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# THE APPLICATION OF CONSUMER PROTECTION LEGISLATION TO AVIATION LITIGATION

WILLIAM L. MAYNARD\*

## INTRODUCTION

ALTHOUGH numerous statutes, both state and federal, have been enacted to provide additional protection to dissatisfied and injured consumers, there is a dearth of litigation under these statutes in the area of aviation litigation. The language of some of this consumer protection legislation, however, is sufficiently broad to provide additional protection for general aviation aircraft purchasers, insurance policyholders, and airline passengers. Therefore, these statutes ultimately may have a direct bearing on a substantial area of aviation litigation. In order to demonstrate the potential applicability of these statutes to aviation litigation, this paper will provide an overview of the basic types of state consumer protection statutes, interpretations of the Federal Trade Commission Act relevant to state consumer protection statutes, the Magnuson-Moss Act, and selected state statutes which permit private actions.

## THE BASIC TYPES OF STATE CONSUMER PROTECTION STATUTES

Many states have enacted various kinds of statutes which attempt to protect consumers by proscribing "unfair or deceptive trade practices."<sup>1</sup> All of these statutes, however, can be readily

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<sup>1</sup> Comment, *Nontraditional Remedies for the Settlement of Consumer Disputes*, 49 TEMP. L.Q. 385, 408 (1976) [hereinafter cited as *Nontraditional Remedies*]; Gold & Cohan, *State Protection of the Consumer: Integration of Civil and Criminal Remedies*, 12 N. ENG. L. REV. 933, 934 (1977).

classified as being one of three basic types of state consumer protection legislation: "little FTC acts," consumer fraud acts, and deceptive trade practice acts.<sup>3</sup> Each type seeks to protect consumers from deceptive practices. They differ, however, in the means each uses to accomplish this goal.

The "little FTC acts" are patterned after section 5 of the Federal Trade Commission Act (FTCA)<sup>3</sup> and proscribe "unfair methods of competition and unfair or deceptive practices" which are prohibited in interstate commerce by the Federal Trade Commission (FTC).<sup>4</sup> These statutes, like the FTCA itself, incorporate broad definitions of deceptive trade practices.<sup>5</sup> In contrast, consumer fraud acts are designed to prevent fraudulent and deceptive selling practices, and concentrate on consumer matters instead of unfair methods of competition.<sup>6</sup> A third type of consumer protection legislation—a variation on the Uniform Deceptive Trade Prac-

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<sup>3</sup> *Nontraditional Remedies*, *supra* note 1, at 408.

<sup>3</sup> 15 U.S.C. §§ 41-77 (1976).

<sup>4</sup> *Nontraditional Remedies*, *supra* note 1, at 409. Massachusetts, Vermont, Washington, and Louisiana are examples of states adopting "little FTC acts." *Id.*

<sup>5</sup> *Id.* Less than half of those states which have enacted "little FTC acts" impose civil penalties for initial violations. Gold & Cohan, *supra* note 1, at 934; *see, e.g.*, ALASKA STAT. § 45.50.551 (1974); CONN. GEN. STAT. ANN. § 42-110o(b) (West 1979); GA. CODE ANN. § 106-1215 (1979); HAWAII REV. STAT. § 480.3.1 (1976); ILL. ANN. STAT. ch. 121-1/2, § 267 (Smith-Hurd 1976); KAN. STAT. ANN. § 50-636 (1976); KY. REV. STAT. § 367.990 (1978); MD. COM. LAW CODE ANN. § 13-410 (1975); MINN. STAT. ANN. § 325.8018(1) (1971) (restraint of trade); MISS. CODE ANN. § 75-24-19 (1974); NEB. REV. STAT. § 59-1614 (1978); N.H. REV. STAT. ANN. § 358-A: 4 III(b) (1979); N.J. STAT. ANN. § 56:8-13 (1971); N.M. STAT. ANN. § 57-12-11 (1978); N.Y. GEN. BUS. LAW § 350-C (McKinney 1963) (false advertising only); OR. REV. STAT. § 646.642 (1977); S.C. CODE § 39-5-110 (1977); S.D. COMP. LAWS ANN. § 37-24-27 (1977); TEX. BUS. & COM. CODE § 17.47(c) (Vernon 1973); VT. STAT. ANN. tit. 9, § 2458(b)(1) (1972); WASH. REV. CODE ANN. § 19.86.140 (1978); W. VA. CODE § 46A-7-111 (1976); WIS. STAT. ANN. § 100 (26)(6) (West 1973) (unfair collection practices); V.I. CODE tit. 12A, § 104 (Supp. 1978). Statutory citations derived from Gold & Cohan, *supra* note 1, at 936 n.13. Varying burdens of proof are imposed. Of those states which impose civil penalties for initial violations, twelve require proof that the violation was willful, intentional, or knowing: Arizona, Connecticut, Georgia, Kentucky, Mississippi, Montana, Nevada, New Mexico, Oregon, South Carolina, South Dakota, West Virginia. *Id.* at 937 n.18, and accompanying text. Fifteen states require no showing of intent: Alaska, California, Hawaii, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Texas, Vermont, Washington, Wisconsin. *Id.* at 937 n.19, and accompanying text.

<sup>6</sup> *Nontraditional Remedies*, *supra* note 1, at 409. Examples of such laws may be found in New Jersey, Illinois and Arizona. *Id.*

tices Act (UDTPA)<sup>7</sup>—has been adopted by a great number of states. The UDTPA lists twelve specific acts which are prohibited,<sup>8</sup> instead of utilizing the broad definitions of deceptive trade practices found in both consumer fraud acts and “little FTC acts.” Some states which have adopted the UDTPA have also added provisions which generally proscribe “any other act or practice which is unfair or deceptive to the consumer.”<sup>9</sup>

#### INTERPRETATIONS OF THE FEDERAL TRADE COMMISSION ACT

Many state consumer protection statutes require state courts to look to interpretations of the FTCA by the Federal Trade Com-

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 409-10. The Uniform Deceptive Trade Practices Act § 2 makes unlawful:

- (1) passing off goods or services as those of another;
- (2) causing likelihood of confusion or of misunderstanding as to source, sponsorship, approval or certification of goods or services;
- (3) causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) using deceptive representations or designs of geographic origin in connection with goods or services;
- (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
- (6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) disparaging the goods, services, or business of another by false or misleading representations of fact;
- (9) advertising goods or services with intent not to sell them as advertised;
- (10) advertising goods or services with intent not to supply reasonable expectable public demand, unless the advertisement discloses a limitation of quantity;
- (11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- (12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

*Nontraditional Remedies*, *supra* note 1, at 409-10, n.159. Several states have followed the approach of the UDTPA: ALASKA STAT. § 45.50.471 (Supp. 1975); DEL. CODE ANN. tit. 6, § 2532 (1974); MINN. STAT. ANN. § 325.772 (West. Supp. 1975); MISS. CODE ANN. § 75-24-5 (Supp. 1975); NEV. REV. STAT. § 598.410 (1975); TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 1980); WYO. STAT. § 40-12-105 (1977).

<sup>9</sup> *Nontraditional Remedies*, *supra* note 1, at 410.

mission and the federal courts for guidance in determining what constitutes a deceptive act or practice.<sup>10</sup> The Texas statute, for example, which allows a consumer to bring an action for “[f]alse, misleading or deceptive acts or practices”<sup>11</sup> requires the Texas courts to define such terms with reference to the interpretations of the FTCA by the Federal Trade Commission and federal courts.<sup>12</sup> These interpretations have created a substantial body of “deceptive practices law” which contains general principles that could easily make some state consumer protection legislation applicable to aviation litigation.

An act or practice is “false, misleading or deceptive,” under “deceptive practices law,” if it has the capacity or tendency to deceive; actual deception is not required.<sup>13</sup> In determining capacity or tendency to deceive, consideration is given to the impact of the representation on the “ignorant, the unthinking, and the credulous.”<sup>14</sup> An advertisement containing the literal truth may be deceptive if consumers could misinterpret its meaning.<sup>15</sup> The test is whether the advertisement, as a whole, is misleading or deceptive, even though the literal truth may be disclosed.<sup>16</sup> For example, ambiguous advertising which implies two meanings, one of which is correct and the other of which is false, is considered deceptive.<sup>17</sup> The materiality of the misrepresentation, while recognized as a factor,<sup>18</sup> is of no real consequence. The consumer is entitled to the truth, even if it would only be of value in making an irrational buying decision.<sup>19</sup> Intent to deceive, which is historically an ele-

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<sup>10</sup> See, e.g., FLA. STAT. § 501.204(2) (1973); TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon Supp. 1980).

<sup>11</sup> TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1980).

<sup>12</sup> *Id.* § 17.46(c)(1)(a).

<sup>13</sup> See, e.g., *FTC v. Hires Turner Glass Co.*, 81 F.2d 362, 364 (3d Cir. 1935).

<sup>14</sup> *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944) citing *Florence Mfg. Co. v. J.C. Doud & Co.*, 178 F. 73, 75 (2d Cir. 1910); *Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978). See *Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1944).

<sup>15</sup> See, e.g., *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956); *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944).

<sup>18</sup> See, e.g., *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942); Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1056 (1967).

<sup>19</sup> *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

ment of common law fraud,<sup>20</sup> is totally irrelevant.<sup>21</sup> It is immaterial if the speaker does not have knowledge of the misrepresentation or knowledge of the advertisement's falsity.<sup>22</sup>

It is clear that any express falsehood will be deceptive.<sup>23</sup> In many situations, however, the deception can be more subtle, as where one statement in a sales pitch or advertisement is untrue or deceptive, while other statements therein attempt to "clarify" the untrue or deceptive one. The rule in "deceptive practices law" is that a violation of law occurs if a sales pitch or advertisement taken as a whole has the capacity or tendency to deceive.<sup>24</sup> If a statement that purports to qualify or "defalsify" the deceptive statement is not as conspicuous or as fully emphasized as the deceptive statement, then a violation of law likely will be found.<sup>25</sup> As stated by the United States Supreme Court in *Donaldson v. Read Magazine, Inc.*,<sup>26</sup> deception can occur "because things are omitted that should be said, or because advertisements are composed or purposefully printed in such a way as to mislead."<sup>27</sup>

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<sup>20</sup> See, e.g., *Wilson v. Jones*, 45 S.W.2d 572, 573 (Tex. Comm'n App. 1932, holding approved); *Bondies v. Glenn*, 119 S.W.2d 1095, 1098 (Tex. Civ. App.—Eastland 1938, writ dismissed); *Panhandle & Santa Fe Ry. Co. v. O'Neal*, 119 S.W.2d 1077, 1079-80 (Tex. Civ. App.—Eastland 1938, writ refused). In Texas, intent to deceive, or knowledge that a representation is false, while not an essential element of fraud, must be shown in order to recover exemplary damages. *Success Motivation Inst., Inc. v. Lawlis*, 503 S.W.2d 864, 870 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ refused n.r.e.).

<sup>21</sup> *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967) ("whatever Ward's intentions were in the advertising, they are not controlling"); *Gimbel Bros., Inc. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941) ("a deliberate effort to deceive is not necessary").

<sup>22</sup> See, e.g., *D.D.D. Corp. v. FTC*, 125 F.2d 679, 682 (7th Cir. 1942).

<sup>23</sup> See, e.g., *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934) (composition of product misstated); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933) (seller not "manufacturer"); *In re Perfect Mfg. Co.*, 43 F.T.C. 238 (1948) (goods not "fireproof").

<sup>24</sup> See, e.g., *Spiegel, Inc. v. FTC*, 411 F.2d 481, 483 (7th Cir. 1969); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (2d Cir. 1962); *Elliot Knitwear, Inc. v. FTC*, 266 F.2d 787 (2d Cir. 1959); *Barnest, The Law of Trade Practices—II, False Advertising*, 23 OHIO ST. L.J. 596, 640 (1962).

<sup>25</sup> *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963), cert. dismissed, 376 U.S. 967 (1964) (qualifying statement too remote from and less conspicuous than deceptive one); *Metal Stamping Corp. v. General Motors Corp.*, 33 F.2d 411, 412 (7th Cir. 1929).

<sup>26</sup> 333 U.S. 178, 188 (1948).

<sup>27</sup> *Id.*

Silence is not golden, because "[t]o tell less than the whole truth is a well-known method of deception."<sup>28</sup> Clearly, there is a duty to disclose facts which would cure a misapprehension that could result from statements which are made.<sup>29</sup> It has also been held that a duty exists to disclose a product's composition if it has been changed<sup>30</sup> or is different than what it appears to be,<sup>31</sup> to disclose a danger that might result from use of the product,<sup>32</sup> and to disclose any prior use of a product.<sup>33</sup>

The ramifications of extending these general principles of "deceptive practices law" to air crash litigation should be apparent. For example, a state's consumer protection statute allowing a private action for damages might be applied to the sale of a typical four-passenger single-engine aircraft which later crashes, causing injuries to the consumer. Assume that the manufacturer had previously litigated and lost a crashworthiness case involving the same model aircraft. An allegation that the manufacturer knew of the dangers of enhanced injuries associated with an accident might make evidence of the prior accident and litigation admissible. Moreover, the manufacturer's failure to disclose the known danger might be considered a deceptive trade practice giving rise to remedies made available under that state's consumer protection statute.

Interpretations of the Federal Trade Commission Act by the FTC and the federal courts also eliminate many of the defenses historically available to defendants in fraud cases. A plaintiff in most cases will no longer be able to defend by alleging that the defendant did not rely on his misrepresentation. Federal courts construing the FTCA have consistently held that the standard for judging deceptive trade practices is not actual deception, but whether the practice has the capacity to deceive.<sup>34</sup> Therefore, since

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<sup>28</sup> *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950). See also *Benrus Watch Co. v. FTC*, 352 F.2d 313 (8th Cir. 1965).

<sup>29</sup> See *Alberty v. FTC*, 182 F.2d 36, 43 (D.C. Cir.) (dissenting opinion), *cert. denied*, 340 U.S. 818 (1950).

<sup>30</sup> *Royal Baking Powder Co. v. FTC*, 218 F. 744, 753 (2d Cir. 1922).

<sup>31</sup> *Benrus Watch Co. v. FTC*, 352 F.2d 313, 323 (8th Cir. 1965); *Theodore Kagen Corp. v. FTC*, 283 F.2d 371 (D.C. Cir. 1960).

<sup>32</sup> *American Medicinal Prods., Inc. v. FTC*, 136 F.2d 426, 427 (9th Cir. 1943).

<sup>33</sup> *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 269 (10th Cir. 1965).

<sup>34</sup> *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1967).

actual deception is not required, it seems logical to conclude that there need be no showing that anyone relied upon the misrepresentation. A Massachusetts court,<sup>35</sup> interpreting that state's consumer protection statute with reference to "deceptive practices law," has held:

As numerous FTC cases made clear, the definition of an actionable "unfair or deceptive act or practice" goes far beyond the scope of the common law action for fraud and deceit. To cite only a few distinctions, in the statutory action proof of actual reliance by the plaintiff on a representation is not required . . . [A claim] is not subject to the traditional limitations of preexisting causes of action such as tort for fraud and deceit.<sup>36</sup>

The "capacity to deceive" test has been acknowledged in a similar fashion by Texas courts interpreting that state's consumer protection statute.<sup>37</sup> Submissions of the reliance issue, however, have been mentioned without disapproval in other such cases in that state.<sup>38</sup>

In common law fraud, the "puffing" rule allowed a seller to misstate nonspecific facts "on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk."<sup>39</sup> Under "deceptive practices law," however, the standard is not that of the reasonable man; it is that of the "ignorant, the unthinking, and the credulous."<sup>40</sup> For example, the FTC's view of "puffing"<sup>41</sup> is very narrow:

Puffing, as we understand it, is a term frequently used to denote exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined. In contrast thereto, the representation as to "the world's lowest price" is a statement of an objec-

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<sup>35</sup> *Slaney v. Westwood Auto Co.*, 322 N.E.2d 768 (Mass. 1975).

<sup>36</sup> *Id.* at 779.

<sup>37</sup> *See, e.g., Wesware, Inc. v. State*, 488 S.W.2d 844, 847 (Tex. Civ. App.—Austin 1972, no writ).

<sup>38</sup> *See, e.g., Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978); *Singleton v. Pennington*, 568 S.W.2d 367 (Tex. Civ. App.—Dallas 1978, no writ).

<sup>39</sup> W. PROSSER, *LAW OF TORTS* § 109, at 723 (4th ed. 1971); *see Saunders v. Martin*, 390 S.W.2d 513, 515-16 (Tex. Civ. App.—Texarkana 1965, no writ); 25 *TEX. JUR. 2d Fraud and Deceit* § 47 (1961).

<sup>40</sup> *FTC v. Hires Turner Glass Co.*, 81 F.2d 362, 364 (3d Cir. 1935).

<sup>41</sup> *In re Better Living, Inc.*, 54 F.T.C. 648 (1957), *aff'd*, 259 F.2d 271 (3d Cir. 1958).



tive actuality, the truth or falsity of which is not variable and can be ascertained with factual precision. This representation cannot, therefore, properly be termed "puffing." It is either true, or it is false.<sup>42</sup>

Where deceptive trade practices are committed within the apparent scope of the authority of an agent, "deceptive practices law" has held that the principal is liable even though the conduct was not authorized or was even prohibited by the principal.<sup>43</sup> Similarly, a person who places in the hands of another a means of consummating a deceptive trade practice is himself liable.<sup>44</sup> Likewise, those persons who either own or control a corporation have been held personally liable for the deceptive trade practices committed by the corporation through its agents.<sup>45</sup>

"Deceptive practices law" also indicates that breach of warranty may constitute a deceptive practice. For example, assume that a consumer purchases a typical four-passenger aircraft for personal use which, for no apparent reason, comes apart in flight, causing injuries to the consumer. Assume further that the manufacturer had previously litigated and lost a claim involving similar facts, under allegations of defective design and breach of the implied warranty that the plane was reasonably fit for flight. In addition to providing grounds for an allegation that the manufacturer failed to disclose a known danger, these facts also appear to support a claim for breach of the implied warranty that the plane was reasonably fit for its ordinary usage. Under the FTC decisions, failure

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<sup>42</sup> *Id.* at 653.

<sup>43</sup> See *Shafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1958); *Goodman v. FTC*, 244 F.2d 584, 594 (9th Cir. 1957); *Standard Distribs., Inc. v. FTC*, 211 F.2d 7, 11 (2d Cir. 1954); *Parke, Austin & Lipscomb, Inc. v. FTC*, 142 F.2d 437, 440 (2d Cir.), *cert. denied*, 323 U.S. 753-54 (1944); *Perma-Maid Co. v. FTC*, 121 F.2d 282, 284 (6th Cir. 1941); *In re Star Office Supply Co.*, 77 F.T.C. 383, 444 (1970).

<sup>44</sup> See *FTC v. Winstead Hosiery Co.*, 258 U.S. 483, 494 (1922); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

<sup>45</sup> *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 120 (1937); *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 402-03 (D.C. Cir.) (per curiam), *cert. denied*, 414 U.S. 828 (1973); *Dultz v. FTC*, 406 F.2d 227 (3d Cir.) (per curiam), *cert. denied*, 395 U.S. 936 (1969); *Benrus Watch Co. v. FTC*, 352 F.2d 313, 324-25 (8th Cir. 1965); *Pati-Port, Inc. v. FTC*, 313 F.2d 103, 105 (4th Cir. 1963); *Standard Distribs., Inc. v. FTC*, 211 F.2d 7, 14-15 (2d Cir. 1954).

to perform on warranties is considered an unfair and deceptive trade practice.<sup>46</sup>

### THE MAGNUSON-MOSS ACT

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Magnuson-Moss Act) creates a federal private cause of action for breach of warranty obligations, which is in addition to "any right or remedy of any consumer under State law or any other Federal law."<sup>47</sup> An aggrieved consumer may recover all litigation expenses, including attorneys' fees, in a successful Magnuson-Moss action.<sup>48</sup> It is thus a significant piece of consumer protection legislation at the federal level. An overview of the Act will illustrate its obvious application in aircraft litigation.

The Magnuson-Moss Act requires that all written warranties on consumer products costing more than ten dollars must be prominently designated as either "full" warranties or "limited" warranties.<sup>49</sup> If a manufacturer wants to market his product under a "full" warranty, it must meet the following minimum standards under the Act: (1) there must be no charge for repairing the product if there is a defect or malfunction within the warranty period; (2) implied warranties cannot be disclaimed or limited; (3) any exclu-

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<sup>46</sup> Failure to honor the terms of a guarantee or warranty is normally treated as a breach of contract. The Federal Trade Commission, when faced with such failures, has labeled them unfair and deceptive trade practices. In *Infraglass Heater Co.*, 55 F.T.C. 124 (1958), a distributor of electric water heaters was charged with failing to honor the guarantee that it advertised would accompany its products. The Commission ordered respondent to cease and desist from "representing, directly or by implication, that their electric heaters, or any other merchandise, is guaranteed when any provision of the guarantee is not fully complied with." *Id.* at 126. This failure to honor the guarantee was clearly an unfair and deceptive trade practice.

In *Excel Products, Inc.*, 61 F.T.C. 1119 (1962), a distributor of storm windows and doors, aluminum and fiberglass awnings, carpets, and patio covers was representing in its advertisements that it "will make repairs or adjustments pursuant to the terms of their guarantee." *Id.* at 1121. The complaint alleged that "[R]espondents in many instances do not make repairs or adjustments in accordance with their guarantee . . . [and the representations in their advertisements] are false, misleading and deceptive." *Id.* at 1121. Respondents were ordered to cease and desist from engaging in these unfair and deceptive trade practices.

<sup>47</sup> 15 U.S.C. § 2311(b)(1) (1976).

<sup>48</sup> 15 U.S.C. § 2310(d)(2) (1976).

<sup>49</sup> 15 U.S.C. § 2303 (1976). Both full and limited warranties can be limited to a stated duration, such as "full six-month warranty" or "limited three-year warranty." *Id.*

sion or limit on consequential economic damages for breach of warranty must appear clearly and conspicuously on the face of the warranty; and (4) if the product cannot be repaired after a reasonable number of attempts, the consumer must be permitted to elect either a replacement without charge, or a refund.<sup>50</sup> By comparison, a "limited" warranty to a great extent can be tailored to the desires of the manufacturer. For example, it might be a "parts only" warranty under which the buyer must foot the bill for labor, or it might be a "parts and labor" warranty without any right for the buyer to obtain a replacement or refund. A manufacturer also may use a "limited" warranty that requires the buyer to return the defective product to the manufacturer or authorized dealer for service at his own expense.<sup>51</sup> The Act also contains an anti-tying provision,<sup>52</sup> which forces warrantors to supply the labor and parts for warranty repair service free of charge if they wish to condition the warranty on the use of labor or parts that are designated by brand name.<sup>53</sup>

One of the most heralded aspects of the Magnuson-Moss Act is its prohibition against disclaimers of implied warranty. In the past, "boilerplate" in most written warranty forms contained a paragraph which provided that the written warranty was "in lieu of all other warranties, express or implied, including any warranty of merchantability." Such a disclaimer of the Uniform Commercial Code (UCC) implied warranty of merchantability was valid under the UCC so long as it was conspicuous.<sup>54</sup> The authors of the Act, however, regarded such a disclaimer as a deceptive practice and drafted the Magnuson-Moss Act to make certain that "the fine print shall no longer taketh away what the bold print giveth."

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<sup>50</sup> 15 U.S.C. § 2304 (1976). In addition, the benefits of a "full warranty" automatically extend to any second or subsequent purchasers during its duration. 15 U.S.C. § 2304(b)(4). Nor may the full warrantor impose any "unreasonable duties" on consumers as a condition of securing performance under the warranty. 15 U.S.C. § 2304(b)(1). The FTC has ruled, for example, that requiring return of a registration card as a condition precedent of full warranty coverage is an unreasonable duty. 16 C.F.R. § 700.7 (1979).

<sup>51</sup> See 15 U.S.C. § 2304 (1976).

<sup>52</sup> 15 U.S.C. § 2302(c), (e).

<sup>53</sup> The FTC may waive this provision if the manufacturer demonstrates that the product will function properly only if the brand name parts or labor are used. 15 U.S.C. § 2302(c).

<sup>54</sup> U.C.C. § 2-316.

Thus, the statute provides that a seller who gives a written warranty, or enters into a service contract within ninety days of any sale, may not disclaim or modify any implied warranty to a consumer with respect to that sale.<sup>55</sup> There are, however, two exceptions to this rule. First, a "limited" warranty may limit the duration of any implied warranty to the duration of a written warranty, so long as the duration is reasonable, conscionable, and set forth in clear and unmistakable language on the face of the warranty.<sup>56</sup> Second, either a "full" or "limited" warranty may exclude liability for consequential economic loss, so long as the exclusion appears conspicuously on the face of the warranty.<sup>57</sup>

The private action created by the Magnuson-Moss Act allows a "consumer" to sue a "supplier, warrantor, or service contractor" for breach of a written warranty, an implied warranty, a service contract, or a violation of any obligations imposed by the Act.<sup>58</sup> The Act defines "consumer" as a buyer or other qualified transferee of a "consumer product."<sup>59</sup> A "consumer product" is broadly defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes."<sup>60</sup> Under the FTC's interpretation of the Act, even a small amount of "normal" consumer use makes the entire product line subject to the Act. The FTC requires only that an appreciable portion of a product class be sold for consumer purposes.<sup>61</sup> Thus, an airplane that is normally used for personal use would be covered by the Act, even if it were purchased for business use.

A necessary condition to the application of the Magnuson-Moss Act is the existence of a written warranty as defined under the

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<sup>55</sup> 15 U.S.C. § 2308 (1976).

<sup>56</sup> *Id.*

<sup>57</sup> 15 U.S.C. §§ 2304, 2308.

<sup>58</sup> *Id.* § 2310(d)(1). A service contract is a written contract "to perform, over a fixed period of time or for a specified duration, services relating to maintenance or repair" of a consumer product. *Id.* § 2301(8). Thus, the service contract can be entered into before or after the sale of the product and need not be part of the basis of the bargain.

<sup>59</sup> *Id.* § 2301(3).

<sup>60</sup> *Id.* § 2301(1).

<sup>61</sup> 42 Fed. Reg. 36,112, 36,115 (1977) (to be codified in 16 C.F.R. § 700.1(a)).

Act.<sup>62</sup> It is noteworthy that the Act's definition makes it unnecessary to use formal words such as "warranty" or "guarantee" or to have a "specific intention to make a warranty."<sup>63</sup> The Act does not, however, include a provision that permits the creation of warranties from a description of the goods or the use of a sample or model.<sup>64</sup> The Magnuson-Moss Act definition of written warranty requires the sale of a consumer product to a buyer "for purposes other than resale of such product."<sup>65</sup> The Act does not apply to leases of goods, or to service transactions which do not involve the sale of a consumer product.

In addition to giving the right to sue to consumers, the Act defines "consumers" with sufficient breadth to overturn state law doctrines of privity of contracts.<sup>66</sup> It defines a consumer as "any person to whom such [consumer] product is transferred during the duration of an implied or written warranty,"<sup>67</sup> and all consumers are given the right to sue for breach of warranty. The Magnuson-Moss Act gives consumers a cause of action for breach of warranty against a "supplier" as well as a "warrantor." A "supplier" is "any person engaged in the business of making a consumer product directly or indirectly available to consumers;" 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."<sup>68</sup> It is possible, however, for a manufacturer to give an express warranty to a distributor without having the warranty extend to consumers. This is because Magnuson-Moss will not apply to a written warranty unless it becomes part of the basis of a bargain with a buyer who purchases for purposes other than resale. Because a retailer buys for resale, a warranty that extends only to the retailer is not within the ambit of the Magnuson-Moss Act. Similarly, the supplier of a component part may safely give a written warranty that is limited to the manufacturer.<sup>69</sup>

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<sup>62</sup> See 15 U.S.C. §§ 2301(6), 2302-2304 (1976).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 15 U.S.C. § 2301(6) (1976).

<sup>66</sup> *Id.* § 2301(3).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 2301(4), (5).

<sup>69</sup> 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified in 16 C.F.R. § 700.3(c)).

Significantly, the Magnuson-Moss Act gives consumers a cause of action for breach of implied warranty.<sup>70</sup> Although the Act creates no implied warranties, it prohibits warrantors from disclaiming implied warranties created under state law.<sup>71</sup> Warrantors using a "full" warranty can neither limit the duration of nor disclaim its implied warranty liability. For example, a manufacturer who offers a one year "full" warranty on airplanes may not disclaim or otherwise limit its liability for breach of the implied warranty of merchantability. Thus, if an implied warranty arises automatically under the UCC with the sale of an airplane, it will be effective for the full four years of the UCC's statute of limitations.<sup>72</sup>

The Magnuson-Moss Act provides that consumers injured by any breach of warranty or by certain statutory violations "may bring suit for damages and other legal and equitable relief. . . ."<sup>73</sup> Successful litigants can recover costs, expenses, and attorneys' fees, based on actual time expended, that have been reasonably incurred. A court, however, may deny an award of attorneys' fees if it determines that such an award would be inappropriate.<sup>74</sup> In some cases, the Act contains specific remedies for violation of its provisions. For example, if the warrantor improperly attempts to disclaim liability for implied warranties, the disclaimer is invalid.<sup>75</sup> Similarly, if the warrantor under a "full" warranty fails to make a conspicuous limitation of consequential damages, the limitation is ineffective.<sup>76</sup>

Under the Magnuson-Moss Act, no private action for breach of a written or implied warranty may be brought "unless the person obligated under the warranty . . . is afforded a reasonable opportunity to cure such failure to comply."<sup>77</sup> For purposes of the right to cure, the Act does not distinguish between the rejection of goods, revocation of acceptance, and damages for breach of war-

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<sup>70</sup> 15 U.S.C. §§ 2304(a)(2), 2308 (1976). These provisions preempt state law, so that an attempted disclaimer is invalid for purposes of both federal and state law. *Id.* § 2308(c).

<sup>71</sup> 15 U.S.C. § 2308(c).

<sup>72</sup> U.C.C. § 2-725(1).

<sup>73</sup> 15 U.S.C. § 2310(d)(1) (1976).

<sup>74</sup> *Id.* § 2310(d)(2).

<sup>75</sup> *Id.* § 2308.

<sup>76</sup> *Id.* § 2304(a)(3).

<sup>77</sup> *Id.* § 2310(e).

ranty. When a consumer purchases a new product which immediately malfunctions, the consumer may wish to resist the warrantor's offers to repair and insist that the defective product be replaced. It is not clear whether Magnuson-Moss requires the consumer to accept repair rather than replacement, since the Act is silent as to what constitutes an effective cure.<sup>78</sup>

It is not clear whether the Act will cover personal injury cases. The Act states that "[n]othing in this chapter (other than sections 2308 and 2304(a)(2) and (4) . . .) shall . . . affect the liability of, or impose liability on, any person for personal injury. . . ."<sup>79</sup> The sections excepted parenthetically, however, relate to implied warranty coverage. The Magnuson-Moss Act apparently allows recovery for personal injuries in a private action for breach of implied warranty.<sup>80</sup>

The Federal Trade Commission Act, which is administered by the FTC, does not provide for private actions by consumers,<sup>81</sup> as does the Magnuson-Moss Act.<sup>82</sup> The FTC, however, has adopted a variety of rules to implement the Act. For example, FTC rules govern disclosure by warrantors<sup>83</sup> and impose presale information responsibilities on sellers.<sup>84</sup> It is unclear whether a violation of these rules gives rise to a private action.

#### STATE CONSUMER PROTECTION STATUTES

In addition to the enforcement authority vested in the state attorney general, many state consumer protection statutes allow consumers to bring private actions to recover damages. The mechanics of bringing such actions are illustrated by the following discussion of the consumer protection statutes of several states which allow private actions.

##### *California*

The California legislature's contribution to the consumer pro-

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<sup>78</sup> See 15 U.S.C. §§ 2301(10), 2304(a) (1976).

<sup>79</sup> 15 U.S.C. § 2311(b)(2) (1976).

<sup>80</sup> *Id.* § 2304(a)(3).

<sup>81</sup> *Alfred Dunhill v. Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

<sup>82</sup> 15 U.S.C. § 2310(d)(1) (1976).

<sup>83</sup> 16 C.F.R. § 701 (1979).

<sup>84</sup> *Id.*

tection bandwagon is the Consumers Legal Remedies Act (CLRA).<sup>85</sup> The CLRA lists eighteen merchandising frauds<sup>86</sup> derived from three phases of unfair competition: passing-off,<sup>87</sup> misrepresentation of goods and services or their origins,<sup>88</sup> and deceptive advertising.<sup>89</sup> The CLRA allows either an individual plaintiff or a class of plaintiffs<sup>90</sup> to seek actual damages, injunctive relief and punitive damages.<sup>91</sup> Before these damage claims may be filed, however, the plaintiff must notify the merchant and give him thirty days to make repair or replacement that is appropriate.<sup>92</sup> The CLRA limitations period is three years. Prior to 1970, a claimant was required to seek recovery for fraud; therefore, his cause of action did not become legally cognizable until the decep-

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<sup>85</sup> CAL. CIV. CODE §§ 1750-84 (West 1973 & Supp. 1979).

<sup>86</sup> *Id.* § 1770.

<sup>87</sup> Passing-off is the false representation to consumers that the goods or services are those of another and is regulated by CAL. CIV. CODE § 1770(a) (West Supp. 1979). *See, e.g.,* Dixi-Cola Laboratories v. Coca-Cola Co., 117 F.2d 352 (4th Cir.), *cert. denied*, 314 U.S. 629 (1941). CAL. CIV. CODE § 1770(d) (West Supp. 1979) covers the misrepresentation of facts regarding geographic origin that can take the form of passing-off when geography and identity are closely linked. *See, e.g.,* Pillsbury-Washburn Flour Mills Co. v. Eagle, 86 F. 608 (7th Cir. 1898), *cert. denied*, 173 U.S. 703 (1899) (falsely representing flour as Minnesota brand).

<sup>88</sup> CAL. CIV. CODE §§ 1770(b)-(h), (o), (p), (r) (West Supp. 1979). Little distinction can be made between subsections (b), (c), and the last phrase of (e). They all prohibit the false representation by another of the sources, sponsorship or certification of the product. Subsections (f) and (g) prohibit misrepresentation of the quality or condition of goods or services. Subsection (h) forbids false disparagement of a competitor. Subsection (o) proscribes any representation that a good or service is needed when, in fact, it is not. Subsection (p) forbids misrepresenting previous representations, and subsection (r) prohibits misrepresenting an agent's authority to negotiate final terms. *Id.*

<sup>89</sup> *Id.* §§ 1770(i), (j), (m), (n), (q) (West Supp. 1979). Subsection (i) is the old tort of deceit without the element of reliance; (j) and (m) are narrower versions of (i), with exceptions added. Subsection (n) proscribes misrepresenting consumers' rights and remedies. Subsection (q) is unique to the CLRA in forbidding the offer of an economic benefit which "is contingent on an event to occur subsequent to the consummation of the transaction"; this language is similar to CAL. CIV. CODE § 1803.10 (West 1973). In 1975, two new sections were added which concern the advertising of unassembled furniture. *Id.* § 1770(k)(1) (West Supp. 1979).

<sup>90</sup> *Id.* § 1781(a). Any consumer entitled to bring an action under section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in section 1780.

<sup>91</sup> *Id.* § 1780(a)(3).

<sup>92</sup> *Id.* § 1782(a).



tion was discovered.<sup>93</sup> All claims under the CLRA, however, accrue the day the act is committed, regardless of when a prudent man might uncover a fraud.<sup>94</sup>

### *Florida*

The Florida consumer protection statute (Florida Act) is broad enough to apply to almost any activity in the marketplace, including antitrust matters and restraint of trade activities.<sup>95</sup> It allows an individual to bring an action for declaratory relief, injunctive relief, or damages against all alleged violators of the Act.<sup>96</sup> To encourage such civil action by citizens and to protect businessmen from the expense of defending against frivolous lawsuits, the Florida Act allows the prevailing party in a private action to recoup costs and attorneys' fees.<sup>97</sup> Although the Act prohibits private class actions, it does allow the enforcing authority to bring a "class action" on behalf of consumers.<sup>98</sup>

A private action may be based upon a violation of any provision of the Act or a violation of any rule promulgated pursuant to the Act.<sup>99</sup> Section 501.204 of the Florida Act prohibits any "unfair" or "deceptive" act, and relies upon sixty years of interpretations of the FTCA by federal courts and the FTC for a precise definition of those terms. There are, however, limitations upon liability for violations of the Act. For example, a person engaging in an "unfair" or "deceptive" act is liable only for damages directly related to the "unfair" or "deceptive" activity, and not for consequential damages.<sup>100</sup>

### *Georgia*

In 1975, the Georgia Legislature adopted the Fair Business

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<sup>93</sup> CAL. CIV. PROC. CODE § 338(4) (West 1973).

<sup>94</sup> CAL. CIV. CODE § 1783 (West 1973).

<sup>95</sup> FLA. STAT. § 501.011 (1973 & Supp. 1979).

<sup>96</sup> *Id.* § 501.211.

<sup>97</sup> *Id.* § 501.211(2). This section directs the trial judge in his discretion to award the prevailing party attorneys' fees and costs based upon the attorney's actual work on the case; attorneys' fees and costs are recoverable against a retailer, however, only if the retailer acted in bad faith and with actual knowledge of the falsity of the claim of the manufacturer or wholesaler which he was discussing.

<sup>98</sup> *Id.* § 501.207(1)(c).

<sup>99</sup> *Id.* § 501.203(5) (Supp. 1979).

<sup>100</sup> *Id.* § 501.212(3) (Supp. 1979).

Practices Act of 1975 (FBPA).<sup>101</sup> The FBPA utilizes a modified version of the definition of "deceptive trade practices" contained in the Uniform Deceptive Trade Practices Act<sup>102</sup> and proscribes the twelve specific practices as does the UDTPA after which it was modeled.<sup>103</sup> The beginning section of the FBPA states: "(a) Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce<sup>104</sup> are hereby declared unlawful."<sup>105</sup> Since the FBPA incorporates the Federal Trade Commission Act by reference, federal court and FTC interpretations of the Federal Trade Commission Act can be used to determine the meaning of "unlawful practices." The beginning section of the FBPA also states: "(b) By way of illustration only and without limiting the scope of subsection (a), the following practices are hereby declared unlawful" and lists the first eleven practices of the UDTPA with two changes.<sup>106</sup>

The Act provides for both administrative and private remedies. A private suit for injunctive relief is allowed, and general damages are allowed under the liberalized definition of "deceptive practices."<sup>107</sup> The requirement of scienter is no longer necessary for recovery of general damages or attorneys' fees,<sup>108</sup> but, if an intentional violation is established, a court may award up to three times the actual damages.<sup>109</sup> The Act also provides that "[i]f [a] court finds the action continued past the rejection of [a] reasonable written offer of settlement in bad faith or for the purposes of harassment, the court shall award attorneys' fees and expenses of liti-

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<sup>101</sup> GA. CODE ANN. § 106-1201-1217 (Supp. 1979).

<sup>102</sup> *Id.* § 106-1203(b).

<sup>103</sup> *Id.*

<sup>104</sup> "Trade" and "commerce" mean the advertising, distribution, sales, lease or offering for distribution, sale or lease, of any goods, services or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, anything of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of the state. *Id.* § 106-1202(c). "Consumer acts or practices" includes acts or practices intended to encourage consumer transactions. *Id.* § 106-1202(h).

<sup>105</sup> *Id.* § 106-1203(a).

<sup>106</sup> *Id.* § 106-1203(b).

<sup>107</sup> *Id.* § 106-1210(a).

<sup>108</sup> *Id.* § 106-1210(a), (d).

<sup>109</sup> *Id.* § 106-1210(c).

gation to the adverse party."<sup>110</sup> Retailers who are sued under the Act because of actions by their suppliers can file a claim against them for indemnity.<sup>111</sup> Furthermore, the Act provides that if the injury resulted from an error occurring through no fault of the offender, recovery will be limited to actual damages.<sup>112</sup>

### Ohio

Ohio has adopted a version of the Uniform Consumer Sales Practices Act, the statute promulgated by the Uniform Law Commissioners.<sup>113</sup> The Ohio Act<sup>114</sup> changes the substantive law of fraud, deception, and unconscionability relevant to "consumer transactions."<sup>115</sup> It provides for individual, class action, and publicly enforced remedies, along with remedies which combine individual and public elements. An individual consumer can maintain an action for rescission of a contract,<sup>116</sup> actual damages,<sup>117</sup> a declaratory judgment,<sup>118</sup> or injunctive relief.<sup>119</sup> An individual consumer can also collect a minimum of \$200 in lieu of actual damages.<sup>120</sup> Consumers may bring class actions under the Act for violations of Ohio Commerce Department rules, and for practices which an Ohio court has determined to be violations of sections 1345.02 or 1345.03 of the Act.<sup>121</sup> The relief in such a class action, how-

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<sup>110</sup> *Id.* § 106-1210(d).

<sup>111</sup> *Id.* § 106-1210(e).

<sup>112</sup> *Id.* § 106-1211.

<sup>113</sup> Uniform Consumer Sales Practices Act, 7A U.L.A. 1 (1978).

<sup>114</sup> OHIO REV. CODE ANN. §§ 1345.01-1345.99 (Page 1979).

<sup>115</sup> " 'Consumer transaction' means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible . . . to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." OHIO REV. CODE ANN. § 1345.01(A) (Page 1979). However, transactions between consumers and the utilities specified in OHIO REV. CODE ANN. § 4905.03 (Page 1973) (*i.e.*, telephone companies, electric companies, and water companies) are excluded from coverage, as are dealings with the financial institutions and insurance companies described in OHIO REV. CODE ANN. § 5725.01 (Page 1973), along with attorney-client and physician-patient transactions. *Id.* § 1345.01(A) (Page 1979).

<sup>116</sup> *Id.* § 1345.09(A) (Page 1979).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* § 1345.09(D).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* § 1345.09(B).

<sup>121</sup> *Id.*

ever, is limited to actual damages; the \$100 minimum damage amount is not available in a class suit.<sup>122</sup>

The Act forbids both "deceptive acts or practices"<sup>123</sup> and "unconscionable acts or practices"<sup>124</sup> in consumer transactions. Section 1345.02 of the Act lists a series<sup>125</sup> of "deceptive" practices and proof of the commission of one of these practices establishes a violation of the Act. The specific practices described in section 1345.02 are illustrative and do not exhaust the category of prohibited deceptive practices. On the other hand, section 1345.03, which deals with unconscionability, also lists a series<sup>126</sup> of sales

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 1345.02.

<sup>124</sup> *Id.* § 1345.03.

<sup>125</sup> OHIO REV. CODE ANN. § 1345.02(B), (C) (Page 1979) provides as follows:

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive.

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;

(9) That the supplier has a sponsorship, approval, or affiliation he does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies or obligations if the representation is false.

(C) No supplier shall offer to the consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction.

<sup>126</sup> *Id.* § 1345.03(B) provides as follows:

(B) In determining whether an act or practice is unconscionable,

methods but makes proof of a supplier's use of such methods only one circumstance to be taken into consideration in determining whether his conduct is unconscionable. Proof of knowledge by the supplier, however, is required.

The deceptive sales techniques which the Act prohibits include misrepresentations incorporated into sales pitches and deliberate schemes to defraud. Misrepresentations as to the quality,<sup>127</sup> durability,<sup>128</sup> age,<sup>129</sup> or endorsement<sup>130</sup> of the product offered are forbidden. Premeditated techniques which are prohibited are false fire sales,<sup>131</sup> referral sales schemes,<sup>132</sup> and bait-and-switch advertising.<sup>133</sup> Post-sale protection is also afforded.<sup>134</sup> Assurances given in reaction to consumer complaints, and threats made to stifle complaints, can constitute violations.

The Director of Commerce is empowered to promulgate detailed substantive rules defining deceptive trade practices which

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the following circumstances shall be taken into consideration:

- (1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;
- (2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;
- (3) Whether the supplier knew at the time the transaction was entered into the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;
- (4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;
- (5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;
- (6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment.

<sup>127</sup> *Id.* § 1345.02(B)(2).

<sup>128</sup> *Id.* § 1345.02(B)(7).

<sup>129</sup> *Id.* § 1345.02(B)(3).

<sup>130</sup> *Id.* § 1345.02(B)(9).

<sup>131</sup> *Id.* § 1345.02(B)(4); Uniform Consumer Sales Practices Act § 3(b)(4), Commissioner's Comment, 7A U.L.A. 8 (1978).

<sup>132</sup> OHIO REV. CODE ANN. § 1345.02(C) (Page 1979).

<sup>133</sup> *Id.* § 1345.02(B)(6); Uniform Consumer Sales Practices Act § 3(b)(6), Commissioner's Comment, 7A U.L.A. 8 (1978).

<sup>134</sup> OHIO REV. CODE ANN. §§ 1345.02(A), 1345.03(A) (Page 1979).

constitute violations of section 1345.02.<sup>135</sup> One such rule makes prior statements germane to the commission of a deceptive act. Hence, even if the parol evidence rule otherwise would have prevented the substantive content of such prior statements from being made a part of the consumer-supplier agreement, and thereby precluded the consumer from holding the supplier to the fulfillment of pre-sale statements and promises, the consumer can nevertheless offer proof of such statements in the demonstration of a deceptive practice.<sup>136</sup> As a result, the parol evidence rule is rendered irrelevant.

### *Oregon*

In 1971, the Oregon legislature enacted the Unlawful Trade Practices Act (UTPA), which gives to consumers both public and private remedies against specific unlawful business practices.<sup>137</sup> In order to prevail in a private action brought under the UTPA, however, a consumer must show by a preponderance of the evidence that the defendant engaged in an unlawful trade practice, or introduce proof of any prior injunction, final judgment, or court order issued pursuant to the public enforcement portion of the UTPA, as prima facie proof of a violation of the Act.<sup>138</sup>

The UTPA does not require the plaintiff to prove intent or reliance as is required in common law fraud. He need only show conduct by the defendant which the defendant knew or should have known was a violation of the Act.<sup>139</sup> Plaintiff, moreover, is entitled to file additional separate counts in fraud, misrepresentation, and breach of warranty.<sup>140</sup> The statute of limitations period is one year and is tolled from the date of the discovery of the

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<sup>135</sup> OHIO REV. CODE ANN. § 1345.05(B) (Page 1979). See also *id.* ch. 119.

<sup>136</sup> See *Sparhawk v. Gorham*, 101 Ohio App. 362, 139 N.E.2d 652 (1956).

<sup>137</sup> OR. REV. STAT. §§ 646.605-646.656 (1977).

<sup>138</sup> "A willful violation occurs when the person committing the violation knew or should have known that his conduct was a violation." *Id.* § 646.605(8).

<sup>139</sup> *Id.* § 646.638(1).

<sup>140</sup> *Id.* § 646.656. The action may be brought in the form of a counterclaim against the seller or lessor as well. *Id.* § 646.638(6). The Oregon Supreme Court considered but failed to decide the issue of whether OR. REV. STAT. § 646.656 allows the combination of a suit in equity for rescission of a contract with an action at law for damages. *Sherrod v. Holzshuh*, 274 Or. 327, 330-31, 546 P.2d 470, 472 (1976).

unlawful practice.<sup>141</sup> The UTPA provides that an injured consumer may sue to recover actual damages or \$200, whichever is greater.<sup>142</sup> The plaintiff need not allege or prove the amount of actual loss in an action to recover the statutory minimum of \$200; the actual amount of loss is held immaterial to the recovery.<sup>143</sup> The plaintiff may also request an award of punitive damages along with equitable relief<sup>144</sup> and reasonable attorneys' fees and costs.<sup>145</sup>

The plaintiff in a consumer action need not show a "willful and malicious" misrepresentation by the defendant in order to receive punitive damages. In *Allen v. Morgan Drive Away, Inc.*,<sup>146</sup> the Oregon Supreme Court held that punitive damages are justified if the conduct of the defendant is such that it should be deterred.<sup>147</sup> In that case, the court held that evidence showing a "deliberate and calculated effort to misrepresent the facts" surrounding the specific transaction was sufficient to justify the imposition of punitive damages.<sup>148</sup> Nevertheless, the requirement of "reasonable proportionality" may not be applied. One Oregon court, for example, allowed each plaintiff to seek actual damages of \$34.95 and punitive damages of \$250,000.<sup>149</sup>

### Texas

Texas adopted in 1975, and amended in September 1977 and in August 1979, the Deceptive Trade Practices Act (DTPA).<sup>150</sup> Because the 1977 and 1979 amendments to the DTPA are not retroactive, and because each amendment makes substantial changes to the Act, a consumer contemplating suit under the Act

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<sup>141</sup> OR. REV. STAT. § 646.638(5) (1977). The limitation period is suspended from running when a public enforcement suit is filed under section 646.632(1) by the local district attorney or the attorney general. *Id.*

<sup>142</sup> *Id.* § 646.638(1).

<sup>143</sup> *Scott v. Western Int'l Surplus Sales, Inc.*, 267 Or. 512, 517 P.2d 661 (1973).

<sup>144</sup> OR. REV. STAT. § 646.638(1) (1977).

<sup>145</sup> *Id.* § 646.638(3).

<sup>146</sup> 273 Or. 614, 542 P.2d 896 (1975).

<sup>147</sup> *Id.* at 616, 542 P.2d at 898.

<sup>148</sup> *Id.*

<sup>149</sup> *Jeffries v. Doe*, Civ. No. 78685 (Cir. Ct. Marion County, Or. Nov. 23, 1973), originally filed as Civ. No. 72-2506 (Cir. Ct. Lane County, Or.); *David v. Doe*, Civ. No. 78672 (Cir. Ct. Marion County, Or. Nov. 14, 1973), originally filed as Civ. No. 72-2898 (Cir. Ct. Lane County, Or.).

<sup>150</sup> TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon Supp. 1980).

should carefully review the amendments which apply to his cause of action. Generally, however, the DTPA allows any consumer who has been adversely affected by a deceptive or misleading practice to maintain a private action for treble damages and attorneys' fees.<sup>151</sup> The Act covers deceptive or misleading acts relating to services and repairs as well as to goods;<sup>152</sup> both business<sup>153</sup> and personal uses of goods are covered by the Act.<sup>154</sup> The DTPA provides a cause of action for any consumer who is adversely affected by "the use or employment of any person of an act or practice declared to be unlawful by Section 17.46." Section 17.46(a) declares unlawful any "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Section 17.46(b) then defines "false, misleading, or deceptive acts or practices" to include twenty-two specific items of conduct, commonly referred to as the "laundry list."

An act or practice not listed in the "laundry list" of section 17.46(b) is "false, misleading or deceptive," and hence unlawful under section 17.46(a), if it has the capacity or tendency to deceive; actual deception is not required.<sup>155</sup> In determining capacity and tendency to deceive, consideration is given to the impact of the representation on the "ignorant, the unthinking and the credulous."<sup>156</sup> This standard was specifically articulated by the Supreme Court of Texas in the case of *Spradling v. Williams*.<sup>157</sup> "The law is not made for the protection of experts, but for the public, that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions."<sup>158</sup>

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<sup>151</sup> *Id.* § 17.50. The amendments effective August 29, 1979, limit the treble damages recovery to \$1,000. *Id.*

<sup>152</sup> *Id.* §§ 17.45, 17.46.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* § 17.46. The Act outlines five separate categories of unlawful conduct: (1) false, misleading or deceptive acts or practices; (2) a laundry list of practices which are considered deceptive per se; (3) breach of an express or implied warranty; (4) any unconscionable action or course of action; and (5) deceptive or misleading practices in the insurance business, as defined by rules and regulations issued by the Texas State Board of Insurance. *Id.*

<sup>155</sup> *FTC v. Hires Turner Glass Co.*, 81 F.2d 362 (3d Cir. 1935).

<sup>156</sup> *Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978).

<sup>157</sup> *Id.* at 563.

<sup>158</sup> *Id.*



Furthermore, evidence of intent to deceive or intent to violate the law is not required to prove that conduct is "false, misleading, or deceptive."<sup>159</sup>

Unlike the other state statutes previously discussed, the DTPA mandates the imposition of punitive damages<sup>160</sup> unless the defendant has availed himself of one of the three enumerated defenses: (1) bona fide error; (2) defendant did not receive written notice, or, if he did receive notice, he tendered plaintiff's damages, including attorneys' fees; and (3) for breach of warranty, defendant was not given a reasonable opportunity to cure the defect before suit was filed.<sup>161</sup> Like several state statutes mentioned previously, however, the DTPA requires that FTC and federal court interpretations of the FTCA be used for guidance in determining whether specific conduct constitutes a false, misleading or deceptive act.<sup>162</sup> In actions by consumers for damages, as opposed to actions by the attorney general, only court decisions are to be used for guidance.<sup>163</sup>

The Uniform Commercial Code permits the disclaimer of warranties and the limitation or modification of remedies.<sup>164</sup> The DTPA, however, provides that "[a]ny waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void."<sup>165</sup> The question raised by this provision is whether this "no waiver" clause negates exclusions and limitations in a warranty which were heretofore allowed under the UCC. One commentator has suggested that "[i]f Section 2.316 is complied with, no warranty ever arises and, therefore, there is no remedy provided by the Act which the consumer could waive."<sup>166</sup> Whether sections 2-718 and 2-719 of the UCC, which permit limitation or modification of remedies, conflict with the Act's "no waiver" provision is still an open question. These sections provide

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<sup>159</sup> State v. Credit Bureau of Laredo, 530 S.W.2d 288, 293 (Tex. 1975).

<sup>160</sup> Littleton v. Woods, 554 S.W.2d 662 (Tex. 1977).

<sup>161</sup> TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1980).

<sup>162</sup> *Id.* § 17.46(c)(2); Spradling v. Williams, 566 S.W.2d 561, 562 (Tex. 1978).

<sup>163</sup> 566 S.W.2d at 562 n.1.

<sup>164</sup> U.C.C. §§ 2-316, 2-718, 2-719.

<sup>165</sup> TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1980).

<sup>166</sup> Note, *Implied Warranties: Can They Still Be Waived in Texas*, 26 BAYLOR L. REV. 440, 448 (1974).

for limitation or modification of remedies for breach of a warranty that has not been disclaimed. There appears to be no way to reconcile these provisions with the "no waiver" provision in many consumer transactions. For example, any attempt by the seller to limit the consumer's recovery to actual damages would apparently be void, since the Act entitles the consumer to seek "three times [his] actual damages." Moreover, any attempt to limit the consumer's remedy for breach of warranty to repair and replacement, which is permissible under section 2-719 of the UCC, may be void under the "no waiver" provision, since such a limitation of remedies would impair the injured consumer's statutory right to seek any or all of the remedies listed in section 17.50(b) of the Act.

One of the interesting aspects of the Act is that it expressly includes the insurance industry in its coverage. A consumer is entitled to sue under the DTPA where he has been adversely affected by "an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."<sup>167</sup> Among other things, the Act prohibits misrepresentations with respect to the terms or benefits of any policy,<sup>168</sup> as well as untrue, deceptive, or misleading information and advertising.<sup>169</sup> In addition to providing a cause of action under the DTPA for violations of the State Insurance Code, the legislature also provided in the Insurance Code itself a private cause of action for violations of rules or regulations of the State Board of Insurance issued under article 21.21 of the Insurance Code or any practice prohibited by section 17.46 of the DTPA.<sup>170</sup> The result of providing a private cause of action under article 21.21 of the Insurance Code for violations of section 17.46 of the DTPA is that the entire "laundry list" contained in section 17.46(b) of the DTPA, as well as the section 17.46(a) "catch-all" prohibition, are now incorporated into article 21.21 of the Insurance Code itself.

The major difference between the aforementioned private causes of action is that in article 21.21 of the Insurance Code, the legislature did not limit the class of plaintiffs who can sue to "con-

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<sup>167</sup> TEX. INS. CODE ANN. art. 21.21, § 3 (Vernon 1963).

<sup>168</sup> *Id.* § 4(1).

<sup>169</sup> *Id.* § 4(2).

<sup>170</sup> TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1979).

sumers.” Rather, section 16 of article 21.21 allows an action by “any person who has been injured by another’s engaging in any of the practices declared [unlawful].”<sup>171</sup> “Person” is broadly defined as “any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and life insurance counselors.”<sup>172</sup>

Private causes of action under both the Insurance Code and the DTPA may be maintained for violations of rules or regulations issued under article 21.21 by the State Board of Insurance as well as for violations of article 21.21 itself.<sup>173</sup> The State Board of Insurance, in 1971, issued rules and regulations concerning insurance trade practices, advertising, and solicitation.<sup>174</sup> The most significant section of these rules and regulations provides as follows:

No person shall engage in this State in any trade practice that is a misrepresentation of an insurance policy, that is an unfair method of competition or that is an unfair or deceptive act or practice as defined by the provisions of the Insurance Code of Texas or as defined by these and other Rules and Regulations of the State Board of Insurance.<sup>175</sup>

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<sup>171</sup> *Id.* § 16(9). Compare *id.* art. 21.21, § 16(a) with TEX. BUS. & COM. CODE ANN. § 17.50(9) (Vernon Supp. 1980).

<sup>172</sup> TEX. INS. CODE ANN. art. 21.21, § 2(a).

<sup>173</sup> *Id.* § 16(a).

<sup>174</sup> Texas State Board of Insurance, Regulation in Respect of Insurance Trade Practices, Advertising and Solicitations, Docket No. 18663 (Dec. 3, 1971). Copies are available from the State Board of Insurance, Austin, Texas. Note that section 1 makes these rules and regulations applicable to “insurers and insurance agents and other persons in their conduct of the business of insurance or in connection therewith, whether done directly or indirectly and irrespective of whether the person is active as insurer, principal, agent, employer, or employee, or in other capacity or connection with such insurer.”

<sup>175</sup> *Id.* The term “misrepresentation” is expressly defined as follows:

Sec. 5. MISREPRESENTATION DEFINED. STANDARDS FOR DETERMINING MISREPRESENTATION. The term misrepresentation of the prohibited conduct, act or practice that constitutes misrepresentation by a person subject to the provisions of this regulation, is defined as any one of the following acts or omissions:

- (a) any untrue statement of a material fact; or
- (b) any omission to state a material fact necessary to make the statements made (considered in the light of the circumstances under which they are made) not misleading; or
- (c) the making of any statement in such manner or order as to

The regulations of the State Board of Insurance also direct the Commissioner of Insurance to issue interpretations and guidelines to aid in the administration and enforcement of the Board regulations.<sup>176</sup> The Commissioner of Insurance, by official order, issued such guidelines in 1971.<sup>177</sup> It is unclear whether violation of the provisions of these guidelines constitutes a violation of "rules and regulations" of the State Board of Insurance. If the Commissioner's order containing these guidelines carries the force of a Board rule or regulation, then a private cause of action arises under the DTPA and under article 21.21 of the Insurance Code when any act or practice violates the guidelines. At a minimum, the guidelines are strongly persuasive in determining what acts or practices constitute unfair and deceptive trade practices or unfair methods of competition.<sup>178</sup>

### *Washington*

In 1961, the state legislature enacted the Washington Consumer Protection Act (WCPA).<sup>179</sup> The Act provided Washington's consumers, acting through their state attorney general, with an administrative remedy for unfair or deceptive practices employed by the business community in the conduct of trade or commerce.<sup>180</sup> The Act was amended in 1970 to give Washington consumers the

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mislead a reasonably prudent person to a false conclusion of a material fact; or

(d) any material misstatement of law; or

(e) any failure to disclose any matter required by law to be disclosed, including failure to make disclosure in accordance with the provisions of these and other applicable regulations of the State Board of Insurance.

*Id.* § 5. This rule effectively requires a finding that the misrepresentation complained of be material.

<sup>176</sup> Texas State Board of Insurance, Regulation in Respect of Insurance Trade Practices, Advertising and Solicitations, Docket No. 18663, § 7 (Dec. 3, 1971).

<sup>177</sup> Texas State Board of Insurance, Regulation of Insurance Trade Practices, Advertising and Solicitation, Docket No. 35848 (Dec. 21, 1971).

<sup>178</sup> Cf. TEX. BUS. & COM. CODE ANN. § 17.46(c) (Vernon Supp. 1980), which directs the courts to look to FTC and federal court interpretations of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976), in construing section 17.46(a) of the Deceptive Trade Practices Act.

<sup>179</sup> WASH. REV. CODE §§ 19.86.010-19.86.920 (1978).

<sup>180</sup> WASH. REV. CODE § 19.86.020 (1978) provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

right to bring a private action for damages<sup>181</sup> and to obtain treble damages and attorneys' fees.<sup>182</sup>

The Washington Supreme Court formulated the concept of the "per se" violation, in 1972, holding that the infringement of any law designed to protect the public is "per se" an unfair or deceptive practice condemned by the WCPA.<sup>183</sup> In 1973, the court continued its liberal construction of the Act in *Hockley v. Hargitt*<sup>184</sup> by allowing the plaintiff to enjoin future violations of the WCPA. In 1975, however, the court in *Johnston v. Beneficial Management Corp.*<sup>185</sup> declared that the words "unfair act or practice," as used in the statute, are not actionable unless the affirmative and deceitful actions are designed to effect a sale.<sup>186</sup> The court observed that the state legislature had modeled the WCPA after the Federal Trade Commission Act.<sup>187</sup> Since all the cases decided under the FTCA concern affirmative acts designed to effect a sale,<sup>188</sup> the court concluded that actionable conduct, pursuant to the Act, must also involve actions designed to effect a sale.<sup>189</sup>

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<sup>181</sup> *Id.* § 19.86.090, formerly ch. 216, § 9 [1961] Wash. Sess. Laws 1958, granted each citizen the right to bring a private action for damages resulting from unfair or deceptive acts or practices.

<sup>182</sup> WASH. REV. CODE § 19.86.090 (1978) provides for treble damages to be awarded by the court in its discretion, provided the increased award does not exceed one thousand dollars.

<sup>183</sup> *State v. Reader's Digest Ass'n*, 81 Wash. 2d 259, 501 P.2d 290 (1972).

<sup>184</sup> 82 Wash. 2d 337, 510 P.2d 1123 (1973).

<sup>185</sup> 85 Wash. 2d 637, 538 P.2d 510 (1975).

<sup>186</sup> *Id.* at 643, 538 P.2d at 515. The basis of the action arose from the allegations that the seller, National Appliance Company, used high pressure sales tactics to induce the buyer to purchase a vacuum cleaner and a membership in a "family buying power plan" and grossly misrepresented the value of both. It was alleged that the finance company, National Finance Corporation, knew of the seller's deceitful practices before the contracts were purchased and that it made a profit from those transactions.

The court dismissed the plaintiff's contentions that Nationwide Finance Corporation's (assignee of the contracts purchased by National Finance Corporation) offer to make additional loans under the contract constituted an unfair act. The court reasoned that the alleged offer did not unfairly induce a purchase and the words "unfair act or practice" are not actionable unless the deceitful actions were designed to effect a sale.

<sup>187</sup> 15 U.S.C. §§ 41-51 (1977).

<sup>188</sup> 85 Wash. 2d at 643, 538 P.2d at 515.

<sup>189</sup> *Id.* at 643-44, 538 P.2d at 515.

## CONCLUSION

Although the facts of each case must be carefully analyzed to determine the applicability of state and federal consumer protection statutes, it is apparent that these laws can have a significant impact on aviation litigation. The additional remedies of attorneys' fees and punitive damages, together with expanded conceptions of what constitutes relevant and material evidence, should provide sufficient incentive to the plaintiffs' bar to make increasing use of the consumer protection statutes in aviation litigation.



**Comments  
and  
Case Notes**



