

CONSUMER PROTECTION

AND THE LAW

2011-2012 EDITION

Volume 1

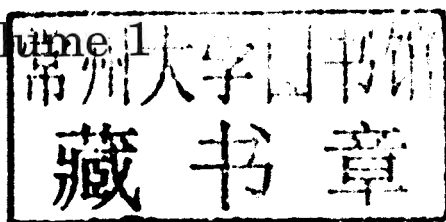
DEE PRIDGEN
RICHARD M. ALDERMAN

Consumption

and _____

2011-2012 Edition
Issued in October 2011

Volume 1



Dee Pridgen
Richard M. Alderman

WEST®

A Thomson Reuters business

For Customer Assistance Call 1-800-328-4880

© 2011 Thomson Reuters

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the **Copyright Clearance Center** at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or **West's Copyright Services** at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

About the Authors

Dee Pridgen is the Carl M. Williams Professor of Law and Social Responsibility at the University of Wyoming College of Law in Laramie, Wyoming, where she teaches courses in consumer protection, antitrust, contracts, and payment/epayment systems. She was selected as the Centennial Distinguished Professor of Law in 1995. She served as Associate Dean of the College of Law from 2002 to 2010.

Ms. Pridgen was previously an attorney in the Federal Trade Commission's Bureau of Consumer Protection in Washington, D.C. She has been a visiting professor at Catholic University of America, Columbus School of Law, at the University of Baltimore School of Law, and at the University of Maryland School of Law. She was also selected as a Fulbright Scholar/Lecturer in 1997-98, teaching American consumer protection law and antitrust law at Tokyo University's Faculty of Law in Tokyo, Japan.

Ms. Pridgen received her undergraduate degree in English literature, with distinction in all subjects, from Cornell University, and her J.D. degree, cum laude, from New York University, where she was on the staff of the law review. She is a member of Phi Beta Kappa and the Order of the Coif. She was elected to the American Law Institute in 2003.

Ms. Pridgen is the original author and since 2007 the coauthor with Richard M. Alderman of *Consumer Protection and the Law* (Thomson Reuters/West) and *Consumer Credit and the Law* (Thomson Reuters/West), and is the coauthor of a casebook, *Consumer Law, Cases and Materials* (Thomson West 2007, 3d ed., with Spanogle, Rohner and Sovern). She is the author of numerous articles on consumer protection and consumer credit law. She is a member of the International Association for Consumer Law, and has spoken at international consumer law conferences in Helsinki, Finland, and Auckland, New Zealand.

Richard M. Alderman grew up in upstate New York. He attended Tulane University and in 1968 was awarded a B.A. in psychology. Following graduation, he attended Syracuse University Law School where he was graduated first in his class and was awarded a Juris Doctorate degree. After a year practicing with Legal Services, he attended the University of Virginia Law School and was awarded a Masters of Law degree.

Alderman is the Dwight Olds Chair in Law and Associate Dean at the University of Houston Law Center, where he has taught since 1973. During that time he has taught courses in Contracts, Commercial Law, Consumer Law, Deceptive Trade Practices Act and Sports Law. Dean Alderman also serves as the Director of the Center for Consumer Law, an internationally recognized program. Alderman is the author of 19 books and numerous articles. He serves as the Editor-in-Chief of "The Journal of Consumer and Commercial Law," the official publication of the Consumer and Commercial Law Section of the State Bar of Texas.

In addition to his duties at the Law Center, Dean Alderman appears regularly as the "People's Lawyer" on radio and television. He currently appears in Houston, Texas and is syndicated to TV stations in fourteen Texas cities. Alderman also has a weekly newspaper column in the Houston Chronicle that also runs in more than twenty other newspapers in the state of Texas. His work in educating the public about their legal rights has been recognized by the State Bar of Texas and the American Bar Association, which have twice awarded him their highest honors. He is often quoted in national publications, and has appeared on numerous national television shows. A highlight of his career came in April 2000 when the Houston City Council and Mayor named April 15 "Richard M. Alderman Day" in honor of his work educating the public about their legal rights.

Professor Alderman's wife Janie runs her own graphic design business. They have one son, "Willie," born in 1991.

Preface to 2011-2012 Edition of Consumer Protection and the Law, Volumes 1 and 2 by Dee Pridgen and Richard M. Alderman

This work charts the intricacies of modern consumer law as it affects consumer transactions from the advertising stage through warranty provisions. Consumer law is an exciting and expanding area of legal study that has great practical relevance to both business and consumer clients. During the past 40 years, many changes have taken place as courts and legislatures revise the rules to address perceived injustices in the marketplace and amend existing doctrine to achieve fairness with economical efficiency. The recent economic downturn, coupled with new administrations at the federal and state level, has caused a renewed focus on consumer protection. Consumers are more actively asserting their rights and more attorneys are handling consumer cases. This work will continue to keep you informed of developments in this ever-growing field.

Formerly controlled by the doctrine of caveat emptor, tempered by common-law fraud cases, consumer law is now subject to regulation at both the state and federal level. Numerous State statutes regulate deceptive, misleading, and unfair acts and practices, providing substantial remedies, including attorney's fees. The substance, scope and remedies associated with these laws provide fertile ground for legal activity as more attorneys realize their usefulness in dealing with consumer problems.

Practitioners must also be aware of FTC jurisprudence in this area, because of the unique relationship between state and federal legal doctrines in this area. The FTC Act is the major federal statute governing advertising and marketing, and has served as a model and reference point

for the host of "little FTC acts" that have been passed in the states. The FTC still looms large in consumer protection. The activism or conservatism of succeeding administrations has not seriously affected the major thrust of FTC consumer protection law.

Anyone practicing in this area must also have a grasp of the UCC law of sales, as well as the federal Magnuson-Moss Act and special state warranty laws. State legislation improving warranty protection for new car owners (lemon laws) also provide a fertile ground for consumer law claims. All these consumer product warranty laws work in supplemental fashion rather than superseding one another. They also create a rather different legal environment for consumer product warranties than that which prevails in commercial transactions.

The attorney active in the consumer area must master a wealth of detail while perceiving the overall pattern of a myriad of state and federal law. Changes in the law continue to take place, keeping consumer protection current in the modern world. Of course, these changes also add to the complexity of the lawyer's task. It is hoped that this work will be of some assistance in gaining an appreciation of the theory of consumer protection law, while meeting the challenge of navigating the mass of the many new and revised rules.

DEE PRIDGEN AND RICHARD M. ALDERMAN
2011

Foreword

All clients, from the most wealthy property owner to the poverty-stricken ghetto dweller, have probably been affected by consumer problems at some point in their lives. Yet despite the pervasiveness of the issues, the law of consumer protection is still in its infancy by jurisprudential standards. Few attorneys have taken a course in consumer protection in law school because until recently there has not been much law on the subject. It has only been a few decades since the tide began to turn from the hands-off approach of caveat emptor to the more protective stance embodied in a host of federal and state consumer protection legislation.

Consumer transactions are subject to a special set of rules that may not apply to business deals. Attorneys anchored to the common law of contract and the Uniform Commercial Code may find themselves at sea in the flood of new statutes and regulations that have been passed to shield consumers from deceptive or unfair practices in the marketplace. These concurrent requirements may seem like a complex maze. Previously there has been no good navigational aid. These volumes is intended to provide some coherent guidance in a developing and sometimes bewildering area of law.

This work brings together the disparate elements of consumer protection—i.e., the law of marketing, advertising, and warranties. It also integrates state and federal law. This is crucial for the practicing attorney because federal law does not necessarily preempt the field. State laws themselves vary in form and substance. While such differences can be confusing, the provisions of state law are summarized in tabular or chart form in the Appendixes sections of these volumes. This multi-state approach should be helpful to firms doing business in more than one state, or attorneys dealing with transactions that cross state lines.

Most books on consumer law have thus far been more specialized, covering only the law of advertising, only the Federal Trade Commission or only the law of a particular state. Others have been broad, covering all of the law of real estate, for instance, as it applies to both commercial and residential property. This work looks at the law applicable to consumer transactions from start to finish, but does not include information not pertinent to consumer dealings.

Books on consumer protection can be outdated rapidly. Despite the current pause in the outpouring of consumer-oriented legislation from Washington, states have remained active in producing new consumer legislation. From 1982 to 1985, for instance, thirty-five states passed special legislation, known as "lemon laws," to address consumer warranty disputes concerning new vehicles. Even without new statutes, however, existing laws remain subject to judicial interpretation through a constant stream of litigation. Thus, the author will provide regular updates to allow the reader to keep pace with developments in this fast-moving field.

This work is meant for a wide range of readers. It can be used by attorneys representing consumers as well as those representing businesses seeking to comply with the law. It will be useful to government attorneys, state and federal, who enforce consumer protection laws. Also, legal scholars and law students may find the analysis of the theory behind these laws to be thought-provoking and stimulating. Finally, state legislators, members of Congress, and other policymakers will be able to ascertain what other jurisdictions have done on particular consumer protection matters, and what issues have arisen in litigation.

This work is intended to be an objective reference treatise, yet I feel it is only fair to disclose my own philosophical stance on consumer protection at the outset. Generally, I support the idea that the law should actively protect consumers rather than simply allowing the forces of supply and demand to take care of all problems through the automatic operation of the competitive system. Most individual consumers are at a disadvantage vis-à-vis the more sophisticated business entities with which they deal. They

FOREWORD

may not have sufficient information to make a wise choice, or they may be vulnerable to exploitation due to emotional or cultural circumstances. The theory that consumers always act rationally in their own self-interest does not reflect reality. Firms taking advantage of the weaknesses of consumers should be subject to legal constraint. Admittedly, regulation can be counterproductive if poorly drafted or overly burdensome. Nonetheless, the basic idea that the law should attempt to prevent or punish abuses in the marketplace is well founded.

Some may question whether the current trend toward deregulation will make consumer protection law an endangered species even before it has reached its full development. I contend that the notion that consumer protection has been replaced by a free market approach is a myth. While the federal government may be holding back in its enforcement to some extent, and Congress has ceased passing quite so many new laws on the topic, the basic foundation of statutes and regulations passed in the 1960s and 1970s is still in place. Furthermore, as the federal government has become relatively inactive, state governments have increased their vigilance in the protection of consumers. Witness the profusion of state lemon laws, for one example. State attorneys general are also starting to prosecute national advertisers, a move that was unheard of during the days of greater activity at the Federal Trade Commission. This somewhat unfortunate trend has complicated both the tasks of compliance and enforcement. The balkanization of consumer law, however, enhances the need for a work such as this one, that tracks both federal and state developments.

One of my goals in writing this work is to encourage more attorneys to represent consumer plaintiffs. In the past, such cases have not been cost-effective because the amount of money at issue was too small to justify the expense of a lawsuit. Also, the applicable commercial law doctrines were unfavorable, assuming equality between buyer and seller. Thus, for many years, the Federal Trade Commission was the sole bastion of protection for the consumer. Times have changed, however. The federal and state legislation of the past two decades contains some incentives for private consumer law suits, such as provi-

sions for attorney's fees to the prevailing consumer plaintiff, class actions and minimum damages. These aspects of consumer protection law are stressed throughout these volumes.

Another one of my goals is to educate the law-abiding business community on the requirements of consumer protection statutes and regulations. Compliance by businesses without litigation is far more efficient for all concerned than using the court system.

A book of this type could not have been written by one person alone without some assistance. I have been lucky to have had a series of competent and eager research assistants, all but one of whom were law students at the University of Wyoming when they worked on this project. In chronological order, they are Curtis B. Buchhammer, Susan Feinman, Jeri Bidinger, William L. Combs, Matthew G. Reynolds, Diane M. Fiedler and Debra M. Byers (graduate of Indiana University School of Law).

I am also grateful to the following persons who applied their expert knowledge of certain aspects of consumer protection law in the course of reviewing chapters of this manuscript: Professor W. Page Keeton, University of Texas School of Law; Robert J. Hughes, Federal Trade Commission (FTC); John Sheldon, National Consumer Law Center; Professor Richard Craswell, University of Southern California Law Center; Neil W. Averitt, FTC; Professor Wayne K. Lewis, DePaul University College of Law; Ernest J. Isenstadt, FTC; Robert Easton, FTC; Professor Jack L. Van Baalen, University of Wyoming; Rachel Miller, FTC; and Evan Johnson, Center for Auto Safety. Others who provided invaluable assistance in the gathering of materials and ideas include Richard Kelly, Amy Henchey, and Ruth Stockton.

I would also like to thank the secretaries who labored over their word processors on this manuscript, including Lory Godfrey, Anna Crank, Marie Epperson, and April Clark.

I am indebted to Dean Peter C. Maxfield of the Wyoming College of Law for his unfailing support of this endeavor.

FOREWORD

I would also like to thank the University of Wyoming College of Law and the George Hopper Faculty Research Fund for their continuing support for the annual updating of this work.

Finally, a word of thanks to Justin Franklin, Fredric Strom and the others at Clark Boardman Callaghan who have helped make this work possible.

DEE PRIDGEN
Laramie, Wyoming
1985

Summary of Contents

Volume 1

PART A. INTRODUCTORY

Chapter 1. Overview

PART B. STATE LAW OF CONSUMER PROTECTION AND SALES PRACTICES

Chapter 2. Common-Law Actions and Origins of State UDAP Statutes

Chapter 3. Unfair and Deceptive Practices Acts

Appendix 3A. State Consumer Protection Statutes—
Citations

Appendix 3B. State Consumer Protection Statutes—
Substantive Provisions

Appendix 3C. State-by-State Bibliography on Unfair
and Deceptive Trade Practices Acts

Chapter 4. Scope and Coverage of State Acts

Appendix 4A. Statutory Limitations and
Exemptions

Chapter 5. Prerequisites to Statutory Actions

Appendix 5A. Statutory Private Actions:
Prerequisites and Existence

Chapter 6. Private Remedies

Appendix 6A. Private Remedies

Chapter 7. Agency Enforcement

Appendix 7A. Governmental Enforcement Authority

Table of Laws and Rules

Table of Cases

Index

Volume 2

**PART C. FTC LAW OF UNFAIR AND DECEPTIVE
TRADE PRACTICES**

- Chapter 8. Historical Background and Jurisdiction
- Chapter 9. Unfair Trade Practices
 - Appendix 9A. FTC Policy Statement on Unfairness
- Chapter 10. Deceptive Practices: General Criteria
 - Appendix 10A. FTC Policy Statement on Deception
- Chapter 11. Deceptive Practices: Specific Applications
 - Appendix 11A. FTC Policy Statement on
Advertising Substantiation
- Chapter 12. FTC Remedies
- Chapter 13. Federal Trade Commission Enforcement:
New Frontiers

PART D. CONSUMER PRODUCT WARRANTIES

- Chapter 14. Uniform Commercial Code and the
Magnuson-Moss Warranty Act
- Chapter 15. New Cars: State Lemon Laws
 - Appendix 15A. State Lemon Laws—Citations
 - Appendix 15B. State Lemon Laws—Provisions
 - Appendix 15C. State Lemon Laws—Bibliography
- Chapter 16. Used Cars
- Chapter 17. Mobile Homes
 - Appendix 17A. Mobile Home Warranty Laws—
Citations
 - Appendix 17B. Mobile Home Warranty Laws—
Provisions
- Chapter 18. Homes
 - Appendix 18A. State-by-State Listing of Implied
Warranty of Habitability

SUMMARY OF CONTENTS

Appendix 18B. State-by-State Listing of Treatment
of Subsequent Buyers

Table of Laws and Rules

Table of Cases

Index

Table of Contents

PART A. INTRODUCTORY

CHAPTER 1. OVERVIEW

- § 1:1 Historical context
- § 1:2 Practical context
- § 1:3 Organization of the book—In general
- § 1:4 —State laws
- § 1:5 —Federal Trade Commission Act
- § 1:6 —Consumer product warranties
- § 1:7 Summary

PART B. STATE LAW OF CONSUMER PROTECTION AND SALES PRACTICES

CHAPTER 2. COMMON-LAW ACTIONS AND ORIGINS OF STATE UDAP STATUTES

- § 2:1 Introduction
- § 2:2 Elements of common-law fraud
- § 2:3 Misrepresentation by nondisclosure
- § 2:4 Seller culpability—The scienter requirement
- § 2:5 Buyer's justifiable reliance/Puffery
- § 2:6 Negligent misrepresentation
- § 2:7 Innocent misrepresentation
- § 2:8 Remedies and limitations on common-law actions
- § 2:9 Origins of Unfair and Deceptive Practices Acts
- § 2:10 Model acts for state UDAP statutes

CHAPTER 3. UNFAIR AND DECEPTIVE PRACTICES ACTS

- § 3:1 Deceptive trade practices
- § 3:2 —Intent to deceive

- § 3:3 —Reliance
- § 3:4 — —Justifiable reliance not required
- § 3:5 — —Justifiable reliance required
- § 3:6 — —Actual reliance/materiality
- § 3:7 —Omission of material facts
- § 3:8 — —Actual knowledge or intent standard
- § 3:9 — —Negligence or duty to disclose standard
- § 3:10 — —Strict liability standard
- § 3:11 —Specific deceptive practices
- § 3:12 — —Deceptive pricing
- § 3:13 — —Bait and switch advertising
- § 3:14 — —Pyramid schemes
- § 3:15 Unfairness and unconscionability—General criteria
- § 3:16 —Unconscionably high prices
- § 3:17 —Distant venue
- § 3:18 —Duress, coercion, and unfair advantage
- § 3:19 —Reckless promises
- § 3:20 —Defective products and poor warranty performance
- § 3:21 —Miscellaneous misconduct
- § 3:22 FTC jurisprudence as interpretive source
- § 3:23 —Statutory provisions
- § 3:24 —Judicial deference to FTC
- § 3:25 —States guided but not bound by FTC
- § 3:26 Violations of state regulations specific prohibitions
- § 3:27 Violations of other state or federal laws
- Appendix 3A. State Consumer Protection Statutes—Citations
- Appendix 3B. State Consumer Protection Statutes—
Substantive Provisions
- Appendix 3C. State-by-State Bibliography on Unfair and
Deceptive Trade Practices Acts

CHAPTER 4. SCOPE AND COVERAGE OF STATE ACTS

- § 4:1 Introduction
- § 4:2 “Consumer” transactions—Introduction
- § 4:3 Limitation to “consumer” transactions—Business
litigation—Covered
- § 4:4 — —Not covered
- § 4:5 —Must the seller be a merchant?
- § 4:6 —Nonmerchants not covered
- § 4:7 —Nonmerchant sellers covered