

   a) Rule really does mean any form - you can write it on a MRE carton and 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 preempted.

b) State law with no requirement for providing notice 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 Ordnances." 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, Unfair and Deceptive Acts and Practices §§ 9.5 (7th ed. 2008 and Supp. 2011).

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, 15 C.F.R. § 310.

5. Telephone Disclosure and Dispute Resolution, 15 U.S.C. § 5711 (2000) [implemented by the Telephone Disclosure and Dispute Resolution Rule].

6. Restrictions on Use of Telephone Equipment, 47 U.S.C. § 227 (2006).

7. Telephone Disclosure and Dispute Resolution Rule, 16 C.F.R. § 308.

8. 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).

9. 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 statue 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(3).

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, 15 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.A. 6101 (note), Pub. L. No. 110-187 (Feb 15, 2008).

(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 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.

a) The purpose of the statue 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 within the meaning of the Fair Trade Act.

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, 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.

(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 it 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.

(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 (2006) ($50 limit of liability for credit card unauthorized use.).

(i) Any material aspect of negative options.

(3) Solicitors for charitable organization even if they seek donations rather than purchases of goods or services can not 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.

(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). Authorization is verifiable if it is:

(a) Express and in writing.

(b) Express and made orally and is tape-recorded.

(c) 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.

(d) Written confirmation of the transaction has been sent to the customer by first class mail and has all information required for oral authorization above. Prior to submission for payment and the

confirmation includes all disclosures required under the Rule.

(e) 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 or a debit card subject to the protections of the Electronic Funds Transfer Act and Regulation E.

(5) 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 facilitation. 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. The following are defined as abusive telemarketing acts or practices.

(1) Threats, intimidation, profane, or obscene language.

(2) Requesting or receiving payment for goods and services to fix credit reports UNLESS:

(a) The time frame in which the seller is supposed to have provided all goods and services has passed; and

(b) 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.

(3) 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.

(4) Requesting or receiving payment or fee in advance of obtaining a loan or other extension of credit.

(5) Using preacquired account information without the expressed informed consent of the consumer including, at a minimum, obtain from the customer the last four digits of the account number to be charged. And make an audio recording of entire transaction.

(6) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; except in processing of payment for a business transaction.

(7) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer.

e) A pattern of telephone calls. The following are defined as abusive telemarketing acts or practices when engaged in by a telemarketer.

(1) Causing the phone to ring repeatedly and continuously with intent to annoy, abuse, or harass any person at the called number.

(2) Denying or interfering in any way with a person's right to be placed on the "do-not-call" registry.

(3) Initiating a call when that person's telephone number is on the "do-not-call" registry maintained by the FTC. (Number remains on the "do-not-call" registry for 5 years (renewable); unless the seller:

(a) Has obtained an express agreement in writing with the person authorizing calls to that person; or

(b) 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.

(4) 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:

(a) It has established and implemented WRITTEN procedures to comply with this rule;

(b) It has trained its personnel on these procedures;

(c) The seller or telemarketer maintains a list of those who may not be called; AND

(d) The subsequent call is a result of error.

(5) 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

f) 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.

g) 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:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods and services;

(3) The nature of the goods and services; AND

(4) 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.

(5) In a charitable solicitation, the identity of the charitable organization and 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.

(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 change ownership 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 proceeding 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 proceeding 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 or, 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

(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 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).

(c) Non-profit organizations.

(9) Charities are not required to comply with “Do Not Call” registry, however you can tell them

individually 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 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 $11,000 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)

      (1) If the consumer purchases goods from a telemarketer using a credit card, consider the claims and defenses protections under the FCBA. (15 U.S.C. § 1666i)

      (2) Basic Requirements (For more detail, see Chapter 5).

         (a) Claims and defenses may include a dispute as to quality of merchandise and nondelivery 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. Sears or J.C. Penney - store card).

8. The FTC Mail or Telephone Order Merchandise Rule. (See below). This rule requires delivery of goods ordered over the phone within 30 days.

E. Unsolicited Bulk Commercial E-mail (Spam)

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. 15 U.S.C. §§ 7701-7713 (2006).

3. CAN-SPAM requires:

a) Subject headings not be misleading to a reasonable recipient;

b) Commercial e-mail must provide the valid postal address and actual e-mail address of the sender;

c) The sender must

III. THE MAIL OR TELEPHONE ORDER MERCHANDISE RULE

A. Reference.

1. 16 C.F.R. Part 435.

2. National Consumer Law Center, Unfair and Deceptive Acts and Practices, §5.9 (7th ed. 2008 and Supp. 2010).

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.[1]

(1) The seller cannot extend the delivery deadline by counting thirty days as running from later date such as when the seller charges credit card.seller does not comply by sending all part of the merchandise- for example – software for the computer purchased.

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 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:[2]

(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 thirty (30) days AFTER the applicable time limit expires, the buyer is automatically deemed to have CANCELED UNLESS[3]

(1) The seller ships the merchandise within thirty (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 thirty (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. § 435.2)

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:" refers to 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

   b) The time at which the seller receives both said payment and an order from the buyer containing all of the information needed by the seller to process and ship the order.

   c) 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.

   d) 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 one (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 Negative Option Plans by Sellers in Commerce," 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. GA and ID have incorporated the FTC statute into their UDAP regulations. Numerous states have similar rules.

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 impose 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 § 14(A)(2) (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,

e) Bogus income opportunities ,

f) Internet got consumer to download a program that hijacked the user's computer modem so that all calls were routed through Moldova at a great expense to the consumer. The operator of the scheme got part of the revenue generated by the scheme through the

international operator.

g) 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. (S.D.N.Y. filed 2001) at www.ftc.gov/os/2001/11/crescentstip.pdf (stipulated final judgment and order).

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. Reference.

1. 39 U.S.C. § 3009 (2006).

2. National Consumer Law Center, Unfair and Deceptive Acts and Practices, § 5.8.4 (7th ed. 2008 and Supp. 2010).

B. General.

1. Consumers unsure of their legal rights found it inconvenient to send back items and are scared of debt collection threats. In the past, sellers have threaten 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 constitute 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 in order 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 packages 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. Reference.

1. Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. § 5711 (2006).

2. Telephone Disclosure and Dispute Resolution Rule, 16 C.F.R. § 308.

3. National Consumer Law Center, Unfair and Deceptive Acts and Practices, § 5.9.8 (7th ed. 2008 and Supp. 2010).

B. The Telephone Disclosure and Dispute Resolution Act of 1992 regulates the use of 900 numbers on the federal level and is enforceable by the FTC.

1. This rule prohibits common carriers form 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 eighteen 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.

C. 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. Chapter 5 of the Truth in Lending Act, 15 U.S.C. § 1667a-f (2006).

2. Regulation M, 12 C.F.R. Part 213.

3. National Consumer Law Center, Truth in Lending Chapter 9 (7th ed. 2010).

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 ones you'll see. According to the Federal Trade Commission, "[w]ith a closed-end lease, you may return the vehicle at the end of the lease term, pay any end-of-lease costs, and walk away." Keys to Vehicle Leasing, available at http://www.ftc.gov/bcp/conline/pubs/autos/leasing/index.htm (visited 5 May 2000).

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, – 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 Annotation, 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 $25,000.**

   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,

(b) in writing,

(c) the CLA requirement that disclosures be made in writing is overridden only of the lessor companies 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.

(d) in a form the consumer may keep.

2. The writing must

a) be dated

b) identify the lessor and the lessee.

c) Disclosures may be made:

(1) in the contract or other document evidencing the lease.

(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 consumment of a consumer lease. A dealer violates the CLA if the dealers provides a vehicle to consumer contingent on financing coming through, then later cancel the contract and rewrite it at some later time as a lease on terms less favorable to the consumer then back dates that lease to when the consumer received the vehicle. See Jafri v. Lynch Ford, Clearinghouse No. 53,536 9 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 (The Federal Box). (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 has been violated where the lessor instead promised to pay this amount for the consumer, and does pay the amount. See Patterson v. Bob Wade Lincoln-Mercury, Inc., 55 Va. Cir. 499, 2000 Va.

Cir. LEXIS 619 (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*., 2000 U.S. Dist. LEXIS 15645 (E.D. Pa. Oct. 27, 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 determination 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 pay $6,600 for the difference between the residual value and the realized value, while if not in default would only owe $500 for 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 agreed to by 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 tip: 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 and 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. State Leasing Disclosure Statutes. The following states have leasing disclosure statutes that may provide additional protections:

1.	California	Cal. Civil Code § 2985.8
2.	Colorado	Colo. Rev. Stat. §§ 5-2-311 – 13
3.	Connecticut et. seq.	Conn. Gen. Stat. §§ 42-270 et. seq., §§ 42-390
4.	D. C.	D.C. Code Ann. § 28-3810
5.	Florida	Fla. Stat. § 521
6.	Hawaii	Haw. Rev. Stat. § 481L
7.	Illinois	815 Ill. Comp. Stat. Ann. § 636
8.	Indiana	Ind. Code §§ 9-23-2.5-1/24-4.5-2-101
9.	Iowa	Iowa Code § 537.1101
10.	Kansas	Kan. Stat. Ann. § 16a-1-101
11.	Louisiana	La. Rev. Code § 9:3301
12.	Maine	Me. Rev. Stat. Ann. Tit. 9-A § 5-101; Consumer Credit Code Regulation Z-2, Rule 240.
13.	Maryland	Md. Code Ann. Com. Law § 14-2001
14.	Michigan	Mich. Comp. Laws § 445.991
15.	New Hampshire	N.H. Rev. Stat. Ann. Ch. 361-D
16.	New Jersey	N.J. Rev. Stat. § 56:12-60
17.	New York	N.Y. Pers. Prop. Law § 331
18.	Oklahoma	Okla. Stat. Ann. Tit. 14A § 1-101
19.	South Carolina	S.C. Code Ann. § 37-1-101

20.	Washington	Wash. Rev. Code § 63.10.010
21.	West Virginia	W.Va. Code § 46A-1-104
22.	Wisconsin	Wis. Stat. § 429-101

I. Taking Leased Vehicles Overseas.

1. The SCRA provides for the termination of auto leases. See Pub. L. No.108-189, § 305, formerly cited as 50 U.S.C. App. § 535.

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 lease and then receives military orders for a permanent change of station outside the continental United States or deploys with 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 of the date of the lessee's military orders.

VII. CONCLUSION.

CHAPTER D

PROTECTIONS BASED UPON PROBLEMS WITH THE GOODS

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PROTECTIONS FOR AUTOMOBILES

May 2018

CHAPTER D

PROTECTIONS BASED UPON PROBLEMS WITH THE GOODS

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A. UCC Article 2.

B. Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (2006).

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 (4th ed. 2010 & Supp. 2011).

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 LA.

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 reality.

(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. 1991) (applying Iowa law).

b) Was there a “transaction” or a “sale” involving those goods?

(1) A "sale" consists in 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. Warranty of Title. (§ 2-312)

1. Seldom an issue in consumer transactions.

2. 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.

3. Disclaimer or modification of the warranty of title is allowed, as long as the buyer is protected from surprise.

4. 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.

5. A claim for breach of warranty does not require evidence that the seller knew of the defect in the title.

6. 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.

7. Warranty of title issues arise in sale of "Gray Market Vehicles" (manufactures outside of U.S.) that they may not meet the U.S. safety and emission standards. If the state refuses to issue certificate of title it is a breach of implied warranty of title.

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.

(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 manufacturers 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, 44 UCC Rep. 2d. 416 (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*, 145 N.H. 404, 762 A.2d. 1034 (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*, 244 Ga. App. 437, 535 S.E.2d 776 (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, 45 UCC Rep. 2d 538 (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 breech. See *Lipinski v. Martin J. Kelly Oldsmobile, Inc*., 2001 Ill. App. LEXIS 805 (Ill. 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 <u>particular purpose</u> 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*., 365 MD. 321, 779 A. 2d 362, 45 UCC Rep. 2d 319 (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 buyer.

2. Express warranties. § 2-316(1).

a) Modifying express warranties. Attempts to negate or limit the warranty are construed wherever reasonable as staking 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, 43 UCC Rep. Serv. 2d 1131 (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 pertain 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 Cinquegrani v. Sandel Avionics*, 469 F.3d 1071 (7th Cir. 2006). *Cf. Bristow v. Lycoming Engines*, 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 a engine and parts).

e) Leases. The Act has recently 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, wholesales, 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 dealer who provides a written warranty, but if a dealer only passes on a manufacturer's warranty the dealer is not liable for a breech 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. Evenif 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.

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*, 2001 Ala. LEXIS 431 (Ala. Nov. 30, 2001).

c) Whether the written warranty remains in effect is the most difficult question for used products.

2. Tie-ins are generally prohibited. This provision provides that sellers/warrantors:

a) Cannot condition warranty applicability on using a particular part or certified product.

b) Cannot limit to factory servicing.

c) Cannot mandate a specific brand name.

d) CAN mandate a particular grade of product. For example, cannot say Quaker State Motor Oil, but CAN say 10W-40 motor oil.

e) 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.

f) 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 locations such as Sears 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."

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. All domestic manufactures and

most importers 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. All 50 states and the District of Columbia have some form of "lemon law." See Appendix B.

B. 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.

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 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.

(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.*, No. 87-272 (Vt. Dec 1, 1989) (in five separate attempts, dealer was unable to correct stalling problem and rough running engine; dealer then installed valve that it said corrected problem--court affirmed refund of portion of purchase price and other expenses: statutory criteria was three repair attempts and satisfaction (subjective) of customer). 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 19.188.041(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 (# of miles driven)/100,000 x (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.*, Hawaii Rev. Stat. § 490:2-313.2; 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. http://www.autosafety.org 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. Find Express Warranties (*See also* Warranty Law Above) because 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*, 101 Misc. 2d 756, 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 (2006).

b) 49 C.F.R., Part 580.

c) NATIONAL CONSUMER LAW CENTER, AUTOMOBILE FRAUD (4th ed. 2011).

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 U.S. agency.

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

a) **Civil penalty.** For violations occurring before December 21, 2010, liable to the United States Government for a civil penalty of not more than $3,200 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 $140,000. 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 (1) $1,500 for damages prior to December 21, 2010,

or (2) $3,000 for damages on or after December 21, 2010; 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 Del. Super. LEXIS 209 (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. (3d ed. 2006).

2. Even if the manufacture has repaired the defects, the cars will sell for more if the defect history is not disclosed.

3. Lemon Laundering is being conducted by manufactures on a wholesale basis. More recently manufactures will sell car 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 proof 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 buyer can generally enforce the original warranty despite the lack of horizontal privity.

8. Examining a vehicles title history can help undercover lemon laundering. A car returned to a manufacturer particularly during first 12,000 miles is usually a lemon (unless short-term lease) or if in the first years sold back to original dealer. 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, 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. The meaning of the term "As Is"

5. 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.)

6. Availability of Service Contracts

7. A suggestion to the consumer to ask the dealer whether a pre-purchase independent inspection is permitted.

8. On the back, a list of the 14 major mechanical and safety systems of a car and a partial list of defects likely to occur within those systems in used cars.

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, 299 Ark. 182, 772 S.W.2d 309 (1989). Trial court apparently awarded Magnuson-Moss attorney's fees for violation of FTC Used Car Rule. Arkansas Supreme Court, without discussing whether Magnuson-Moss Act can be used to challenge FTC Used Car Rule violations, affirmed trial court award.

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)(McKinney).

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 (West).

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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May 2018

I. TRUTH IN LENDING ACT (TILA).

A. References.

1. Truth in Lending Act, 15 U.S.C.A. §§ 1601-1667f (2010).

2. Regulation Z, 12 C.F.R. Part 226.

3. Official Staff Commentary on Regulation Z (12 C.F.R. Part 226.101).

4. NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (7th. ed. 2010 & Supp. 2011).

5. Alperin and Chase, Consumer Law: Sales Practices Credit Regulation, Vol. I & II, (West Pub. Co. 1986) with Supplements 2008-2009.

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

7. Electronic Fund Transfer Act, 15 U.S.C. 1693 (2006).

8. Regulation E, 12 C.F.R. Part 205.

9. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

10. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 [hereinafter Dodd-Frank Act] (2010).

11. 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.

4. The Act is in Title I of the Consumer Credit Protection Act and is implemented by the Federal Reserve Board via Regulation Z (12 C.F.R. Part 226). As of 21 July 2011, the Consumer Financial Protection Bureau (CFPB) has the authority to prescribe TILA-based rules and regulations. Dodd-Frank Act, § 1100A(7).

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

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

C. 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.

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). As of July 30, 2009, 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 "organization." *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 $25,000.00 (or $50,000+), except for
(1) private student loans, and (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. The amount over which credit (other than the two exceptions described above) is exempt from TILA was changed as of July 21, 2011. As of January 1, 2012, the amount increased to
$51,800, as this ceiling amount will now adjust based on inflation.

e) Car dealerships who work with auto manufacturer financiers are "credit arrangers," not "creditors." *Riviere v. Banner Chevrolet, Inc.*, 158 F.3d 335 (5th Cir. 1998), *citing Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 101 S.Ct. 2239 (1981).

The district court found that Banner was not a creditor under the current version of TILA: Banner does not meet the first condition that the individual or business must offer or extend credit. Although Banner has a credit department, it investigates credit histories, and it prepares forms; ultimately, Banner assigns the loan to

GMAC, FMC, or another entity. It is that entity that "lends" the money to the consumer to enable him to purchase a vehicle. If a vehicle buyer defaulted on monthly payments, Banner would have no right to repossess the vehicle, or to sue for the balance unpaid. That right would belong to the lien holder or the extender of credit; GMAC is the sole lender/creditor in the transaction.

E. Electronic Disclosures.

1. The Electronic Signatures in Global and National Commerce Act, 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 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 will want to get the consumer's approval to give these disclosures electronically in 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. FRB 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*, 295 F. 3d 325 (7th Cir. 1999)(applying TILA to check advancement loans).

(3) The Federal Reserve Board 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*., 1999 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 in to 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 205 (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 as to 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.W. 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) *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). Good example of a disguised credit sale. 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. § 226.2(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. § 226.6;

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

(2) 12 C.F.R. § 226.13 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. Convoluted 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.

Open-end creditors must disclose the following in the form of a table at account opening;

- Each APR for purchases, cash advances, and balance transfers, including;
    - o Variable rate information;
    - o Introductory rates;
    - o Premium initial rates; and
    - o Penalty Rates
- Fees for issuance or availability of credit;
- Any fixed finance charge or minimum interest charge;
- Transaction charges;
    - Grace period;
- Cash advance fees and balance transfer fees;
- Late payment fees, over-the-limit fees, and returned payment fees;
- Required insurance, debt

cancellation, or debt suspension coverage; and

- If fees for issuance or availability of credit exceed certain thresholds, the amount of available credit after such fees are charged to the account.

(3) Disclosures directly beneath the table include:

(a) Balance computation method;

(b) Loss of an introductory rate;

(c) Statement about billing error rights.

(4) 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 types of transactions can be found 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 FRB rulings and interpretations;

b) Use of model forms;

c) Bona fide efforts to prevent clerical and similar errors;

d) Use of a faulty calculation tool;

e) The creditor corrects the error within 60 days of

discovery and prior to written suit or written notice from the consumer, or,

f) 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 secured by real estate or a dwelling, no less than

$200 and 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 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 Cooling Off Period (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.

2. 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.

3. 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.

b. Extended right to rescind.

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

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

(3) 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.

(4) 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:

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

(ii) The consumer's right to rescind,

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

(iv) The effects of rescission, and

(v) 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.

(5) Running of the 3-year time period for rescission extinguishes the right. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 118 S.Ct. 1408 (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*, 161 F.3d 2, 1998 WL 614150 (4th Cir.) (unpublished opinion).

(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.

(i) 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) An open question is what action a consumer must take to preserve their right to rescind. Many federal circuits are tackling the question of whether consumers who wish to rescind their loan must notify their lenders of the rescission within 3 years of receiving their loan, or

whether instead consumers must sue their lenders within the same 3-year period. There is currently a circuit split. *See Gilbert v. Residential Funding LLC, et. al*, No. 102295, 2012 WL 1548580 (4th Cir., May 3, 2012) (stating that the consumer's notice of intent to rescind was enough to preserve rescission right); *but see McOmie-Gray v. Bank of America Home Loans*, 667 F. 3d 1325 (9th Cir., Feb. 8 2012) (stating the borrower must file a lawsuit to preserve rescission right).

(6) NOTE: On September 24, 2010, the Federal Reserve Board published a proposed rule that would make extensive changes to rescission rights. The proposed rule would revise the definition of the "material" disclosure violations that extend the rescission period to three years. No rule had been issued by July 21, 2011. Practitioners should check the CFPB's website, www.consumerfinance.gov, for developments on this and other TILA-related matters

4. 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 end of 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. Consumer must provide creditor with dated written statement describing emergency.

(1) Specifically modifying or waiving right, and

(2) Signed by all consumers entitled to rescind.

5. 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 he/she is 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.

6. 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, it's reasonable value.

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

c) Court may modify procedures.

(1) Court has power to exercise equitable discretion and condition rescission of a loan upon the return of the loan proceeds.

(2) *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).

(3) *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).

7. 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 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 his/her 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 are 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.

8. 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, 15 U.S.C. § 1638(b), and it is as of that time that the adequacy and accuracy of the disclosures are measured.

9. 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.

      (4) 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.

   b) *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.

c) *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. § 226.33.

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 available for elders so they can tap home equity into 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. § 226.32.

1. Applicability.

a) 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:

(1) In the case of a credit transaction secured --

(a) [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

(b) "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;

(2) 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—

(a) In the case of a transaction for $20,000 or more, 5 percent of the total transaction amount; or

(b) 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

(3) 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.

b) See Dodd Frank Act § 1431 for further definitions.

c) Does NOT apply to:

(1) Reverse mortgages as defined above

(2) 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 conspicuous and in a certain 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 (HELCs).

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 HELC plans entered into after 7 November 1989.

2. HELC rules apply to open-end credit plans secured by the consumer's "principal dwelling." The definition of "principal dwelling" under HELC is more expansive than under TILA. Under HELC, the rules apply to consumer's second or vacation home, as well.

3. Disclosures required at time of application.

a) 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.

b) Disclosure required at plan opening.

(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.

4. In addition to disclosure mandates, there are substantive limitations that apply to the draw period of a HELC, the repayment period, and any renewal or modification of the HELC agreement.

a) Creditors may not terminate a HELC and accelerate payment of the outstanding balance before the scheduled expiration of the HELC 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 HELC.

b) A creditor may not unilaterally change the terms of an HELC plan after the account has been opened, unless

(1) The contract contained the change contemplated on the occurrence of an event, or

(2) Consumer expressly agrees in writing to the change.

(3) (3) In a variable-rate HELC, the index and margin used under the plan may be changed if the original index becomes unavailable, or

(4) The change unequivocally benefits the consumer or is insignificant.

5. Remedies. TILA remedies are available for most violations of HELC.

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." To 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 are detailed below. The Act was implemented in 2010. Some of the 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.

Fees **not** covered by the rule include:

(6) Balance transfer fees;

(7) Cash advance fees;

(8) Foreign transaction fees;

(9) Expedited payment fees;

(10) Optional services fees;

(11) Lost or stolen card fees.

The following fees are no longer allowed:

(12) Declined transaction fees;

(13) Account inactivity fees; and

(14) Closure or termination of account fees.

d) 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.

e) Creates additional rules on the payment of credit-card debts;

f) Issuers must establish and maintain reasonable policies and procedures to consider a consumer's ability to pay.

g) 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.

h) Prohibits the provision of tangible items (such as t-shirts, magazines, etc.) to college students at or near colleges or college-related events.

i) 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.

j) 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.

k) Billing error protections.

l) 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 (7th. ed. 2010 & Supp. 2011), 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. (2000).

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. § 226.13

5. Electronic Funds Transfer Act, 15 U.S.C. § 1693 (2000). 6. 12

C.F.R. Part 205.

7. NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (7th ed. 2010 & Supp 2011).

8. NATIONAL CONSUMER LAW CENTER, CONSUMER BANKING AND PAYMENT LAWS (4th ed. 2009 and Supp. 2011).

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
Applicability	✓ Open-end consumer credit transactions (i.e., credit cards, store charge accounts, telephone charge cards).	✓ 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 t**o debit or credit an account**. ✓ The term includes, but is not limited to: ❑ 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: ❑ 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, ▪ Initiated by telephone conversation between consumer and employee of

	Fair Credit Billing Act	Electronic Fund Transfer Act
		institution, and ▪ 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)	✓ 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.	✓ 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 clarification concerning an electronic transfer. Does not include routine inquiry about the balance of account.
Billing Error Procedure (Consumer)	✓ Consumer notifies card issuer IN WRITING w/i 60 calendar days of transmittal of periodic statement to the consumer. ❑ 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: ❑ 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 that place for notice to be effective.	✓ 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: ❑ 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
	✓ After the consumer gives notice, he/she may withhold payment of the disputed amount or pay the amount without waiving billing error rights. ❑ However, paying the disputed amount does waive assertion of claims and defenses against a credit card issuer.	
Billing Error Procedure (Card/Access Device Issuer)	✓ 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: ❑ 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: ❑ 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 not: ❑ Take any action to collect the amount in dispute. ❑ If the consumer keeps a deposit account	✓ Upon notification: ❑ 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: ❑ 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
	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. ❑ Restrict or close the account in issue based on the debtor's failure to pay the disputed amount. ❑ Report or threaten to report adversely on the debtor's credit rating based on the disputed amount. ✓ Creditor **may** ❑ seek collection of unpaid, undisputed amounts. ❑ decrease credit limit by amount in dispute. ✓ 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: ❑ Creditor also reports that the amount is in dispute. ❑ Mails or delivers to consumer the name and address of each person to whom creditor made the report, and, ❑ Promptly reports any subsequent resolution of reported delinquency to all persons to whom creditor made the report. ✓ A creditor who has fully complied with FCBA procedures is under no further responsibilities if consumer reasserts same billing error.	
Unauthorized Use (Definition)	Use with no actual, implied, or apparent authority from the cardholder. (Question of State Law) ✓ Not Unauthorized Use: ❑ Attempt to orally limit spending. *See, e.g., Martin v. American Express, Inc.*, 361 So.2d 597 (Ala. Civ. App. 1978). ❑ Use of card by authorized person for unauthorized purpose. *Master Card v. Town of Newport*, 396 N.W. 2d 345 (Wis. 1986). ▪ Letter to credit card issuer to limit credit limit did not shield cardholder from liability for excess charges by an apparently authorized person. *Id.*	✓ 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: ❑ 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. ❑ Transfers initiated with fraudulent intent by the consumer or a person acting in concert

	Fair Credit Billing Act	Electronic Fund Transfer Act
	▪ State law imposes no duty on issuer to mitigate despite cardholder notification that an authorized user is making unauthorized charges. *American Express v. Web*, 261 Ga. 480, 405 S.E.2d 652 (1991). ▪ But see *Standard Oil Co. v. Steel*, 489 N.E. 2d 842 (Ohio Misc. 1985). Cardholder who voluntarily gave her card to a friend liable for all charges friend made before she notified card issuer of unauthorized use, but not for charges made after notification. ❑ *Society National Bank v. Kienzle*, 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. ❑ *See also Universal Bank v. McCafferty*, 88 Ohio App. 3d 556, 624 N.E.2d 258 (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. Court held consumer liable for only up to $50 of friend's charges. State law determines whether the use is authorized or unauthorized.	with the consumer. ❑ Transfers initiated by the financial institution or its employees.
Unauthorized Use (Conditions for Liability)	✓ A cardholder is liable for unauthorized use only if: ❑ 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: ▪ 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	✓ A consumer is liable for any unauthorized electronic fund transfer only if: ❑ 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. ❑ 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 consumer incurs no liability from an unauthorized electronic fund transfer.

	Fair Credit Billing Act	Electronic Fund Transfer Act
	incurs no liability from the unauthorized use of a credit card.	
Liability for Unauthorized Use	✓ $50 maximum ✓ In action to enforce liability, the burden of proof is upon the card issuer to show: ❑ that the use was authorized or, ❑ if the use was not authorized, then issuer must show the conditions of liability have been met.	✓ Three-Tiered Liability ❑ 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: • Up to $500 for the period between the discovery of the loss and 60 calendar days (like #2 above) to be calculated as follows: ➢ $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 agreements. ✓ For example, the financial institution MAY NOT try to limit its liability if the consumer is negligent in co-locating the ATM card with the PIN number and both are stolen and used.
Other	✓ Some claims & defenses that you have against the merchant may be asserted against the	✓ Issuance of Access Devices.

	Fair Credit Billing Act	Electronic Fund Transfer Act
Provisions	credit card issuer IF: ❑ 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 ✓ Claims and defenses may include: ❑ 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. ✓ Location of transaction ❑ A matter of state law; states differ on whether mail or telephone order occurred at consumer's home or seller's place of business. ❑ *See Lincoln First Bank v. Carlson*, 426 N.Y.2d 433, 103 Misc.2d 467 (1980) (no presumption that consumer gives up all defenses if transaction takes place at distance greater than 100 miles). . ✓ 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. ✓ Payment of the disputed amount waives right to assert claims or defense as to the card issuer. ✓ 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. ✓ Relationship to Billing Error Resolution procedures. ❑ Even though certain merchandise disputes, such as nondelivery of goods, may also constitute "billing errors," the protections operate independently. For example: ▪ A cardholder that asserts billing error	❑ "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, • 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: • Access device is not validated, • Distribution is accompanied by ➢ 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. ✓ Access device considered validated when financial institution has performed all procedures necessary to enable consumer to use it to initiate an electronic transfer. ✓ Pre-Authorized Transfers From Consumer's Account - Consumer's Right To Stop Payment. ❑ 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. ❑ If consumer does not provide written confirmation, stop-payment order ceases to be binding 14 days after it has been made.

	Fair Credit Billing Act	Electronic Fund Transfer Act
	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. ▪ 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. ✓ 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.	
Remedies	✓ 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. ✓ 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). ✓ Also, consider UDAP action.	✓ Actual damages. ✓ Statutory damages of $100 to $1,000. ✓ Court costs and reasonable attorney's fees. ✓ Criminal penalties of up to 1 year's imprisonment and a $5,000 fine for knowing and willful noncompliance. ✓ Criminal penalties of up to 10 years' imprisonment and a $10,000 fine for violations affecting interstate or foreign commerce. ✓ Treble damages (3 times the consumer's actual damages) if: ❑ 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 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, 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. State Debt Collection Statutes. See Appendix B.

3. Federal Trade Commission Staff Commentary to FDCPA (non- binding), *available at* http://www.ftc.gov/os/statutes/fdcpa/commentary.htm.

4. NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION (6th ed. 2008 and Supp. 2010).

B. Overview of the Debt Collection Process.

1. Creditors (those to whom the debt is owed) begin collection efforts with a series of form letters, graduate to phone calls or personal visits, 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 from a

c) When payments are 30 to 60 days late, the creditor generally threatens to repossess collateral or foreclose on a mortgage.

2. At any stage of the process, the creditor may forgive the debt ("write off") 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.

3. The creditor may turn the account over to a lawyer or debt collector (one in the business of collecting debts for others).

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 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 1982 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.

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 FTC interprets the FDCPA via non-binding interpretive commentaries.

3. Federal Trade Commission Formal Advisory Opinion in 2000, *available at* http://www.ftc.gov/os/2000/04/fdcpaadvisoryopinion.htm. The advisory opinion to the American Collectors Association addressed two issues:

a) Collectors may undertake collection activities during the thirty- day period during which a consumer may request the collector to validate debt as long as the collection activities do not over shadow or are not inconsistent with the notice of validation rights.

b) 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. The FDCPA allows the validation notice to be sent separately within 5 days of the initial collection communication.

4. 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 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. *Nadalin v. Automobile Recovery Bureau, Inc.*, 1999 WL 130194 (7th Cir. 1999).

(a) The FDCPA regulates "debt collectors," a term that is defined as excluding repossessors and

other enforcers of security interests. 15 U.S.C. § 1692a(6).

(b) A repossessor 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) Repossessors withheld personal property from owner of repossessed vehicle in order to collect their $25 bailment fee. These repossessors "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 repossessor]'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 repossessors' common law rights and remedies, whatever they may be, as bailees, provided the repossessor is not seizing property as collateral for the lender's loan to the owner."

(d) Repossessors 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) (Supp. V 1987).

(a) U.S. Supreme Court resolved all debate about whether attorneys are covered under the Act in *Heintz v. Jenkins*, 115 S.Ct. 1489 (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 afflicted 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 (<u>not</u> 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*, 988 F.Supp. 712 (S.D.N.Y. 1997), *permission for interlocutory appeal granted Romea v. Heiberger & Associates*, 988 F.Supp. 715 (S.D.N.Y. 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) 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.)

5. Requirements imposed by the FDCPA.

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

(1) The amount of the debt.

(a) Summary Judgment was granted for consumers when their notification collection letter demanded a sum "plus accrued interest and /or late charges, and attorney fees, exact amount to be determined by an agreement between you and us or by the court." See *Bawa v. Bowman, Heintz, Boscia & Vician*, 2001 U.S. Dist. LEXIS 7842 (S.D. Ind. 2001).

(2) The name of the creditor to whom the debt is owed.

(3) A notice to the consumer that they may request verification of the debt, and that if the consumer does not send such a request within 30 days, then the debt collector will assume the debt is valid.

(a) Debt collectors are only required to show that they SENT a validation notice to consumers. Once they do, consumers have 30 days to request verification of the debt. *Mahon v. Credit Bureau Of Placer County Incorporated*, 1999 WL 123725 (9th Cir. 1999) ("We hold that section 1692g(a) requires only that a Notice be "sent" by a debt collector. A debt collector need not establish actual receipt by the debtor.")

(b) Requires validation of debts. Upon request, the debt collector must notify the debtor of the nature of the debt, the identity of the creditor, and must cease collection efforts until verification of the debt is completed. All the consumer has to do is send written notice "I dispute the debt"

(c) "[A] debt collector must provide verification of the debt to the debtor, upon written request made by the debtor within 30 days after receipt of the initial Notice. 15 U.S.C. § 1692g(b). If no written demand is made, 'the collector may assume the debt to be valid.' *Avila v. Rubin*, 84 F.3d 222, 226 (7th

Cir.1996); 15 U.S.C. § 1692g(a)(3)."

(i) Thirty days from the date of receipt of the notification. Practice tip: The time for verification has often passed but request verification anyway.

(d) A tardy request for verification does NOT trigger the debt collector's obligation to verify the debt.

(e) Adequate verification varies depending on the reason for the dispute. The debt collector must cease collection from the date verification is requested until the verification is provided, but may continue collection within the first 30 days of the notice.

(4) A statement that upon the consumer's written request within the thirty day period, the debt collector will provide the consumer the name and address of the original creditor if different from the current creditor

b) "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).

(1) When an independent debt collector solicits payment from a consumer, it must -- within five days of the initial communication -- provide the consumer with a detailed validation notice . . .

(2) When determining whether Section 1962g has been violated, courts use "an objective standard, measured by how the 'least sophisticated

consumer' would interpret the notice received from the debt collector."

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

(1) Debt collectors must inform the consumer in the first contact with that consumer (oral or written) that they are a debt collector AND that any information gained will be used in the process of collecting a debt.

(2) Any subsequent communications must disclose only that the communication is from a debt collector.

(3) Formal pleadings made in connection with legal proceedings need not contain the disclosure.

d) The act provides a means by which a consumer can stop the attempts of a debt collector to communicate with the consumer.

(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, unless to notify debtor that the debt collector intends to invoke specific remedies.

e) Other consumer protections provided by the FDCPA.

(1) Restricts contact with the debtor unusual or inconvenient times or places.

(a) Know or should have known as inconvenient to consumer.

(b) Absent knowledge, debt collector should assume can only communicate between 0800 and 2100 hours.

(c) Inconvenient places include funeral homes, a neighbor's house, a hospital, or the work place.

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

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

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

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

(iii) Contact is reasonably

necessary to effectuate a post-judgment judicial remedy.

(b) 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 written communication.

(vi) Check state law. Some states prohibit any contact with the employer. In these states the Army will not assist either the debt collector or the creditor.

(c) They may contact a credit reporting agency if otherwise permitted by law.

(3) 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*, 763

F. Supp. 1269 (D.N.J. 1991) (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.)

(4) 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.

(5) 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.

(6) 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.

(7) 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.

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

(9) A debt collector may not solicit post-dated checks in lieu of pursing a lawsuit and may not deposit any post- dated checks accepted prior to the date written on the check.

6. 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. 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); s*ee 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, pursuant to recent amendments in the Dodd-Frank Act, the Consumer Financial Protection Bureau (CFPB) is authorized to take action. *See* Dodd- Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1089 (2010). Legal Assistance Attorneys should contact the CFPB Enforcement Branch with any questions or concerns.

2. The Act also creates a private cause of action for the consumer. Consumer could also assert violations of the FDCPA as a counter- claim in a suit to collect the debt.

3. Standing to sue.

a) "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."

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

b) Additional statutory damages allowed by the court up to $1,000 (no actual damages required). Divided 6th Circuit holds
$1,000 for each violation of statute rather than $1,000 per suit.

(*Wright v. Finance Service of Norwalk, Inc.* discussed above - executrix sued for FDCPA violations in collection notices sent to her deceased mother).

(1) To collect statutory damages, a consumer need only prove the statute was violated. They do not have to prove they suffered any actual impact. *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997).

(2) 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.

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. (FTC Commentary: 1 year limitations period applies only to private lawsuits, not those initiated by government).

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.

b) DOD Directive 1344.09, Indebtedness of Military Personnel (Oct. 27, 1994) (December 8, 2008).

c) AFI 36-2906, Personal Financial Responsibility (1 January 1998).

d) MILPERSMAN 7000-020, 4 April 2006.

e) MCO P5800.16A, Marine Corps Manual for Legal Administration, (31 Aug 1999).

f) United States Coast Guard Personnel Manual, COMDTINST M1000.6A, Ch. 8, Sect. L (8 January 1988).

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.

(3) Credit Unions and Banks:

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

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

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

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

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 military member in which there is no reasonable dispute as to the facts or the law; or one reduced to judgment which conforms to 50 U.S.C. App. § 501 (SCRA), if applicable. (32 C.F.R. § 112.3).

(b) A Proper and Timely Manner. A manner which under the circumstances does not reflect discredit on the military service. (32 C.F.R. § 112.3).

(c) Debt Collector. An agency or agent regularly engaged in the collection of debts described under Pub. L. 95-109 (FDCPA). (32 C.F.R. § 112.3).

(2) General Policies.

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

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

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

(3) Processing debt complaints will NOT be extended to those:

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

(b) Whose claims are patently false and misleading;

(c) Whose claims are obviously exorbitant.

b) Service regulations implement DOD Directive 1344.9.

4. **STEP 3:** Follow Processing Procedures.

a) Requirements for Creditors.

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

(a) Certificate of Compliance, and

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

(c) Copy of any signed contract or judgment.

(2) Creditors not subject to Regulation Z, such as public utility companies, must submit with their requests for assistance - Certification that no interest, finance charge, or other fee is in excess of that permitted by law of state where obligation was incurred.

(3) Foreign owned companies must submit with their requests for assistance:

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

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

b) Indebtedness Complaints Meeting DOD Requirements will be Processed.

(1) Commanders shall:

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

(i) Member's legal rights and obligations,

(ii) Member's defenses or counterclaims.

(b) Advise member that:

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

(ii) Financial and legal counseling services are available.

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

(d) Consider administrative or punitive action, if proper.

(2) Commanders will not:

(a) arbitrate disputed debts, or

(b) admit or deny the validity of the claim.

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

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

c) Indebtedness Complaints Not Meeting Service Requirements - All services: Return complaint, explaining no action until comply with regulation.

d) Services May Deny Assistance to Creditors.

(1) When the claimant, having been notified of the DOD requirements, refuses or repeatedly fails to comply;

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

5. **STEP 4:** Discipline, if appropriate. - **All services**: Commanders may take administrative or disciplinary action against members who fail to meet their just financial obligations in a proper and timely manner.

a) **Army**:

(1) Put in permanent record,

(2) Deny reenlistment,

(3) Administrative separation,

(4) Punitive action under UCMJ, articles 92, 123, 133, or 134.

b) **Marine Corps**:

(1) Put in fitness reports and pro/cons,

(2) Take appropriate administrative, non-punitive, or punitive action.

c) **Navy**:

(1) For officers, action should be governed by MILPERSMAN 1611-010, Officer Performance. For enlisted, take appropriate administrative, non-punitive, or punitive action.

(2) Require member to submit a statement of monthly finance to DOD, Central

Adjudication Facility.

(3) Counseling,

(4) Administrative discharge for misconduct,

(5) Report all bankruptcies to Chief of Naval Personnel.

d) **Air Force:** Unit commanders will consider and, if appropriate, initiate administrative or disciplinary action against members who continue to demonstrate financial irresponsibility.

e) **Coast Guard**:

(1) Put in officer fitness reports and take other corrective action,

(2) Submit adverse special fitness report,

(3) Counseling,

(4) Put in enlisted records

(5) Administrative separation,

(6) Recommend against reenlistment,

(7) Adverse security clearance,

(8) Punitive action.

II. FAIR CREDIT REPORTING ACT (FCRA)

A. References.

1. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u (2006), *as amended by* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1088 (2010).

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 (7th ed. 2010 & Supp. 2011).

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: http://www.nclc.org/initiatives/facta/contents/nclc_analysis_content.ht ml.

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 newly-formed 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 prescribe certain regulations. For example, the CFPB is 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). Because the CFPB is still a relatively new organization, Legal Assistance Attorneys should contact the CFPB 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, <u>regularly engage in</u> ... the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties**,** and [who use] any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f). (e.g., Experian, Trans Union Credit Corporation, Equifax).

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."** 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.

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*, 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) Consumers "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 reverify 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**[1] 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:

[1] Note that the term “adverse action” was not defined in the original version of the statute. However, there were requirements imposed by the statute for taking “adverse action.” Having the definition should put consumers in a better position to assert their statutory rights when a User takes “adverse action.”

(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 5 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 can not 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, don't 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.

Can not 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 polices 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 with the report a summary of the consumer's rights under the FCRA.

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) Consumers 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. *Wilson v. Rental Research Services, Inc.*, 165 F.3d 642 (8th Cir, 1999).

(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).

(b) "[I]n determining the meaning of 'maximum possible accuracy' under § 1681e(b), the statutory language requires that reports be 'accurate'

specifically with respect to the

individual who is the subject of the report. . . . [R]eports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer who is the subject of the report and thus may violate § 1681."

(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.

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 CRAs 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. On 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. 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 insure 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 in Reinvestigation responsibility can not be initiated by notice from a credit repair organization

b) 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 him (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.

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 FTC 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 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 starting December
4. 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.

(1) If the consumer wants additional reports other than for adverse actions the CRA may charge a reasonable fee for the disclosures to the consumer.

(2) 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.

(3) 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

(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;

(4) Credit Scores

(a) The FCRA requires that agencies disclose to the consumer:

(i) their credit score

(ii) the range of possible scores under the scoring model

(iii) the key factors that adversely affected the score

(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.

(b) The agencies can charge a reasonable fee.

(c) 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.

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 provides a phone number for the User

to call, however 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.

III. IDENTITY THEFT

A. Resources

1. Identity Theft and Assumption Deterrence Act, 18 U.S.C. §§ 928(b)(1), 1028, 1028a (2006).

2. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING (7th ed. 2010).

3. http://www.consumer.gov/idtheft.

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 it 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 has reported to congress in 2002 that they get 3000 calls a week to their toll free identity theft hotline. (1-877-ID-THEFT (438-4338)), resulting in over two billion dollars of credit fraud loss each year.

4. The fraud does not come to light until victim is denied a loan or some other kind of credit or in the worse 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% 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. Act requires 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. Forces law enforcement to see the ones whom the Identify was stolen from 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 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, Trans Union) 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. 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 right to 2 free credit reports within 12 months of request.

a) Fraud numbers (only need to contact one)

(1) Equifax: (800) 525-6285

(2) TransUnion: (800) 680-7289

(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 of fraudulent accounts by telephone and in writing and 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, and 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 has been used, notify the Social Security Administration and if Driver's license number has been used contact their state department of registry of motor vehicles.

11. Fill out a ID theft affidavit at www.consumer.gov/idtheft/affadavit

12. Go to the FTC website listed in the resource paragraph above for more detailed information on how to combat Identity theft.

13. Continue to monitor credit report by requesting new credit

reports form the big three reporting agencies every three 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 relate to any transaction by them

2. The agencies must notify furnishes 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 recession.

5. Financial institutions and creditors must establish reasonable policies and procedures for implementing to be issued "red flag" guidelines regarding identity theft.

6. FTC – has to develop new summary of rights for identity theft and fraud victims

IV. CONCLUSION.

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 (2006).

B. The Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679 – 1679j (2006).

C. Telemarketing Sales Rule, 16 C.F.R. § 310.

D. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING (7th ed. 2010 & Supp. 2011).

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 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.

3. Automobile dealers have been found to be credit repair organizations when targeting individuals with bad credit and promising to find financing or offering to help them reestablish credit or improve their credit records even if no separate fee is charged for credit repair. *See Hall v. Jack Walker Pontiac, Toyota, Inc*., CCH 52,143, Ohio C.P. Mar. 15, 1999. *But see Sannes v. Jeff Wyler Chevrolet Inc*., 1999 U.S. Dist. LEXIS 21748 (S.D. Ohio Mar. 31, 1999) (credit repair services advertised by dealer were considered ancillary to main business so act did not apply.)

4. 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--

(a) all guarantees of performance; and

(b) 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]

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 may 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

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

(1) any consumer reporting agency; or

(2) any person--

(a) who has extended credit to the consumer; or

(b) to whom the consumer has applied or is applying for an extension of credit;

2. Hiding the Consumer's Accurate Credit History.

a) 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. Credit repair services have told clients to use Employee identification numbers instead of their social security

numbers to repair their credit.

b) The information may not be hidden from:

(1) any consumer reporting agency;

(2) any person--

(a) who has extended credit to the consumer; or

(b) 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

(3) 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 7
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 (2006).

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. Federal Reserve Board Regulation B (Equal Credit Opportunity), 12 C.F.R. pt. 202.

D. NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION (5th ed. 2009 & Supp. 2011) [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 home owner ship 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. 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.”

C. Rulemaking.

1. Congress originally directed that the Federal Reserve Board promulgate rules and regulations for the implementation and enforcement of the ECOA. The Federal Reserve Board has done so in Regulation B, codified at 12 C.F.R. pt. 202.

2. The Dodd-Frank Act largely transferred ECOA rulemaking authority to the CFPB. See Dodd-Frank Act, §§ 1013, 1085. 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. For example, on August 15, 2012, the CFPB proposed a rule to improve consumer access to appraisal reports. Legal Assistance Attorneys with potential ECOA issues should contact the CFPB with questions or concerns.

D. The Dodd-Frank Act established an Office of Fair Lending and Equal Opportunity within the CFPB. See Dodd-Frank Act at § 1013(c). This 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. § 202.4. Whether or not the ECOA applies to a transaction may be determined by answering the threshold questions below.

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. § 202.1(a)-1. 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 § 202.3(a)-2.

c) Check Cashing or ATM Cards? – No, because there is no extension of credit.

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

2. 12 C.F.R. § 202.2(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.

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.

§ 202.2(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 exempted by the Federal Reserve Board. However, the rule against discrimination against applicants on a prohibited basis still applies. *See* NCLC DISCRIMINATION § 2.2.6; 12 C.F.R. § 202.3(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 202.5(c) concerning information about a spouse or former spouse;

(2) Section 202.5(d)(1) concerning information about marital status;

(3) Section 202.5(d)(2) concerning information about income derived from alimony, child support, or separate maintenance payments;

(4) Section 202.5(d)(3) concerning information about the sex of an applicant, but only to the extent necessary for medical records or similar purposes;

(5) Section 202.7(d) relating to the signature of a spouse or other person;

(6) Section 202.9 relating to notifications;

(7) Section 202.10 relating to furnishing of credit information; and

(8) Section 202.12(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 202.5(c) concerning information about a spouse or former spouse;

(2) Section 202.5(d)(1) concerning information about marital status;

(3) Section 202.5(d)(3) concerning information about the sex of an applicant;

(4) Section 202.7(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 202.7(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 202.7(d) relating to the signature of a spouse or other person;

(7) Section 202.10 relating to furnishing of credit information; and

(8) Section 202.12(b) relating to record retention.

4. Credit extended to the Government.

a) Government credit refers to extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities.

b) Except for section 202.4, 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 Board;

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, 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. § 202.15)

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).

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.

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 as a general rule is two years from the date of the violation, except that--

(1) whenever any agency having responsibility for administrative enforcement commences an enforcement proceeding within two years from the date of the occurrence of the violation, or

(2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

(3) then any applicant who has been a victim of the discrimination which is the subject of the agency's proceeding or civil action may bring an action not later than one year after the commencement of the Agency's proceeding or action.

3. Discovery. Nothing in the ECOA shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures.

VIII. CONCLUSION.

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; 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 [DA 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. 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.

8. DFAS decides all other defenses.

9. 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 (Rapid Action Revision, 4 August 2011).

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 an 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. Removal action must be taken by the AFDCB.

(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, *available at* http://www.mod.uk/NR/rdonlyres/A921BCF9-97C5-4716-8262-44F96196061E/0/nato_sofa_supplementary_agreement.pdf

3. NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS (7th ed. 2010 and Supp. 2011).

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

[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

the force." Thus, an U.S. representative would have to be present during the repossession.

(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 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 repossessor grabs keys from debtor and twists wrist.

(ii) A repossessor 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, 46 U.C.C. Rep. Serv. 2d 913 (N.C. Ct. App. 2002)

(c) If there is a breach of peace, the repossessor 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. App. § 532. 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 5 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. Automatic Refinance (payday loans)
2. Waiver of rights
3. Required arbitration
4. Unreasonable notice
5. Access to an account (unless compliant with cost limitation and otherwise permitted by law)
6. Auto Title security (unless a depository)
7. Allotments
8. Prepayment penalties

E. Final Rule Implementation

1. October 1, 2015: New final rule took effect
2. October 3, 2016: Compliance date, in general
3. October 3, 2017: Compliance date for credit card accounts

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 (21 February 1996).

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. 3-6c, d, and e).

2. LAA may draft leases, but may not help clients with issues involved in income producing business activities. (AR 27-3, Para. 3-6c, 3-8a(2)).

3. Tenants - military members who rent from either civilian or individual military landlords. (AR 27-3, Para. 3-6c).

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. 3-8a(2)).

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 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, and 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. 1.3.1, AFI 51-504 (1 May 1996).

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. 715 (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, 564 N.Y.S.2d 115 (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*, 236 Ill.App.3d 994, 602 N.E.2d 859 (1992); *Manhattan Mansions v. Moe's Pizza*, 149 Misc.2d 43, 561 N.Y.S.2d 331 (1990).

a) Covers actions of the landlord that fall short of actual physical expulsion.

b) To be actionable the landlords 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 he vacates, avoid any further obligation for rent.

(4) Recover special damages, such as damage to his 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 duti 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.

(a) *Wade v. Jobe*, 818 P.2d 1006 (UT. 1991). Once landlord breaches duty to provide habitable conditions, tenant may withhold rent or continue to pay rent to landlord and then bring action for reimbursement for excess rent paid. Special damages also recoverable.

(b) 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 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 you 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 $3,047.45 for 2012. The act has a calculation for rent ceiling for subsequent years based on the housing price inflations adjustment.

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 and 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 Pub. L. No. 108-189, § 305).

a) A lease of premises occupied, or intended to be occupied, by a servicemember or a servicemembers 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.

(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 (see § 536/§305)].

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 § 534 says the lease must be executed by or on behalf of the service member.... (use § 536 to insert "by or on behalf of the dependent."

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) 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

e) 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.

f) 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.'

g) Penalties

(1) If the person knowingly holds, security deposit, or personal effects or other property of the service member or his dependents protected under this provision, or tries to prevent removal of property can be fined as provide in title 18, United States Code, or imprisoned for not more than one year.

h) 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 §305 that they are required to make application to a court under §308 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 servicemembers military service.

(2) Try to argue that if the servicemember's name is jointly on the actual lease than the lease can be terminated once the requirements under §305 are met and that §308 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) Some states allow termination when the service member is released from active duty (see VA Code Ann. § 55-248.21:1), others are silent on that issue - leaving it unclear whether receipt of "PCS orders" is synonymous with orders to leave active duty. For example, the Maryland early lease termination statute failed to address this point. On September 15, 1992, the Md. Attorney General issued an opinion that allows military personnel who are released from active duty and ordered to report to their home of record to terminate their residential leases.

3. Military clauses may be part of a contract or statutory.

a) Attorneys should be careful not to "contract away" Federal or State statutory protections by drafting inconsistent "military clause" language into a lease.

b) 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 (1995), *amended by* S.L. 2005-445, § 4.1, eff. Sept. 28, 2005, S.L. 2011-183, §§ 29(a), (b), eff.	
Oregon	ORS CHAPTER 90	
Pennsylvania	PA CON. STAT. TITLE 51§ 7315	
Rhode Island	R.I. GEN. LAWS § 31-44-7	Mobile Homes Only
Virginia	VA. CODE ANN. § 55-248.21:1	
Washington	WASH. REV. CODE § 59.20.090 (1995) §59.18.200, §59.18.220 (2003)	

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. (Now modified by statute)

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*, 17 Kan. App. 2d 560, 840 P.2d 1206 (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 was 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. *See*, *e.g.*, *Duchon v.*

Ross, 599 N.E, 2d 621 (Ind. App. 1992). 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 S 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 (2012).

b) DoD Instruction 1100.16, Equal Opportunity in Off-Base Housing (14 August 1989).

c) Chapter 2, DoD 4165.63-M, DoD Housing Management (September 1993).

d) AR 210-50, Housing Management (3 October 2005) (Caution: superseded by AR 420-1. This citation is for historical reference only).

e) AR 420-1, Army Facilities Management (12 Feb 2008, RAR 24 Aug 2012).

f) DA Pam 210-8, Housing Utilization Management (5 Nov 1993)

g) AR 190-24, Armed Forces Disciplinary Control Boards and Off Installation Liaison and Operations (27 July 2006).

h) AR 600-20, Army Command Policy para. 6-10 (Rapid Action Revision 27 April 2010).

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, RAR 24 Aug 2012).

b) Navy/Marine Corps: SECNAVINST 5350.14 (2 February 1993).

c) Air Force: Section 1.30, AF HB 32-6009, Housing Handbook (1 June 1996).

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- 2, 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; AR 210-50, para. 6-22.

(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 has now been 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. Section 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." For 2012, the maximum monthly rent covered by the SCRA is $3047.45.

E. American Recovery and Reinvestment Act of 2009: Expansion of the Homeowners Assistance Program (Expanded HAP).

1. The American Recovery and Reinvestment Act of 2009 (ARRA) temporarily expands the existing Homeowners Assistance Program (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.

2. Section 3374 of Title 42, United States Code, as amended by Section 1001 of the ARRA, authorizes the Secretary of Defense, under specified conditions,

   to acquire title to, hold, manage, and dispose of, or, in lieu thereof, to reimburse for certain losses upon private sale of, or foreclosure against, any property improved with a one- or two-family dwelling owned by designated individuals.

3. The broadest relief is in another part of section 1001 which offers "temporary homeowner assistance for members of the Armed Forces permanently reassigned during specified mortgage crisis." Specific requirements apply including:

   a) the property involved is the current principal residence of the servicemember;

   b) that the property was **purchased (or contracted to purchase)** by the servicemember **prior to July 1, 2006**;

   c) that the servicemember was "permanently reassigned" on orders "to a duty station or home port outside a 50-mile radius" of the prior base or installation; and

   d) the qualifying property was sold by the owner between July 1,

2006 and September 30, 2012 (or some earlier date in the regulations).

4. The Expanded HAP program is also available to other groups, to include:

   a) Wounded, injured, or ill servicemembers and DoD (including Coast Guard) civilian employees who must relocate from the primary residence in furtherance of medical treatment, rehabilitation, or due to medical retirement resulting from the wound, injury, or illness, and a need to market the primary residence for sale due to the wound, injury, or illness.

   b) Surviving spouses of servicemembers or civilian employees whose spouse dies as the result of a wound, injury, or illness incurred in the line of duty while deployed on or after September 11, 2001, and who relocate from the member's or civilian employee's primary residence within 2 years of the death of the spouse.

   c) Those impacted by Base Realignment and Closure (BRAC) 2005.

5. This program was funded with $855 million, but the funding has largely been depleted. Nonetheless, those eligible should still apply for benefits, but without qualified legal advice and specific guidance from qualified

   individuals in the U.S. Army Corps of Engineers, should not base decisions on the expectation that the benefits will be paid.

6. Eligible applicants may be compensated for the difference between 90% (95% for Wounded, Injured, Ill / Surviving Spouse Programs) of the appraised fair market value of their property and the appraised value of the property at the time of sale, or sales price, whichever is greater. Closing costs and home improvements may also be reimbursed. Benefits are also paid tax-free. This benefit can be substantial. The average benefit is well into six-figures.

7. The program is administered by Headquarters, United States Army Corps of Engineers (HQUSACE). The specific requirements for this program can be complex based on the nature of the situation in which the servicemember and his or her family finds themselves. For more detailed information, to include how to apply, *see* http://hap.usace.army.mil/.

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) Allowed everywhere except Hawaii and Nebraska.

b) “Level Payment Plans.” Allows customer to pay the same amount each month based on estimate of annual usage.

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) Arrearages of Prior Occupant

(b) Landlord in arrears.

(c) 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*, 100 Md. App. 748 (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 pretermination 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.

VIII. CONCLUSION

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APPENDIX A INTERNET RESOURCES

The purpose of this list is to provide useful information to DoD and Coast Guard legal assistance practitioners. Inclusion of any site on this list does not constitute endorsement by The Judge Advocate General's School, The Department of the Army, The Department of Defense, or any other agency of the United States Government.

Web Sites with Useful Consumer Law & Legal Assistance Information	
SITE	**SUMMARY**
General Applicability	
http://www.va.gov/	The Department of Veterans Affairs web page. Lots of useful information about VA benefits ranging from guaranteed home loans to survivor benefits, to dependency and indemnity compensation. The place to start for many of the casualty assistance/survivor benefits issues.
https://www.jagcnet.army.mil/	The Army JAGC Web Site. The place to go if you need any products put out by the Army JAGC, like TJAGSA publications. Some sections require a password which attorneys can request online.
http://www.marines.mil/news/messages/Pages/maradminsearchold.aspx	Official information site for the Marine Corps. Contains links to a variety of information about the Marines including links to digital publications and Marine Messages.
http://navalforms.daps.dla.mil/web/public/home http://doni.daps.dla.mil/default.aspx	The official sites for Navy directives and forms.

Web Sites with Useful Consumer Law & Legal Assistance Information	
SITE	**SUMMARY**
https://aflsa.jag.af.mil/php/dlaw/dlaw.php https://aflsa.jag.af.mil/cgi-bin/user/home.pl	The Air Force JAGC Web Site. Go to the top site first to register if you have not already done so. The bottom site is the FLIGHT home page. There is a link provided on JAGCNET.
http://www.apd.army.mil/	Official site for Army regulations, pamphlets in electronic format.
http://www.defenselink.mil/pubs	The DoD Pubs page. Links to DoD directives, the MCM and UCMJ.
http://www.uscg.mil/directives/	The official directives and publication site for the U.S. Coast Guard.
http://www.uscg.mil/	The official Coast Guard JAGC website.
http://www.e-publishing.af.mil/	The official site for Air Force publications and forms.
http://www.dfas.mil/	Defense Finance and Accounting Service Site. Lots of useful information about pay rates, involuntary allotments, etc. Applicable to many types of legal assistance cases.
General Consumer Law	
www.consumerfinance.gov	The new website for the Consumer Financial Protection Bureau (CFPB). Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the CFPB is now the nation's primary and premier consumer law agency. Its rulemaking, enforcement, and educational powers are unprecedented.
www.ftc.gov	Summaries and documents from FTC actions. Plain language summaries of federal consumer protections suitable for issue directly to consumers – great for preventive law.

Web Sites with Useful Consumer Law & Legal Assistance Information	
SITE	**SUMMARY**
www.pueblo.gsa.gov	The government's Consumer Information Center. Consumer Resource Handbook online and available for download. All free pubs and info in Consumer Resource Catalog available for download. Comprehensive links on a variety of subjects. **GREAT SITE!**
http://www.notice.com/	CENTRAL NOTICE -- A service of **The Notice Company**, brings you important consumer and legal announcements including class actions and product recalls.
www.cpsc.gov/cpscpub/prerel/category/topic.html	Consumer Product Safety Commission lists recalls from 1995 to the present, categorized by topics/types of products.
www.consumerlaw.org www.nclc.org	National Consumer Law Center Home Page. Order NCLC publications. Links to other sites. Some consumer news.
www.bbb.org	Online Business reports - Information, phone numbers, etc. for all state offices. Links to reports on charitable institutions. Buying Guide Pamphlets. Links to domestic and international agencies (including Europe & Korea).
www.consumerworld.org	Comprehensive set of links to consumer information resources on the internet. Site has menu links plus it is searchable Includes available links to state AG offices under the "agencies" link. A great place to start your internet searching.
www.federalreserve.gov	Federal Reserve Board Home Page. Some good info on enforcement actions and FRB news releases. Some stats on consumer issues.

Web Sites with Useful Consumer Law & Legal Assistance Information	
SITE	**SUMMARY**
www.fraud.org	National Fraud Information Center run by the National Consumers League a longstanding private consumer group. Good information telemarketing fraud. You can report fraud on-line or though a listed 800 number. Scam alerts sorted by subject. Site is searchable.
www.nsclc.org	National Senior Citizens Law Center. A very helpful web site for the latest information on issues of particular interest to seniors. The focus is on Social Security, Medicare and other health issues.
www.naca.net	National Association of Consumer Advocates. Provides a listing of consumer attorney members throughout the country, divided by practice area. Also includes updated information on hot consumer topics and other events.
http://www.abiworld.org/	American Bankruptcy Institute. This website provides bankruptcy information for consumers and lawyers.
www.nvla.org	National Vehicle Leasing Association. Good consumer information on vehicle leasing.
http://www.kbb.com/	Kelley Blue Book. You can get new and used car values for your clients before they buy or sell a car.
Credit Reporting Agencies	
http://www.experian.com/consumer/index.html	A site with lots of useful information as well as the ability to order client credit reports online. There is also valuable information on this site about risk scores and how they are calculated.

Web Sites with Useful Consumer Law & Legal Assistance Information	
SITE	**SUMMARY**
http://www.transunion.com/	Another site that allows you to order credit information online. This also contains some useful consumer information including info on credit card fraud.
http://www.equifax.com/home/en_us http://www.myfico.com/Default.aspx	Another site with features similar to the others. A cite with credit scores. Your FICO scores are a measure of your financial responsibility, based on your credit history. Most lenders will look at your FICO scores when evaluating your credit or loan applications.

APPENDIX B

TABLES OF STATE STATUTES[1]

1. Lemon Laws and Unfair & Deceptive Acts and Practices Statutes.
2. Lemon Buyback Laws and Salvage Vehicle Laws.
3. Telemarketing and Debt Collection Statutes.

[1] This list serves only as a starting point to assist practitioners in finding applicable law. Although every effort is made to keep this list current, state consumer protection laws change frequently. Prior to advising any client, individual attorneys must conduct additional independent research to ensure that he or she has consulted all applicable state and federal law.

State Consumer Protection Laws Quick Reference		
STATE	**LEMON LAW**	**UDAP STATUTE**
Alabama	Ala. Code §§ 8-20A-1 to 8-20A-6	Ala. Code § 8-19-1 to 8-19-15
Alaska	Alaska Stat. §§ 45.45.300 to 45.45.360	Alaska Stat. § 45.50.471 to 45.50.561
Arizona	Ariz. Rev. Stat. Ann § 44-1261 to 44-1267	Ariz. Rev. Stat. Ann. § 44-1521to 44-1534
Arkansas	Ark. Code Ann. §§ 4-90-401 to 4-90-417	Ark. Code Ann. § 4-88-101 to 4-88-207
California	Cal. Civ. Code §§ 1793.1 to 1795.7, 1793.22 to 1793.26	Cal. Civ. Code § 1750 to 1785 Cal. Bus. & Prof. Code §§ 17200 to 17594
Colorado	Colo. Rev. Stat. §§ 42-10-101 to §§ 42-10-107, 12-6-120(1)(a), 12-6-122(2)	Colo. Rev. Stat. § 6-1-101 to 6-1-115
Connecticut	Conn. Gen. Stat. Ann. §§ 42-179 to 42-184	Conn. Gen. Stat. § 42-110a to 42-110q
Delaware	Del. Code Ann. tit. 6 §§ 5001 to 5009	Del. Code Ann. tit. 6 § 2511 to 2527, 2580 to 2584, & 2531 to 2536
District of Columbia	D.C. Code Ann. §§ 50-501 to 50-510	D.C. Code Ann. § 28-3901 to §§ 28-3913
Florida	Fla. Stat. Ann. § 681.10 to 681.118	Fla. Stat. Ann. § 501.201 to 501.213
Georgia	Ga. Code Ann. §§ 10-1-780 to 10-1-794	Ga. Code Ann. § 10-1-370 to 10-1-375, 10-1-390 to 10-1-407
Guam		5 Guam Code Ann. §§ 32101 to 32603
Hawaii	Haw. Rev. Stat. § 481I-1 to 481I-4	Haw. Rev. Stat. § 480-1 to 480-24 & 481A-1 to 481A-5

State Consumer Protection Laws Quick Reference		
STATE	**LEMON LAW**	**UDAP STATUTE**
Idaho	Idaho Code §§ 48-901 to 48-913	Idaho Code § 48-601 to 48-619
Illinois	815 Ill. Comp. Stat. §§ 380/1 to 380/8	815 Ill. Comp. Stat. 505/1 to 505/12 & 510/1 to 510/7
Indiana	Ind. Code §§ 24-5-13-1 to 24-5-13-24	Ind. Code Ann. § 24-5-0.5-1 to 24-5-0.5-12
Iowa	Iowa Code Ann. §§ 322G.1 to 322G.15	Iowa Code Ann. § 714.16 to 714.16A
Kansas	Kan. Code Ann. §§ 50-645 to 50-646	Kan. Stat. Ann. § 50-623 to 50-640 & 50-675a to 50-679a
Kentucky	Ky. Rev. Stat. Ann. §§ 367.840 to 367.845; 367.860 to 387.870	Ky. Rev. Stat. § 367.110 to 367.990
Louisiana	La. Rev. Stat. Ann. §§ 51:1941 to 51:1948	La. Rev. Stat. Ann. § 51:1401 to 51:1420
Maine	Me. Rev. Stat. Ann. tit. 10 §§ 1161 to 1169	Me. Rev. Stat. Ann. tit. 5 § 205A to 214 & tit. 10 § 1211 to 1216
Maryland	Md. Code Ann. Com. Law §§ 14-1501 to 14-1504	Md. Code Ann. Com. Law §§ 13-101 to 13-501 & 14-101 to 14-3202
Massachusetts	Mass. Gen. Laws Ann. ch. 90 § 7N½	Mass. Gen. Laws Ann. ch. 93A §§ 1-11
Michigan	Mich. Comp. Laws §§ 257.1401 to 257.1410	Mich. Comp. Laws § 445.901 to 445.922
Minnesota	Minn. Stat. Ann. § 325F.665	Minn. Stat. Ann. §§ 8.31, 325D.43 to 325D.48, 325F.67, & 325F.68 to 325F.70 and others
Mississippi	Miss. Code Ann. §§ 63-17-151 to 63-17-165	Miss. Code Ann. § 75-24-1to 75-24-27
Missouri	Mo. Stat. Ann. §§ 407.560 to	Mo. Rev. Stat. § 407.010 to 407.307

State Consumer Protection Laws Quick Reference		
STATE	**LEMON LAW**	**UDAP STATUTE**
Montana	Mont. Code Ann. §§ 61-4-501 to 61-4-533	Mont. Code Ann. § 30-14-101 to 30-14-142
Nevada	Nev. Rev. Stat. § 597.600 to 597.680	Nev. Rev. Stat. §§ 41.600 & 598.0903 to 598.0999
New Hampshire	N.H. Rev. Stat. Ann. §§ 357-D:1 to 357-D:12	N.H. Rev. Stat. Ann. § 358-A:1 to 358-A:13
New Jersey	N.J. Stat. Ann. §§ 56:12-29 to 56:12-49	N.J. Stat. Ann. § 56:8-1 to 56:8-91
New Mexico	N.M. Stat. Ann. §§ 57-16A-1 to 57- 16A-9, 56-16-4, 56-16-13	N.M. Stat. Ann. § 57-12-1 to 57-12- 22
New York	N.Y. Gen. Bus. Law § 198-a; N.Y. Veh. & Traf. Law § 417-a	N.Y. Exec. Law § 63(12); N.Y. Gen. Bus. Law §§ 349 & 350
North Carolina	N.C. Gen. Stat. §§ 20-351 to 20-351.10	N.C. Gen. Stat. § 75-1.1 to 75-35
North Dakota	N.D. Cent. Code §§ 51-07-16 to 51- 07-22	N.D. Cent. Code §§ 51-15-01 to 51- 15-11
Ohio	Ohio Rev. Code Ann. §§ 1345.71 to 1345.78	Ohio Rev. Code Ann. §§ 1345.01 to 1345.13 & 4165.01 to 4165.04
Oklahoma	Okla. Stat. Ann. tit. 15, § 901	Okla. Stat. Ann. tit. 15 § 751 to 763 & tit. 78 §§ 51 to 55
Oregon	Or. Rev. Stat. §§ 646.315 to 646.375	Or. Rev. Stat. § 646.605 to 646.656
Pennsylvania	73 Pa. Stat. Ann. § 1951 to 1963	Pa. Stat. Ann. Tit. 73 §§ 201-1 to 201-9.3

State Consumer Protection Laws Quick Reference		
STATE	**LEMON LAW**	**UDAP STATUTE**
Puerto Rico		P.R. Laws Ann. tit.3§§ 341 to 341w & tit. 10 §§ 257 to 273
Rhode Island	R.I. Gen. Laws §§ 31-5.2-1 to 31-5.2-12	R.I. Gen. Laws § 6-13.1-1 to 6-13.1-27
South Carolina	S.C. Code Ann. §§ 56-28-10 to 56-28-110, 56-15-40(1), 56-15-110	S.C. Code Ann. § 39-5-10 to 39-5-160
South Dakota	S.D. Codified Laws Ann §§ 32-6D-1 to 32-6D-11	S.D. Codified Laws Ann. § 37-24-1 to 37-24-35
Tennessee	Tenn. Code Ann. §§ 55-24-201 to 55-24-212	Tenn. Code Ann. § 47-18-101 to 47-18-125
Texas	Tex. Occ. Code Ann. §§ 2301.601 to 2301.613	Tex. Bus. & Com. Code Ann. §§ 17.41 to 17.63
Utah	Utah Code Ann. §§ 13-20-1 to 13-20-7, 41-3-406 to 41-3-414	Utah Code Ann. §§ 13-2-1 to 13-2-8, 13-5-1 to 13-5-18, & 13-11-1 to 13-11-23, & 13.11a-1 to 13.11a-5
Vermont	Vt. Stat. Ann. tit. 9 §§ 4170 to 4181	Vt. Stat. Ann. tit. 9 § 2451 to 2480g
Virginia	Va. Code §§ 59.1-207.9 to 207.16	Va. Code Ann. § 59.1-196 to 59.1-207
Virgin Islands		V.I. Code Ann. Tit. 12A §§ 101-123 & 180-185
Washington	Wash. Rev. Code §§ 19.118.005 to 19.118.904	Wash. Rev. Code Ann. §§ 19.86.010 to 19.86.920
West Virginia	W. Va. Code §§ 46A-6A-1 to 46-6A-9	W.Va. Code §§ 46A-6-101 to 46A-6-110
Wisconsin	Wis. Stat. Ann. § 218.0171. 218.0163(2)	Wis. Stat. Ann. §§ 100.18 & 100.20 to 100.264
Wyoming	Wyo. Stat. Ann. § 40-17-101	Wyo Stat. Ann. §§ 40-12-101

State Consumer Protection Laws Quick Reference II		
STATE	**RESALE OF LEMON STATUTE (LEMON LAW BUYBACK / LEMON LAUNDERING)**	**SALVAGE VEHICLE STATUTE**
Alabama	Ala. Code §§ 8-20A-3, 8-20A-4, 8-20A-5	Ala. Code § 32-8-87
Alaska	Alaska Stat. § 45.45.335	Alaska Stat. § 28-10-211
Arizona	Ariz. Rev. Stat. § 44-1266	Ariz. Rev. Stat. Ann. §§ 28-2091, 28-2095
Arkansas	Ark. Code Ann. § 4-90-412	Ark. Code Ann. § 27-14-2301 to 2307
California	Cal. Civ. Code §§ 1793.23, .24, .26, 11713.12	Cal. Veh. Code §§ 544, 5505, 6050, 11515-11515.2
Colorado	Colo. Rev. Stat. § 6-1-708(1)(b), 6-1-105(1)(x)	Col. Rev. Stat. §§ 42-6-102, 42-6-136, 42-2 206
Connecticut	Conn. Gen. Stat. Ann. § 42-179(g), 42-179(i)	Conn. Gen. Stat. § 14-16c, 14-103a
Delaware	NA	Del. Code Ann. tit. 21 §§ 2512, 6716
District of Columbia	D.C. Code § 50-502(g)	D.C. Code Ann. § 50-505
Florida	Fla. Stat. Ann. §§ 681.111; 681.112; 681.114(2), 319.14 (West)	Fla. Stat. Ann. §§ 319.14, 319.30 (West)
Georgia	Ga. Code Ann. §§ 10-1-790	Ga. Code Ann. §§ 40-3-2, 40-3-36, 40-3-37

Hawaii	Haw. Rev. Stat. §§ 481I-3(I) , 481I-3(k), 481J	Haw. Rev. Stat. § 286-48
Idaho	Idaho Code § 48-905	Idaho Code § 49-524 & 525

Illinois	625 Ill. Comp. Stat. §§ 5/5-104.2, 5/5-104.3 (West)	625 Ill. Comp. Stat. §§ 5/3-117.1, -118.1, 5/3-301 *et. seq.*
Indiana	Ind. Code Ann. §§ 24-5-13.5-1 to –24-5-13.5-14.	Ind. Code Ann. §§ 9-22-3-3 to 9-22-3-5, 9-22-3-30
Iowa	Iowa Code Ann. § 322G.11 & .12	Iowa Code Ann. §§ 321.52, 321-69
Kansas	Kan. Stat. Ann. § 50-645, 50-659	Kan. Stat. Ann. §§ 8-135; 8-197 to 199
Kentucky	No specific lemon resale statute	Ky. Rev. Stat. § 186A.520, 186A.530
Louisiana	La. Rev. Stat. Ann. § 51:1945.1 & 1946	La. Rev. Stat. Ann. §§ 32:702, 32:706.1, 32:707, 32.707.3
Maine	Me. Rev. Stat. Ann. tit. 10 §§ 1147, 1163(7) & (8), 1167, 1168, 1174(E),1475(4), tit. 29-A, § 670	Me. Rev. Stat. Ann. tit. 29-A, §§ 602, 654, 667
Maryland	Md. Code Ann. Com. Law. § 14-1502	Md. Code Ann. Com. Law §§ 11-152, 13-506, 13-507
Massachusetts	Mass. Gen. Laws ch. 90 § 7N l/2(5)	Mass. Gen. Laws ch. 90D, §§ 1, 20B - 20F
Michigan	Mich. Comp. Laws §§ 257.4c, 257.235(5)	Mich. Comp. Laws Ann. § 257.217c
Minnesota	Minn. Stat. Ann. §§ 325F.655(13); 325F.665(5); 325F.665(9)	Minn. Stat. Ann. §§ 168A.01, 168A.151, 325F.664 to 325F.6644
Mississippi	No specific lemon resale statute	Miss. Code Ann. §§ 63-21-33, 63-21-39

State Consumer Protection Laws Quick Reference II		
STATE	**RESALE OF LEMON STATUTE (LEMON LAW BUYBACK / LEMON LAUNDERING)**	**SALVAGE VEHICLE STATUTE**
Missouri	No specific lemon resale statute	Mo. Rev. Stat. §§ 301.010, 301.020, 301.190, 301.227, 301.573
Montana	Mont. Code Ann. § 61-4-525	Mont. Code Ann. §§ 61-3-210 to 212
Nebraska	Neb. Rev. Stat. §§ 60-129, 6-130, 60-174	Neb. Rev. Stat. § 60-129, 60-130, 60-171 to 177
Nevada	Nev. Rev. Stat. §§ 597.620, 597.682 to .688	Nev. Rev. Stat. §§ 482.098, 482.245, 487.160, 487.710 to .890
New Hampshire	N.H. Rev. Stat. Ann. § 357-D:12	N.H. Rev. Stat. Ann. § 261.22
New Jersey	N.J. Stat. Ann. §§ 56:8-2, 56:12-39, 39:10-9.3	N.J. Stat. Ann. § 39-10-32 N.J. Admin Code 13:21-22.7
New Mexico	N.M. Stat. Ann. § 57-16A-7	N.M. Stat. Ann. § 66-1-4.12, 66-1-4.16, 66-3-4, 66-3-10.1
New York	N.Y. Veh. & Traf. Law § 417-a(2), 417-2(4)	N.Y. Veh. & Traf. Law §§ 429, 430
North Carolina	N.C. Gen. Stat. § 20-351.3(d)	N.C. Gen. Stat. §§ 20-4.01, 20-71.3, 20-71.4, 20-109.1
North Dakota	N.D. Cent. Code § 51-07-22	N.D. Gen. Stat. § 39-05-20.1, 39-05-20.2
Ohio	Ohio Rev. Code Ann. § 1345.76(A), (B)(C)	Ohio Rev. Code Ann. §§ 4505.11 & 4505.181
Oklahoma	No specific lemon resale statute	Okla. Stat. Ann. tit. 47 § 591.8, 1111
Oregon	Or. Rev. Stat. § 646A.325,	Or. Rev. Stat. §§ 803.015, 801.405,

State Consumer Protection Laws Quick Reference II		
STATE	**RESALE OF LEMON STATUTE (LEMON LAW BUYBACK / LEMON LAUNDERING)**	**SALVAGE VEHICLE STATUTE**
	646A.405	801.527, 810.012, 819.014 to 819.016
Pennsylvania	Pa. Stat. Ann. tit. 73 §§ 1960(a) and (b), 1961, 1962	Pa. Stat. Ann. tit. 75 §§ 102, 1106, 1161, 1165
Rhode Island	R.I. Gen. Laws § 31-5.2-9; -10, & -11	R.I. Gen. Laws § 31-46-4
South Carolina	S.C. Code Ann. § 56-28-100, 56-28-110	S.C. Code Ann. § 56-19-480 (Law. Co-op)
South Dakota	S.D. Codified Laws Ann § 32-6D-9, 32-6D-10	S.D. Codified Laws Ann. §§ 32-3-12, 32-3-51.5, 32-3-51.6, 32-3-53, 32-3-53.2 (as amended by 2005 S.D. Sess. Laws 155)
Tennessee	No specific lemon resale statute	Tenn. Code Ann. §§ 55-3-120, 55-3-208, 55-3-211, 55-3-212
Texas	Tex. Occ. Code Ann. §2301.610	Tex. Transp. Code Ann. §§ 501.091 to 501.095, 501.097, 501.098, 501.100 to 501.103
Utah	Utah Code Ann. §§ 41-3-406 to -414, 41-1a-522	Utah Code Ann. §§ 41-1a-1001 to 1008
Vermont	Vt. Stat. Ann. tit. 9 §§ 4179, 4181	Vt. Stat. Ann. tit. 23 §§ 2001, 2091, 2093
Virginia	Va. Code §§ 59.1-207.15, 59.1-207.16:1, 18.2-11	Va. Code §§ 46.2-1600 to 1608
Washington	Wash. Rev. Code § 19.118.061	Wash. Rev. Code Ann. § 42.04.524, 46.12.560, 46.55.230
West Virginia	W. Va. Code § 46A-6A-7 & -9	W.Va. Code Ann. § 17A-4-10

State Consumer Protection Laws Quick Reference II		
STATE	**RESALE OF LEMON STATUTE (LEMON LAW BUYBACK / LEMON LAUNDERING)**	**SALVAGE VEHICLE STATUTE**
Wisconsin	Wis. Stat. Ann. § 218.015(2)(d), 218.0170(2)(d), 342.10, 342.15.1	Wis. Stat. Ann. §§ 342.01, 342.07, 342.10, 342.065 (see also Wis. Admin. Code Trans. 139.04)
Wyoming	No specific lemon law resale statute	Wyo Stat. §§ 31-2-103 to 109

State Consumer Protection Laws Quick Reference II		
STATE	**TELEMARKETING**	**DEBT COLLECTION STATUTES**
Alabama	Ala. Code §§ 8-19A-1to 8-19A-24 (Telemarketing); §§ 8-19C-1 to 8-19C-12 (Do-Not Call List)	Ala. Code § 40-12-80
Alaska	Alaska Stat. §§ 45.63.010 to 45.63.100, 45.50.475	Alaska Stat. §§ 8.24.041 to 8.24.380, 45.50.471 to 45.50.561
Arizona	Ariz. Rev. Stat. Ann. §§ 44-1271to 44-1282	Ariz. Rev. Stat. Ann. §§ 32-1001 to 32-1057
Arkansas	Ark. Stat. Ann. §§ 4-99-10 to 4-99-408	Ark. Stat. Ann. §§ 17-24-101 to 17-24-512
California	Cal. Bus. & Prof. Code §§ 17511 to 17513, 17591 to 17595	Cal. Civ. Code §§ 1788 to 1788.33, 1812.700 to 1812.702, Cal Family Code 5610-5616
Colorado	Colo. Rev. Stat. §§ 6-1-301 to 6-1-304, 6-1-901 to 6-1-908, 4 Colo. Code Regs § 723-22	Colo. Rev. Stat. §§ 5-1-101 to 5-12-105, 12-14-101 to 12-14-136, 12-14.1-101 to 12-14.1-113
Connecticut	Conn. Gen. Stat. §§ 42-284 to 42-289	Conn. Gen. Stat. §§ 36a-645 to 647, 36a-800 to 36a-810
Delaware	Del Code Ann. tit. 6 § 2501A-2509A	Del. Code Ann. tit. 30 § 2301(a)(12)
District of Columbia	D.C. Code § 22-3226.01 to 22-3226.15	D.C. Code Ann. §§ 22-3401 to 22-3403, 28-3814 to 28-3816, 28-3901 to 28-3909
Florida	Fla. Stat. Ann. §§ 501.059, 501.601 to 501.626	Fla. Stat. Ann. §§ 559.55 to 559.785
Georgia	Ga. Code Ann. §§ 10-5B-1 to 105B-8	Ga. Code Ann. §§ 7-3-1 to 7-3-29
Hawaii	Haw. Rev. Stat. §§ 481P-1 to 481P-8	Haw. Rev. Stat. §§ 443B-1 to 443B-21, 480D-1 to 480D-5

State Consumer Protection Laws Quick Reference II		
STATE	**TELEMARKETING**	**DEBT COLLECTION STATUTES**
Idaho	Idaho Code §§ 48-1001 to 48-1108	Idaho Code §§ 26-2222 to 26-2251
Illinois	815 Ill. Comp. Stat. Ann. §§ 413/1to 413/27, 402/1 to 402/99, (Do-Not Call List), 505/2P.1	225 Ill. Comp. Stat. 425/1 to 425/9.7
Indiana	Ind. Code Ann. §§ 24-5-12-1 to 24-5-12-25, 24-4.7-1-1 to 24.4.7-5-6	Ind. Code Ann. §§ 25-11-1-1 to 25-11-13, 24-4.5-5-107
Iowa	Iowa Code §714.8(15)	Iowa Code Ann. §§ 537.7101 to 537.7103
Kansas	Kan. Stat. Ann. §§ 50-670 to 50.679a	Kan. Stat. Ann. § 16a-5-107
Kentucky	Ky. Rev. Stat. §§ 367.461 to 367.46999	None, *but see* Ky. Rev. Stat. Ann. § 24A-240 (restrictions on small claims court suits by creditors and debt collectors)
Louisiana	La. Rev. Stat. Ann. §§ 45:821 to 45.833, 45:844.11 to 45:844.15	La. Rev. Stat. Ann. §§ 9:3552 and 9:3562, *see also* 9:3534
Maine	Me. Rev. Stat. Ann. tit. 10 §§ 1498, 1499, 1499A	Me. Rev. Stat. Ann. tit. 32 §§ 11,001 to 11054, 9A §§ 5-107, 5-116, 5-117, 5-201, 19A § 2109
Maryland	Md. Comm. Law Code § 14-2201 to 14-2205, 14-3201 to 14-3202, 8-204 to 8-205	Md. Ann. Code Bus. Reg. §§ 7-101 to 7-502, Md. Comm. Law Code §§ 14-201 to 14-204
Massachusetts	Mass. Gen. Laws Ann. ch. 159, 19E	Mass. Gen. Laws Ann. ch. 93 §§ 24 to 28, 49
Michigan	Mich. Comp. Laws §§ 445.111 to 445.111e, 445.113, 445.116	Mich. Comp. Laws Ann. §§ 339.901 to 339.920 & 445.251 to 445.258
Minnesota	Minn. Stat. 325E.26 to 325E.31, 325E.395, 325E.311 to 325E.316	Minn. Stat. Ann. §§ 332.31 to 332.45 and Minn. Stat. §§ 325F.91

State Consumer Protection Laws Quick Reference II		
STATE	**TELEMARKETING**	**DEBT COLLECTION STATUTES**
	(Telephone Solicitation, expires on December 31, 2012), 325G.12 to 325G.14	– 325F.92 (restricting debt collection activities of rent-to-own companies)
Mississippi	Miss. Code Ann. §§ 77-3-601 to 77-3-619, (77-3-701 to 77-3-737 was scheduled for sunset on July 1, 2006)	None, *but see* Miss. Code Ann. § 97-9-1 (criminal offense to simulate legal process to obtain collection of a debt)
Missouri	Mo. Rev. Stat. §§ 407.1070 to 407.1090 (Telemarketing), §§ 407.1095 to 407.1110 (Do-Not Call List)	Mo. Rev. Stat. §§ 425.300and 287.140(13)
Montana	Mont. Code Ann. §§ 30-14-1401 to 30-14-1406, § 30-14-501 to 30-14-508	None, *but see* Mont. Code Ann. §§ 3-1-602, 30-19-102 to 30-19-116 (rent-to-own regulations), 31-1-704 (payday lending regulations)
Nebraska	Neb. Rev. Stat. §§ 86-212 to 86-235, 86-236 to 86-257	Neb. Rev. Stat. §§ 45-601 to 45-623, 45-1043 to 45-1058
Nevada	Nev. Rev. Stat. §§ 597.814, 598.0918, 228.500 to 228.640, 599B005-599B.300	Nev. Rev. Stat. §§ 649.005 to 649.435
New Hampshire	N.H. Rev. Stat. Ann. §§ 359-E:1 to 359-E:11	N.H. Rev. Stat. Ann. §§ 358-C:1 to 358-C:4
New Jersey	N.J. Stat. Ann. §§ 56:8.119 to 56:8-135, 48:17-25; N.J. Admin. Code § 13:45A-1.1	N.J. Stat. Ann. §§ 45:18-1 to 45:18-6.1
New Mexico	N.M. Stat. Ann. §§ 57-12-22 to 57-12-24	N.M. Stat. Ann. §§ 61-18A-1 to 61-18A-33
New York	N.Y. Gen. Bus. Law § 399-p, 399-pp, 399-z; N.Y. Pers. Prop. Law §§ 440 to 448, N.Y. Pub. Serv. Law §	N.Y. Gen. Bus. Law §§ 600 to 604-b

State Consumer Protection Laws Quick Reference II		
STATE	**TELEMARKETING**	**DEBT COLLECTION STATUTES**
	92-d	
North Carolina	N.C. Gen. Stat. §§ 66-260 to 66-	N.C. Gen. Stat. §§ 58-70-15, 58-70-
	266, 75-100 to 75-105	90 to 58-70-155, 75-50 to 75-56 (Prohibited Acts by Debt Collectors)
North Dakota	N.D. Cent. Code §§ 51-18-01 to 51-18-22	N.D. Cent. Code §§ 13-05-01 to 13-05-10
Ohio	Ohio Rev. Code Ann. 4719.01 to 4719.99	None, *but see* ORC Ann. § 1319.12
Oklahoma	Okla. Stat. Ann. Tit. 15 §§ 775A.1 to 775A.5	Okla. Stat. tit. 14A, § 5-107, *see also* tit. 12, § 1751 (prohibiting collection agency from bringing action in small claims court)
Oregon	Or. Rev. Stat. §§ 646.551 to 646.578	Or. Rev. Stat. §§ 646.639 to 646.643, 697.005 to 697.105
Pennsylvania	Pa. Stat. §§ 2241 to 2249	Pa. Cons. Stat. Ann. 18 § 7311 & 73 § 2270.1 to 2270.6
Rhode Island	R.I. Gen. Laws §§ 5-61-1 to 5-61-6	R.I. Gen. Laws §§ 19-14.9-1 to 19-4.9-14
South Carolina	S.C. Code Ann. §§ 16-17-445 to 16-17-446	S.C. Code Ann. § 37-5-108
South Dakota	S.D. Codified Laws Ann §§ 37-30A-1 *et. seq.*, 49-31-101 to 49-31-108 (Do-Not Call Register)	None

Tennessee	Tenn. Code Ann. §§ 47-18-1501 to 47-18-1527, 65-4-401 to 65-4-408 (Telephone Solicitation)	Tenn. Code Ann. §§ 62-20-101 to 62-20-127
Texas	Tex. Bus. & Com. Code Ann. §§ 44.001 to 44.253 *et seq.*, 38.001 to	Tex. Fin. Code Ann. §§ 392.001 to 392.404, 396.001 to 396.353

State Consumer Protection Laws Quick Reference II		
STATE	**TELEMARKETING**	**DEBT COLLECTION STATUTES**
Texas Continued	38.305, 55.121 to 55.138, 16 Tex. Admin. Code § 26.125	
Utah	Utah Code Ann. §§ 13-26-1 to 13- 26-	Utah Code Ann. §§12-1-1 to 12-1-
Vermont	9 VT. Stat. Ann. § 2464 to 2464d	Vt. Stat. Ann. tit. 9 §§ 2451a to 2461
Virginia	Va. Code §§ 59.1-21.1 to 59.1-21.7, 59.1-510 to 59.1-518	Va. Code § 18.2-213
West Virginia	W. Va. Code § 46A-6F-101 to 46A-6F-703	W.Va. Code Ann. §§ 47-16-1 to 47-16-5, 46a-2-122 to 46a-2-129a, 48-
Wisconsin	Wisc. Stat. §§ 423.201 to 423.205, 100-52	Wis. Stat. Ann. §§ 218.04
Wyoming	Wyo. Stat. Ann. §§ 40-12-301 to 40-12-305	Wyo. Stat. §§ 33-11-101 to 33-11-116, 40-14-507