

# **LEGAL PROTECTION FOR THE CONSUMER**

**Second Edition**

**by Stanley Morganstern**

Legal Almanac Series No. 52

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**by STANLEY MORGANSTERN**

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## INTRODUCTION

"The consumer is moving forward. We cannot rest content until he is in the front row, not displacing the interest of the producer, yet gaining equal rank in representation with that interest. What is new is the concern for the total interest of the consumer, a recognition of certain basic consumer rights: The right to safety, the right to be informed, the right to choose, the right to be heard." President Johnson (1964)

These words of President Johnson have set the tenor of consumerism for the 1970's. The old adage of caveat emptor, let the buyer beware, no longer applies to consumer transactions. To the contrary, the seller is now the one who must beware, and the future will bring an even further swing of the pendulum from favoring the seller to favoring the buyer.

Both the federal government and the state and local governments have worked diligently in promoting the consumer. The number of agencies whose function is to aid the buyer is becoming endless. Legislative enactments aimed at protecting the consumer are increasing each year and cover such varied areas as home remodeling and sale of brewery products.

This almanac is an attempt to acquaint the consumer with those agencies, federal and state, which can aid him. It is an introduction to the vast area of legislation seeking to protect him and assist him in obtaining legal remedies when a seller has mistreated him.

The basis of this almanac is derived primarily from publications obtained from various state agencies which freely disseminate such information upon request. This author gratefully acknowledges the help and assistance of those agencies in preparing this almanac, and has included herein as an appendix a partial listing of agencies available to the consumer seeking help.

The typical objectives of such agencies are as follows:

"To educate and inform the public in order to  
to make more sophisticated consumers; To process and resolve complaints and inquiries regarding consumer transactions; To do in-depth analysis of specific industries which may need more regu-

lation." (Department of Commerce, Consumer Protection Division, State of Ohio.)

There are approximately thirty-seven states which have enacted legislation seeking to control, eliminate and punish deceptive acts and practices by sellers. Most of these states have appropriated money and manpower to enforce these acts. These agencies and the laws which they seek to enforce cannot, however, be effective unless the consumer is aware of their existence and takes advantage of the services offered.

It is interesting to note that the information supplied by these agencies is primarily directed at educating the consumer. Its message is preventive consumerism, rather than corrective. But an important function of these agencies is to correct problems that have arisen. Corrective methods include mediation, legislation and judicial action.

Areas of consumer education which are the subject of legislation include but are not limited to: buying and servicing new or used cars; borrowing, buying or building a new home; arranging or financing funerals; home appliances; insurance; real estate promotions; jewelry; home furnishing; moving and storage; utilities and transportation; guarantees; foods and drugs; false advertising; professional services; finance companies; repair services; door-to-door sales; franchises; travel agencies; magazine subscriptions; mobile homes and many others.

The President's Advisory Council on Consumer Affairs has established goals for successful consumer education:

1. A rudimentary understanding of a market economy and the consumer's position in it, particularly his responsibility to make intelligent choices,
2. Knowledge of standards of quality and an ability to translate the technical jargon often used by manufacturers and advertisers into everyday language,
3. Knowledge of sources of information about products,
4. Knowledge of existing legislation and regulatory agencies that serve consumers,
5. An alertness toward fraudulent and misleading advertising and all other fraudulent schemes,

6. General understanding of the legal rights and recourse of consumers,
7. Knowledge of certain goods and services and what features to look for when making buying decisions.

Of course this almanac cannot cover all of the problems in each of these areas, but it will present some case histories provided by the various state agencies. These histories are illustrative of typical problems and how they are solved.

The educational aspect of the various consumer protection divisions cannot be over emphasized. Many of the agencies have employed such diverse means as preparing curriculum and course material for use in schools, both on an adult and student level, radio and television spots, speakers for community and social groups, and mailings of educational material.

The scope of consumer protection activities in Michigan was described by Frank J. Kelly, Attorney General:

"It has been our endeavor to mobilize the resources of law enforcement agencies, business organizations, service clubs, labor organizations and other public and private clubs in the war against consumer frauds. We have initiated legislation, fought successful civil law suits, brought criminal actions against individuals and organizations, engaged in educational programs and taken other actions designed to make Michigan an unpleasant place for consumer fraud activities."

These activities are typical of the efforts of consumer divisions throughout the United States. To explore each of the divisions and the legislative enactments would require several volumes, but we shall present the most typical statutes and explore in some detail the ways and means by which a consumer can prevent and correct consumer frauds in many areas. These include not only direct frauds by misrepresentations of price, quality, warranties and the like, but also deceptive advertising practices, home solicitations, and all other areas where the consumer is at the mercy of the seller.

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# **Chapter I**

## **CONSUMER PROTECTION: FEDERAL**

### **The Federal Trade Commission (FTC)**

The Federal Trade Commission is the major federal agency dealing with consumer protection problems. Its authority extends to conduct in interstate commerce. It administers the Federal Trade Commission Act, the Wool Labeling Act, the Trademark Act, the Fur Products Labeling Act, and the Textile Fiber Identification Act. The FTC also enforces the Fair Packaging and Labeling Act, which prohibits unfair and deceptive packaging and labeling of any consumer commodity shipped in interstate commerce, and the Truth in Lending Act which controls the finance charges on loans and regulates what must be disclosed in a loan. The Act provides for private as well as public enforcement of the disclosure provisions. Private citizens may recover twice the amount of the finance charge in connection with the transaction, up to a maximum of \$1,000. The successful plaintiff can additionally recover court costs and reasonable attorney's fees. The Truth in Lending Act also limits the liability of a credit cardholder to only \$50 for the unauthorized use of the card by another person. Even this liability may be waived if the issuer of the card does not provide a self-addressed pre-stamped notification to be mailed in the event of loss or theft of the credit card, and if the issuer does not provide a method to identify the user of the card as an authorized user, such as an electronic confirmation.

In addition, the FTC enforces the Consumer Credit Reporting Act. This Act restricts the release of a credit report on a consumer to specified persons for specific reasons. It prohibits obsolete information from being included in the report and restricts who and under what circumstances a person may procure an investigative report on any consumer. The Act compels disclosure of credit report information to the affected consumer upon request.

The FTC enforces all of these acts through a number of local offices.\* Its powers include both rulemaking and issuance of (voluntary) industry guides to comply with the regulations. For example, recent guidelines issued include: auto pricing practices, credit card billing, unsolicited credit cards, door to door sales (cooling off period), retail food ads, and unsolicited merchandise.

The FTC has exercised some control over franchise arrangements which have involved unfair trade practices, such as overstating a prospective franchise's sales volume.

In its enforcement activities, the FTC has occasions to consider revising some of its rule in light of current methods and practices and is almost always considering new areas of regulation.

#### The Food and Drug Administration (FDA)

The FDA in the Department of Health, Education and Welfare is primarily responsible for administering the federal Food, Drug and Cosmetic Act. Section 331 of this Act is the heart of the protection afforded consumers. It prohibits the introduction into interstate commerce of adulterated or misbranded goods. It also prohibits alteration or removal of any label of a food, drug or cosmetic while such article is held for sale after shipment in interstate commerce. To effectuate the directives of this Act, the agency has adopted extensive regulations for control of food, food additives, drugs and cosmetics.

Pursuant to this Act, the FDA has launched into the regulation of many other consumer protection areas, including: the use of prescription drugs for conditions not named in the official labeling; food labeling; a review of all over the counter drugs currently marketed; labeling rules on dietary foods, imitation foods and frozen desserts; registration of blood banks; and the filing of cosmetic products and raw material composition statements.

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\* Regional offices are located in Atlanta, Boston, Chicago, Cleveland, Kansas City, Los Angeles, New Orleans, New York City, San Francisco and Seattle. The FTC's Bureau of Consumer Protection is at Sixth & Pennsylvania Avenue, Washington, D.C. 20580. Office of Information at same address.

The FDA also administers the Caustic Poisons Act which prohibits shipment in interstate commerce of misbranded, dangerous, caustic or corrosive substances, and the Import Milk Act.

#### The Department of Agriculture

The Department of Agriculture administers the Wholesome Poultry Products Act (Poultry Products Inspection Act), the Federal Meat Inspection Act (Wholesome Meat Act), the Egg Products Inspection Act, the Perishable Agricultural Commodities Act, the Agricultural Marketing Act, and the Packers and Stockyards Act, each of which affects the quality of food available to the consumer.

#### The Postal Service

The United States Postal Service administers the postal fraud statutes which prohibit the use of the mails for fraudulent purposes, allow the postmaster to stop receipt of mail by the person by returning the mail with the marking "fraudulent", and permit temporary impounding of mail. These laws, which together have been termed "a powerful consumer protection law," can potentially curb fraudulent practices in mail order sales.

#### The Department of Housing and Urban Development (HUD)

HUD administers the Interstate Land Sales Full Disclosure Act which requires the registration of subdivisions and filing of a statement when an interstate land sale is involved. This statement is aimed at the disclosure of such features of that particular parcel of land as ownership, title problems, physical accessibility, safety hazards, public utility access, easements and encumbrances.

#### The Consumer Product Safety Commission (CPSC)

The Consumer Product Safety Commission represents a major effort to protect consumers against unreasonable risks of personal injury and to help consumers evaluate the comparative safety of products. The Commission is armed with comprehensive authority to set safety standards, ban products that cannot

be made safe, rid the market of imminently hazardous products, require record keeping, examine records, call for reports, inspect business premises, require labeling, warning, and instructional information directions, and demand safety certifications. The enabling legislation for CPSC also contains provisions covering defect notices, recalls, replacements, repairs, purchase price refunds, information collection and publication, new products, exports and imports. These requirements are backed up by enforcement devices -- civil and criminal penalties, injunctions, seizures, condemnations, import exclusions and consumer suits.

Besides this extensive general authority, the CPSC has assumed the functions of the FDA under the Hazardous Substances Act and the Poison Prevention Packaging Act, as well as the functions of the FTC and the Department of Commerce in administering the Flammable Fabrics Act.

#### Office of Consumer Affairs (OCA)

The President by Executive Order 11583 in February, 1971, established an Office of Consumer Affairs in the Executive Office of the President. The Office is now part of the Department of Health, Education and Welfare. The objectives of the Office of Consumer Affairs include co-ordinating federal consumer programs, advising the President and federal agencies on policies and plans as they affect the consumer interest, recommending legislation and encouraging and coordinating research and consumer programs.\*

#### Other Federal Laws

Other federal laws have been passed to aid the consumer. For example, extortionate credit transactions are prohibited. The Federal Reserve Board may regulate, license or prohibit certain credit transactions under the Federal Credit Control Act. Federal restrictions on wage garnishment have also been enacted. Title III of the Consumer Credit Protection Act of 1968 restricts the amount of garnishable earnings to 25% of the

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\* The Office of Consumer Affairs is located in the New Executive Office Building, Room 6025, Washington, D.C. 20506.

debtor's disposable earnings in any given week and prohibit an employer from discharging any employee because his earnings have been subjected to garnishment for any one indebtedness.

One of the most effective weapons in the consumer protection arsenal, the class action, was considerably weakened by a 1975 U.S. Supreme Court case, *Eisen v. Carlisle & Jacquelin*. That case held that individual notice must be sent to each class member whose name and address could be ascertained through reasonable effort, regardless of the possibly prohibitive cost this would entail for the representative plaintiff. Over 2,250,000 class members were involved in the case. Thus, the effective use of the class action by consumer protection groups has greatly diminished.

### Federal Consumer Agency Legislation

Federal consumer representation legislation has been proposed from time to time during the past several decades. Proposals were introduced in the Senate in 1929 and in 1932 to create a "consumer counsel." The 1929 proposal was defeated, and in 1932 President Hoover vetoed the bill to which the consumer proposal was an amendment.

The consumer movement gained momentum after 1933, but proposals by President Franklin D. Roosevelt nevertheless never got off the ground. The creation of a cabinet-level Consumer Department was proposed during the late 1930's, but it was not until 1959 that consumer legislation first appeared in Congress. The late Senator Estes Kefauver and twenty-one co-sponsors introduced a bill to create a cabinet level Department of Consumers.

In March 1962, President John F. Kennedy issued the first Presidential message to Congress addressing consumer interests. He also created a consumer advisory council within the Council of Economic Advisers. But the Council existed for only eighteen months, never meeting again after making its first report in October 1963.

In January 1964 President Lyndon B. Johnson issued an executive order creating the President's Committee on Consumer Interests.

During the 91st Congress (1969-70) there were five related consumer-representation concepts before Congress. A compromise bill calling for an independent consumer protection agency

and a council of consumer advisors in the White House passed the Senate, but failed in the House Rules Committee. In 1971 legislation to establish an independent consumer protection agency with far weaker powers than in the Senate-passed 1970 bill was adopted by the House, but died in the Senate. The measure had been endorsed by Virginia Knauser, the President's special assistant for consumer affairs, but denounced by Ralph Nader, who was in favor of giving the agency stronger advocacy powers.

As a result, action in both houses demonstrated a shift away from cabinet-level department proposals, and the independent consumer agency concept emerged from the Government Operations committees of both houses as the recommended approach with its consumer advocacy function, only one feature of leading consumer department bills, as the dominant feature.

In 1971 President Richard Nixon by executive order enlarged the existing White House Consumer Advisor Office and asked Congress to delay action on an independent agency.

In the 92nd Congress (1971-72), Senators Ribicoff, Javits and Percy introduced a bill which would have created a stronger consumer agency than those proposed in previous bills. The bill failed as a result of a filibuster, although a weaker bill had passed the House.

Two major bills were considered in the 93rd Congress in 1973 by Senator Ribicoff. While Virginia Knauser, the President's chief spokesman on consumer affairs, endorsed the bill in principle, President Nixon threatened to veto it if passed in the form in which it was proposed. The bill was fiercely debated in each chamber in 1974, and, although the proposal passed the House, the Senate bill was tabled after four attempts at cloture. Senator Ribicoff continued to introduce such bills in 1975, 1976, and in 1977. Congress failed to pass the last attempt in 1977.

The proposed Consumer Protection Act of 1977 would have established an independent, nonregulatory Agency for Consumer Advocacy, with authority to represent the interests of consumers before federal agencies and the courts. The agency would be administered by a presidential appointee for a term coterminous with that of the President, but not to exceed four years. Its defeat in 1977 does not mean the end of such legislation. Sooner or later its time will come.

## **Chapter II**

### **SELECTED STATE LEGISLATION**

Since there is at the present time no standard uniform state law covering the various areas of consumerism, it is necessary to examine at least a few of the individual state laws. Generally, these acts cover a wide variety of consumer problems and punish the sellers or advertisers who commit practices in violation of the laws. These acts may be called deceptive trade practices and deceptive advertising acts. Many states combine the two main areas into a single law while others have enacted separate and distinct laws on each subject.

The enforcement of the laws is generally vested in the state attorney general's office, who, with the aid of investigatory powers and the courts, prosecutes the vendors who have violated any provision of the acts. Most of the state laws, while often providing severe civil and criminal penalties, do not abrogate the consumer's right to bring a private lawsuit. Many, in fact, provide explicitly for such suits and dictate the awarding of double or triple damages along with costs of suit and attorney fees.

While it is not possible to review thoroughly each of the states and each of the state enactments, we shall summarize the consumer legislation of many states. The reader should be aware, however, that an in-depth study of the particular statute in question should be made before seeking to apply it to his particular situation. Appendix A in this volume contains the statutory references to each state's consumer protection laws.

#### **ALASKA**

In 1970 Alaska enacted an Unfair Trade Practices and Consumer Protection Act. Under that act the following practices are unlawful:

1. To fraudulently convey or transfer goods or services by representing them to be those of another;
2. To falsely represent or designate the geographic origin of any goods or services;

3. To cause possible confusion as to the source, sponsorship, approval, affiliation or association with or certification of goods or services, or to actually misrepresent such approval, sponsorship, etc;
4. To represent used goods as new;
5. To misrepresent the quality of goods or services;
6. To disparage the goods and services of another by false or misleading representations;
7. To advertise goods or services with the intent not to sell them as advertised;
8. To mislead by advertising that goods are available for sale when in fact there are not enough of such goods to supply a reasonable demand;
9. To mislead as to the reasons for, existence of, or amounts of, price reductions;
10. To engage in any other conduct which would damage a buyer or competitor;
11. To employ deceptive practices, fraud, false pretense or the like in the sale or advertisement of goods and services whether or not any person has actually been mislead, deceived or damaged;
12. To fail to meet the disclosure provisions of the act as to installment sales contracts.

Although the Alaska statute appears to be most thorough in its inclusion of possible deceptive practices, other acts done by vendors, though not included in the codified law, may be subject to civil lawsuits brought under traditional common law principles. Criminal prosecutions arise from intentional and knowing violations of the statute.

Since the act includes advertising provisions, the typical exemptions are found. Owners and publishers of newspapers, and television and radio station owners and operators are excluded so



long as there is no knowing participation in the unlawful act. Likewise, advertisements governed by other federal and state statutes do not fall within the application of this particular statute.

The attorney general of the state is authorized to investigate alleged violations of the act, to prosecute offenders and to obtain injunctions. The courts can return monies or property to the consumer who has been damaged by reason of the unlawful act. Written assurances of future compliance may be obtained.

The act specifically authorizes private or class actions by consumers. The courts in such actions may award the consumer his actual damages or two hundred dollars, whichever is greater. Willful violations of the act, proved in a civil suit, may result in treble damages or equitable relief if warranted.

Interestingly, the Alaska statute is unique in that it requires the plaintiffs in a class action to post a bond in the sum of five thousand dollars. In the event the plaintiffs do not prevail in the litigation, the bond may be used to cover the defendant's costs and attorney fees incurred in defending the suit. Many statutes allow the plaintiff to recover attorney fees in such suits, but do not give parity to the defendants if they are successful. This one does just that and appears to be most equitable.

A civil action may be commenced within two years from the time the consumer discovers, or reasonably should have discovered, his loss.

Another interesting provision of this statute makes manufacturers or suppliers of merchandise which is the basis for the action liable for the damages assessed to, or suffered by retailers charged under the statute. Penalties for violation of the provisions of the statute are, as in many other states, rather severe. A violation of an injunction can result in a fine up to twenty-five thousand dollars for each and every violation. Other violations of the statute may cost the offender from five to ten thousand dollars.

## ARIZONA

The Division of Consumer Fraud was created in the state of Arizona in 1966. That division is aided by state legislation which makes unlawful any practice, fraud, misrepresentation or the like, employed in consumer transactions. Likewise, the omission of any material fact in the advertising of goods and services is an unlawful act under the Arizona statute.

An act or omission may be unlawful despite the fact that