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CONSUMER PROTECTION IN NORTH DAKOTA

I. INTRODUCTION

Relatively few North Dakota consumers are aware of the provisions of the Consumer Fraud and Unlawful Credit Practice Act¹ contained in Chapter 51-15 of the North Dakota Century Code.² Chapter 51-15, together with Chapter 51-13, the Retail Installment Sales Act, and Chapter 51-14, the Revolving Charge Accounts Act, constitute the major North Dakota consumer fraud provisions. The latter two chapters extend the area of protection against fraudulent practices to include situations involving violations of Chapters 51-13 and 51-14.³

Chapter 51-15 was enacted in 1965.⁴ However, until 1971 there was no organized consumer protection agency within the office of the Attorney General, the state department authorized by Chapter 51-15 to enforce the legislation. In 1971, a special investigator, C. B. "Curt" Hansen, was assigned to create the Consumer Fraud Division of the Attorney General's Office.

From its inception in 1965 to September of 1971, all items of Consumer Fraud were handled on a hit and miss basis by whatever attorney [within the Attorney General's Office] had the time to spend without neglecting his other duties. We had no record keeping of any type and no one developed

1. N.D. CENT. CODE § 51-15 (Supp. 1971) [hereinafter referred to as Chapter 51-15]. N.D. CENT. CODE § 51-13 (1960); § 51-14 (1960) are hereinafter referred to as "Chapter 51-13" and "Chapter 51-14," respectively. See Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 YALE L.J. 1529 (1971) for an excellent discussion of consumer frauds, schemes, laws, and problems which are relevant to the text which follows.

2. Interview with C. B. "Curt" Hansen, Special Investigator and Administrative Assistant to the Attorney General, in Bismarck, North Dakota, July 21, 1972 [hereinafter referred to as Interview with Curt Hansen].

3. Both Chapters 51-13 and 51-14 have penalties of imprisonment for not more than one year, a fine not exceeding \$500, or both. They also contain provisions barring recovery by a seller of service charges, delinquency charges, or refinance charges under certain conditions. N.D. CENT. CODE § 51-14-05 (1960) further provides that if a violation is willful, a retail seller shall have no right to any principal, credit service charge, interest, or other charge made against the buyer. The practical effect of including Chapters 51-13 and 51-14 by reference into Chapter 51-15 is to allow the Attorney General to investigate and prosecute those fraudulent practices that involve a retail sales contract or a revolving charge account. N.D. CENT. CODE § 51-14.1-02 (Supp. 1971) limits the liability of a credit holder to \$100.

See also N.D. CENT. CODE §§ 9-03-08, 9-03-09 (1959) which define actual and constructive fraud regarding contracts. However, proof of injury is necessary, and one is limited in the amount which may be recovered compared to the amount recoverable under Chapter 51-15 if the sum involved is relatively small. This approach is also useful in correcting past wrongs, but is of little help in stopping future acts.

4. N.D. CENT. CODE § 51-15 (Supp. 1971). See also SESS. LAWS, ch. 332 (1965).

any expertise in this area. In September of 1971, I was assigned the project of establishing an effective, but not costly operation in the consumer fraud area. I now work full time in Consumer Fraud, and we have the services of one secretary on a part time basis and use [Assistant Attorney General] Robert Brady for consultation and trial work only.⁵

In the process of administering Chapter 51-15, it was discovered that the present consumer fraud law did not adequately protect North Dakota consumers. The most notable area of concern was pyramid or chain-referral sales.⁶ In these pyramid sales schemes, it is difficult to show an intent to deceive under Chapter 51-15, and to discover sufficient evidence to bring actions against a corporation utilizing such a sales method because "people hate to admit that they've been taken."

During the 1973 North Dakota legislative session, not all the proposed consumer legislation was passed, but significant steps were taken.

II. ANALYSIS OF CHAPTER 51-15

A. BASIC ELEMENTS OF FRAUD

There are four basic elements which must be satisfied to constitute a violation of Chapter 51-15. First, there must be a deceptive act or practice, fraud, false pretense, false promise, or misrepresentation. Second, this deceptive act or practice must be employed by a person.⁸ Third, there must be an intent that others rely upon this deceptive act or practice. Fourth, these three elements must be used in connection with the sale⁹ or advertisement¹⁰ of merchandise.¹¹

5. Letter from C. B. "Curt" Hansen to Ms. Annle Laurle Gunther, June 1, 1972 [hereinafter referred to as Letter from Curt Hansen].

6. See State *ex rel.* Johaneson v. Glenn P. Turner Enterprises, No. 44131 (1st Dist., N.D., filed July 18, 1972).

7. Interview with Curt Hansen.

8. "Person" means any natural person or his legal representative, partnership, corporation, company, trust, business entity, or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee, or cestui que trust thereof. N.D. CENT. CODE § 51-15-01(3) (Supp. 1971).

9. "Sale" means any sale, offer for sale, or attempt to sell any merchandise for any consideration. N.D. CENT. CODE § 51-15-01 (4) (Supp. 1971). Thus, a sale need not be completed to fall under Chapter 51-15. This is especially relevant in regard to Chapters 51-13 and 51-14 because it allows enforcement of these chapters without an actual violation as required by the penalty provisions of Chapters 51-13 and 51-14.

10. "Advertisement" includes the attempt by publication, dissemination, solicitation or circulation, oral or written, to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise. N.D. CENT. CODE § 51-15-01 (1) (Supp. 1971). The advertising media is specifically exempted from the provisions of Chapter 51-15 when there is no knowledge of the intent, design, or purpose of the advertiser. N.D. CENT. CODE § 51-15-03 (Supp. 1971). See N.D. CENT. CODE ch. 51-12 (1960) (for the provisions of North Dakota's false advertising statute); Austern, *What is "Unfair Advertising?"—A Discussion of Consumer Advertising from the Point of View of the Consumer, the Government, and Industry*, 27 BUS. LAW 883 (1972) provides an overview in the area of advertising.

11. "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate, or services. N.D. CENT. CODE § 51-15-01 (2) (Supp. 1971).

B. POWERS OF THE ATTORNEY GENERAL

If the Attorney General believes that any person has violated, is violating, or is about to violate the provisions of Chapter 51-15, he may use several of the powers granted to him to investigate the alleged fraud. After a complaint is received and a determination is made that it is well founded and that it is within his jurisdiction, the Attorney General may take the following action:

1. Require that the person being investigated make a full statement or report, under oath, of all the facts and circumstances surrounding the alleged deceptive act or practice;
2. Examine under oath any person who is connected with the sale or advertisement of any merchandise;
3. Examine any merchandise, sample, record, book, document, account, or paper;
4. Impound any record, book, document, account, paper, or sample of merchandise material to the alleged deceptive act or practice, *but only by order of district court*;
5. Issue subpoenas to any person;
6. Administer an oath;
7. Conduct hearings to aid investigation or inquiry;
8. Prescribe rules and regulations on consumer affairs which shall have the force of law.¹²

In the course of the administration of Chapter 51-15, the Attorney General has not made any rules or regulations on consumer affairs. There is a potentially strong provision which the Attorney General may use to provide quality standards for merchandise sold in North Dakota, to set up sales standards, and to regulate sales practices. It is hoped that the Attorney General will use this provision to close the legal loopholes in Chapter 51-15 and to clarify the gray areas in consumer affairs. Also, the Attorney General could use this provision to bring about the removal of unsafe or dangerous merchandise from the North Dakota market. These broad powers, if effectively utilized by the Attorney General, could give him a decisive and positive role in consumer affairs.

C. PENALTIES FOR FAILURE TO SUPPLY INFORMATION OR TO OBEY A SUBPOENA

If any person fails or refuses to supply requested information or to obey a subpoena, the Attorney General must apply to the district court (after giving notice) to request an order granting injunctive relief. The effect of the injunctive relief is to restrain

12. N.D. CENT. CODE §§ 51-15-04, 51-15-05 (Supp. 1971).

the sale or advertisement of any merchandise of such person by: vacating, admitting, or suspending the corporate charter of a North Dakota corporation; revoking or suspending a foreign corporation's certificate of authority to do business; revoking or suspending any other licenses, permits, or certificates used to further the allegedly unlawful practice; and granting such other relief as may be required.¹³ However, such measures may be applied only until the person files the statement or obeys the subpoena. In effect, this provision of Chapter 51-15 serves only to prevent a company that refuses to file a requested statement or obey a subpoena from operating until it complies. Such power is a serious economic lever which may serve to force compliance with Chapter 51-15.

D. REMEDIES AVAILABLE

1. *Injunction, Prohibition and Restitution*

If a district court finds that a person has violated Chapter 51-15, there are three basic remedies available to the Attorney General. First, he may obtain an injunction prohibiting the person from continuing such deceptive acts and practices, engaging in them, or doing any acts in furtherance of such deceptive acts and practices, after giving the person appropriate notice. Second, the court may forbid further use or employment of any unlawful practices. This is an effective weapon to prevent unscrupulous businessmen from continuing fraudulent practices. Often, hard-core con artists go from one shady deal to another, and with this power the court can stop them from continuing such practices. Presumably, a violation of such a court order would be treated as a contempt of court, although the statute is not clear on this point. Third, the court can make such orders or judgments as may be necessary to restore to any person, money or property, real or personal, which may have been acquired from him in violation of Chapter 51-15.¹⁴ This provision is the most practical and most consumer-oriented of the remedies available under Chapter 51-15. Often the people who have been defrauded by unethical practices are those least able to obtain legal assistance—the poor, the elderly, and the ignorant.¹⁵ Moreover, the cost of litigation is prohibitive, involving in many instances monetary amounts of less than \$100.¹⁶ Chapter

13. N.D. CENT. CODE § 51-15-06 (Supp. 1971).

14. N.D. CENT. CODE § 51-15-07 (Supp. 1971).

15. See Note, *Consumer Protection in Florida: Inadequate Legislative Treatment of Consumer Frauds*, 23 U. FLA. L. REV. 528 (1971).

16. Interview with Curt Hansen. In personally reviewing the entire file of complaints received by the Attorney General, which amount to several thousand over the record-keeping period mentioned in the text above, the author noticed a substantial number of complaints involving \$10 or less.

51-15 is of particular benefit to the consumer as it enables the Attorney General to handle complaints involving small amounts. While exact figures are unavailable, it would seem logical that unscrupulous businessmen would take advantage of the fact that few people pursue these small matters. Moreover, many honest businessmen are unaware of the fact that some of their business practices are illegal, simply because no one has questioned them.¹⁷

The inadequacy which persists in most of the present state regulatory schemes arises primarily from: (1) the absence of an effective remedy for the consumer whose injury does not justify the expense of recourse to the courts, and (2) the absence of an effective state power to combat deceptive practices which are widespread or difficult to discover.¹⁸

2. Receivership

In addition to the three basic remedies of injunction, prohibition, and restitution, when it appears to the Attorney General that a person has engaged in or is engaging in a practice declared unlawful by Chapter 51-13, 51-14, or 51-15 and that such person is about to (1) conceal his assets; (2) conceal his person; or (3) leave the state, the Attorney General may apply to the district court, *ex parte*, for an order appointing a receiver to take charge of the assets of such a person. The requirements for receivership under Chapter 51-15 may be established by affidavit or other evidence.¹⁹

Chapter 51-15 enables the receiver to sue for, collect, receive, or take into his possession all the goods and chattels, rights and credits, money and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description that have been derived by means of any practice declared unlawful by Chapters 51-13, 51-14, or 51-15. If any property so obtained has been commingled until it is unidentifiable in kind, the receiver may sell, convey, and assign this property as if it were property taken by unlawful means. The receiver may hold and dispose of the proceeds of sales of any such property under the direction of the court.

Any person who has suffered damage by the use or employment of any unlawful means in effecting a sale and who submits proof of such damage may participate with general creditors in the distribution of the assets to the extent that he has sustained out-of-pocket losses. The court retains jurisdiction in all proceedings relat-

17. *Id.*

18. Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 718 (1967).

19. N.D. CENT. CODE § 51-15-07 (Supp. 1971).

ing to these matters and in all questions arising out of these proceedings.²⁰ In addition, in any action brought by the Attorney General under Chapter 51-15, the state may recover the costs it has incurred in bringing the action.²¹ Furthermore, individual remedies are not barred by Chapter 51-15²²—the consumer may pursue the matter as well as the Attorney General.²³

E. SHORTCOMINGS OF CHAPTER 51-15

1. *Inadequate Investigative Staff*

In general, Chapter 51-15 is a strong consumer protection act, yet a few shortcomings are evident. One of the most positive aspects of Chapter 51-15 is the vesting of investigative and prosecutorial powers in the Attorney General.

[B]y allowing a state, through the attorney general rather than a local officer, to enforce consumer protection legislation, a statewide front is created against deceptive practices. The traditional ad hoc method of enforcement by the county attorney or individual consumers allowed many unethical businessmen to move from locality to locality to avoid prosecution. The state-wide approach, however, allows the attorney general to pursue deceptive practices throughout the state and assure their discontinuance.²⁴

No showing of actual injury must be made to begin an investigation or to obtain an injunction.²⁵ This enables the Attorney General to move against a deceptive practice before any actual damage occurs. The power of the Attorney General to promulgate rules and regulations in relation to consumer affairs, if used effectively, will allow him to move against specific unlawful practices, while still retaining the flexibility to move against general deceptive acts or practices.²⁶

The investigative powers of the Attorney General provide an adequate means of obtaining information from a person suspected of violating Chapter 51-15. However, the Attorney General has only a minimal investigatory staff, consisting of two investigators. The funding of both investigators is uncertain from year to year because

20. N.D. CENT. CODE § 51-15-08 (Supp. 1971).

21. N.D. CENT. CODE § 51-15-10 (Supp. 1971).

22. N.D. CENT. CODE § 51-15-09 (Supp. 1971).

23. See Note, *supra* note 18, at 710-18 for a discussion of common law actions, recent improvements, and enforcement of criminal statutes. The thrust of the discussion is the inadequacy of such remedies. See also Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271 (1971).

24. *Id.* at 718.

25. N.D. CENT. CODE §§ 51-15-04, 51-15-07 (Supp. 1971).

26. N.D. CENT. CODE § 51-15-05 (Supp. 1971). The Attorney General could ban specific practices such as "bait and switch" through the use of this provision.

they are not funded by the appropriation to the Attorney General, and are not a part of the Attorney General's regular staff.

Adequate provisions for investigation of deceptive practices are essential to an effective scheme of consumer protection legislation. Investigation is not only necessary for enforcement of the state's laws, but also useful in providing data which the legislature may utilize in making recommendations or determinations of general policy.²⁷

2. Fines, Restitution and Damages

There is no provision in Chapter 51-15 for fines, although Chapters 51-13 and 51-14 do provide for fines not to exceed \$500. Thus, it may be cheaper for a large scale business to continue violating Chapter 51-15 than to comply with the law. Violation of an injunction under the Idaho Consumer Protection Act subjects the violator to a maximum \$10,000 civil penalty²⁸ and the possibility of permanent forfeiture of a corporate franchise.²⁹ Another technique is to provide treble damages to the injured party,³⁰ but since the individual consumer usually suffers only minor damages³¹ this would not deter fraud as adequately as a civil penalty. The 1973 legislature adopted a bill prohibiting referral or chain referral sales and providing for treble damages, plus costs and reasonable attorney's fees.³² It would be wise to provide a similar penalty for violations of Chapter 51-15, if for no other reason than uniformity. Such a penalty would serve as more of a deterrent than the \$500 fine provided for in Chapters 51-13 and 51-14.³³

Minnesota, in its statute concerning referral sales, provides that any agreement in violation of the subsection is unenforceable and that the buyer may, at his option, rescind the contract. The consumer may return the property received and obtain full or partial restitution or he may retain the goods delivered and the benefit of any services performed without any further obligation to pay for them.³⁴ Alternative methods of enforcement employed by other states include civil fines as a remedy for unfair or deceptive practices³⁵ and allowance of \$200 liquidated damages, or actual damages, whichever is greater.³⁶

27. Note, *supra* note 18, at 724.

28. IDAHO CODE § 48-616 (Supp. 1972).

29. IDAHO CODE § 48-616 (Supp. 1972).

30. Note, *supra* note 18, at 736.

31. Note, *Consumer Protection Under the Iowa Consumer Fraud Act*, 54 IOWA L. REV. 319, 320 (1967).

32. Senate Bill 2244 (1973).

33. See text accompanying notes 61, 67, & 97-98 *infra*.

34. MINN. STAT. ANN. § 325.79 (3) (Supp. 1972).

35. *E.g.*, N.J. STAT. ANN. §§ 56:8-13 (Supp. 1972) (which provides for a fine of \$2,000 for the first offense and \$5,000 for each subsequent offense); REV. STAT. NEB. § 69-1402 (1971) (which provides for a fine up to \$500 for each offense).

36. IDAHO CODE § 48-608 (Supp. 1972).

The allowance of restitution and damages under Chapter 51-15 removes many of the objections to the imposition of a fine for violations of Chapter 51-15. It should be noted that the consumer is presently protected to this extent under Chapter 51-15, but that imposition of a fine as a policy matter will serve to deter fraudulent practices in North Dakota.³⁷

3. *Informal Proceedings*

Another inadequacy in Chapter 51-15 is the lack of any provision for the use of informal proceedings. Despite this, most disputes between consumers and merchants are handled with an assurance of voluntary discontinuance.³⁸ This amounts to an informal agreement stating the circumstances surrounding the complaint, the fact that such practices are a violation or that they may be a violation of Chapter 51-15, and an assurance that the merchant will no longer employ such fraudulent practices. Use of the assurance of voluntary discontinuance is an attempt by the Attorney General to "halt a deceptive practice, obtain restitution for consumers, and eliminate the problems of proof in future proceedings without the delay, cost, or the unpredictability of litigation."³⁹ A court, however, may choose to ignore an assurance of voluntary discontinuance or may not impose any penalty for a violation of a voluntary assurance of a discontinuance because of the non-statutory status of such an assurance. When this occurs, the Attorney General may find himself unable to enforce the out-of-court agreement.⁴⁰ While it may be that the Attorney General has the power to accept such assurances under present law, positive statutory language to his effect would make this method of settlement more attractive to the Attorney General.

Idaho, in its Consumer Protection Act,⁴¹ specifically sets out the procedure for executing what is termed an assurance of voluntary compliance, a concept similar to the assurance of voluntary discontinuance. Agreeing to an assurance of voluntary compliance is not considered an admission of violation of the Idaho Consumer Protection Act for any purpose.

Thus, a person so executing such document is not prejudicing himself if at some later time he is the subject of judicial inquiry. Also important in this respect is the fact that the completion of an assurance of voluntary compliance does not

37. See text accompanying note 14 *supra*.

38. Interview with Curt Hansen.

39. Note, *supra* note 18, at 720.

40. See Note, *supra* note 31, at 335.

41. IDAHO CODE ch. 48 (Supp. 1972).

foreclose judicial proceedings by the attorney general at any time such proceedings are in the public interest. A major factor which contributes to the effectiveness of the voluntary compliance provisions of this act is that by execution and adherence to such compliance, a businessman is likely to avoid the adverse publicity which judicial action may create.⁴²

In Washington an assurance of voluntary discontinuance is not considered an admission of a violation for any purpose, but proof of failure to comply with the assurance is taken as prima facie evidence of a violation of the consumer protection act.⁴³ Treating a violation of an assurance of voluntary discontinuance like a violation of an injunction, would serve to give force to such assurances.⁴⁴ In summary, adoption of legislation empowering the Attorney General to accept an assurance of voluntary discontinuance would make Chapter 51-15 more effective.

4. Receivership

Obtaining a receivership under Chapter 51-15 can be a difficult task. In the one case in which the North Dakota Attorney General sought a receivership, the court denied the request.⁴⁵ Chapter 51-15 imposes rather strict standards before a receivership may be set up; only upon a showing that a person is about to conceal himself, conceal his money, or leave the state may the court impose a receivership.⁴⁶ The conditions under which the court may appoint a receiver should be expanded to include those operations which have engaged in willful, substantial, and repeated violations of Chapter 51-15. This would insure that consumers defrauded by those operations which purposely set out to use deceptive acts or practices to sell their goods or services will be adequately reimbursed for their out-of-pocket damages.

5. Criminal Penalty

Imposition of a criminal penalty raises due process problems because of the broad investigative powers granted by Chapter 51-15. However, it can be argued that a criminal penalty should be imposed because many fly-by-night small time operators do not have suf-

42. Meuleman, *Idaho Consumer Protection Act: Enforcement Procedures*, 8 IDAHO L. REV. 322, 25 (1972).

43. REV. CODE WASH. ANN. § 19.86.100 (Supp. 1972).

44. Note, *supra* note 13, at 740.

45. State *ex rel.* Johanneson v. Glenn W. Turner Enterprises, No. 44131 (1st Dist., N.D. filed July 18, 1972).

46. N.D. CENT. CODE § 51-15-07 (Supp. 1971).

ficient funds to reimburse North Dakota consumers even if the Attorney General brings an action against them. Since they are judgement proof, the only way to punish such violators may be to impose a criminal penalty.⁴⁷ To insure against abuse of the provisions of the Fifth and Fourteenth Amendments relating to self-incrimination and due process, states which allow criminal penalties for consumer fraud violations also provide that no information obtained by the attorney general of that state may be used or admitted into evidence in any criminal prosecution.⁴⁸ The North Dakota 1973 legislature provided a criminal penalty for referral or chain referral sales prohibited by Chapter 51-15. This penalty can amount to a fine of not less than \$500 nor more than \$5,000, imprisonment in the state penitentiary for not more than five years, or in the county jail for not more than one year, or both such fine and imprisonment.⁴⁹ The advantage of such a penalty is that the offense is a felony until the time of sentencing, which facilitates and encourages extradition because Section 29-30-15 of the North Dakota Century Code provides that the state shall bear the cost of extradition in the case of a fugitive charged with a felony.

While the number of suits actually brought to court under Chapter 51-15 is comparatively small, the volume of cases handled by the Consumer Protection Division of the Attorney General's Office is large and appears to be growing as more people become aware that such protection exists.⁵⁰

III. AN ANALYSIS OF CHAPTER 51-13

Basically, Chapter 51-13 sets out the requirements for executing a retail installment sales contract.⁵¹

A. REQUIREMENTS OF A CONTRACT

1. *Form*

The requirements of a retail installment contract according to Chapter 51-13 are that it must be in writing, that it be dated, that it contain all the agreements of the parties, and that it be signed by both the buyer and the seller. Certain technical requirements

47. Interview with Robert P. Brady, Assistant Attorney General, in Bismarck, North Dakota, June 7, 1972 [hereinafter referred to as Interview with Robert P. Brady].

48. See, e.g., IOWA CODE ANN. § 713-24 (4) (b) (Supp. 1972).

49. Senate Bill 2244 (1973). This bill passed both houses without a dissenting vote.

50. See materials in appendix A. The increase is credited to increased awareness of the Consumer Fraud Division. Interview with Curt Hansen.

51. N.D. CENT. CODE § 51-13-01 (1960) defines the following: retail buyer, retail seller, retail installment sale, retail installment contract, cash sale price, time sale price, official fees, credit service charge, financing agency, holder, person, new motor vehicle, and used motor vehicle (listed as "motor vehicle, new and used"). Although these definitions follow most common sense meanings of such words, one researching this area should examine these definitions closely.

regarding type size and identification of the paper as a retail installment contract are also set out. The contract must contain a specific statement concerning the applicability of liability insurance and a notice to the buyer telling him to read the contract and to make sure the entire contract is filled out.⁵² The contract must also inform him that he has the following rights, among others:

1. He may pay off the contract in advance and receive a refund of the service charge;
2. He may redeem the property if repossessed for a default within the time provided by law; and
3. He may require under certain conditions a resale if the property is repossessed.⁵³

The seller must deliver a copy of the contract to the buyer and until the seller does so, the buyer who has not received delivery of the personal property has an unconditional right to cancel the contract and receive a refund of all payments. Technical requirements are set out for the acknowledgment by a buyer that a delivery of goods has been made. In addition, an adequate description of the personal property sold must be made.⁵⁴

2. *Statements of Cash Sale Price*

A full statement of the cash sale price must be made, including the value of the buyer's down payment (including trade-ins), the amount left to pay, the amount of any official fees, the principal balance, the amount of the credit service charge, the time balance, the number of installments, the amount of each installment in dollars, and the due date of each. The time sale price must also be included. Requirements for payments in unequal amounts are also set out in Chapter 51-13. The amount of the credit service charge may not exceed seven per cent simple interest computed on the principal balance or as otherwise provided.⁵⁵

3. *Insurance*

If the contract provides for insurance, the rates and policy provisions must be comparable to insurance obtainable through other sources. The seller must send the buyer a copy of the policy within thirty days after the execution of the contract. This copy must include the amount, kind, and scope of the insurance, and

52. N.D. CENT. CODE § 51-13-02 (1960).

53. N.D. CENT. CODE § 51-13-02 (2) (c) (3) (1960).

54. N.D. CENT. CODE § 51-13-02 (1960).

55. N.D. CENT. CODE §§ 51-13-02 (5), 51-13-03 (1), (2) (1960).

any other material terms. The buyer may purchase such insurance from an agent, broker, or company of his own choosing, but such a choice makes inclusion of the premium in the contract optional with the seller. Under this provision, he is also relieved of any duty to forward a copy of the policy to the buyer.

One area which has caused substantial trouble to finance companies is the provision that states that if the policy or certificate is cancelled, the unearned insurance premium refund must be credited to the final maturing installments of the contract. However, the credit may be decreased to the extent that the payment is applied toward similar insurance protecting the interests of either the buyer or the holder of the contract.⁵⁶

4. *Delinquency and Collection Charges*

When an installment is in default for more than ten days, a charge may be made, but it may not exceed five per cent of each installment or \$5.00, whichever is less. Only one such delinquency and collection charge may be made on any installment which is delinquent, regardless of how long it remains in default.⁵⁷

5. *Holders in Due Course*

Chapter 51-13 allows a finance company to purchase a retail installment contract from a seller. No notice is required to persons to whom the seller has an obligation, but the buyer must have notice of the assignment. A payment to the last known holder of the retail installment contract is valid where the buyer has had no notice of an assignment.⁵⁸ If the buyer makes a request in writing for a written statement concerning the dates, amounts, and total amount unpaid under a contract, the holder must provide such a statement. A receipt must be given for cash payments.⁵⁹

6. *Protection of the Buyer*

The maturity date of the retail installment contract may not be arbitrarily accelerated by the holder except by the buyer's default.⁶⁰ The contract cannot provide for a confession of judgment, power of attorney, or wage assignment,⁶¹ nor may the seller or holder include a provision authorizing them to enter unlawfully

56. N.D. CENT. CODE § 51-13-02 (6) (1960).

57. N.D. CENT. CODE § 51-13-02 (7) (1960).

58. N.D. CENT. CODE § 51-13-02 (9), (10) (1960).

59. N.D. CENT. CODE § 51-13-02 (11) (1960).

60. N.D. CENT. CODE § 51-13-02 (12) (1960).

61. N.D. CENT. CODE § 51-13-02 (13), (17) (1960).

or commit a breach of the peace to repossess personal property.⁶² The buyer cannot waive any right of action against the seller or holder, or their agents, for any illegal act committed in collection of payments or repossession of personal property, nor can he waive any other legal remedies under the contract.⁶³

A lien upon any goods, other than the personal property that is the subject matter of the retail installment sale, goods that are accessories, or goods used as collateral, is not valid.⁶⁴ Any attempted waiver of the protection of Chapter 51-13 is void and unenforceable.⁶⁵ After full payment of the debt, the buyer can make a written demand for an instrument that indicates payment in full and releases any security interest in the personal property involved.⁶⁶

B. CREDIT SERVICE CHARGE LIMITATION

The credit service charge is limited according to classifications. Automobiles are divided according to class, and an amount is set for each class, with the allowable interest rate ranging from \$7.00 to \$13.00 per one hundred dollars. On all other goods, the limit is \$10.00 per one hundred dollars.⁶⁷ The credit service charge must be computed only on that part of a year or years for which the contract runs.⁶⁸ The credit service charge must include all charges,⁶⁹ and must not include any fees and charges not provided for in subdivision 8, section 51-13-01 of the North Dakota Century Code. However, delinquency and collection charges may be added to this sum,⁷⁰ as may the service fees for refinancing.⁷¹

C. REFINANCING RETAIL INSTALLMENT CONTRACTS

Before a holder may alter a retail installment contract, he must obtain the agreement of the buyer. This includes extension of the scheduled due date, deferment of the scheduled payment of all or part of any installment or installments, or renewal of the balance of the contract.⁷² The holder is allowed to restate the amount of the installments and the due dates. He may collect a flat fee for an extension, deferment, or renewal which is not to exceed

62. N.D. CENT. CODE § 51-13-02 (14) (1960).

63. N.D. CENT. CODE § 51-13-02 (15), (18) (1960).

64. N.D. CENT. CODE § 51-13-02 (16) (1960).

65. N.D. CENT. CODE § 51-13-08 (1960).

66. N.D. CENT. CODE § 51-13-04 (1960).

67. N.D. CENT. CODE § 51-13-03 (1) (1960).

68. N.D. CENT. CODE § 51-13-03 (2) (1960).

69. N.D. CENT. CODE § 51-13-03 (4) (1960).

70. See N.D. CENT. CODE §§ 51-13-02 (7), 51-13-03 (4) (1960).

71. N.D. CENT. CODE § 51-13-06 (1960).

72. N.D. CENT. CODE § 51-13-06 (1960).

\$5.00. He may also receive an additional charge not to exceed one per cent per month simple interest on the balances from the date of the extension, deferment, or renewal. Furthermore, the holder may charge the buyer for the additional cost of any insurance premiums provided for in the contract, but this is subject to the provisions of subsection 6 of section 51-13-02.⁷³

D. PENALTIES

Violating the provisions of Chapter 51-13 is a misdemeanor, punishable by imprisonment for not more than one year or a fine in an amount not to exceed \$500, or both. If it is shown that violations of sections 51-13-02 or 41-13-03, relating to the requirements of retail installment contracts and to the credit service charge limitations, are willful, a conviction shall bar the recovery of any credit service charge, delinquency or collection charge, or refinancing charge on the retail installment contract involved.⁷⁴

III. AN ANALYSIS OF CHAPTER 51-14

Chapter 51-14 relates to revolving charge accounts. The definitions in Chapter 51-14 are similar to the definitions in Chapter 51-13, but there are some differences in phraseology.⁷⁵ A revolving charge agreement must be in writing and signed by the buyer. It must state the amount and rate of the credit service charge at a monthly percentage rate. The seller must deliver a copy of the agreement to the buyer prior to the date on which the first payment is due.⁷⁶ At the end of each monthly or other regular period, the seller must supply the buyer with a statement of the unpaid balance. This statement must include the following information:

- A. The amount of the unpaid balance;
- B. An identification of the goods or services purchased, the cash purchase price, and the date of the purchase unless otherwise furnished by the seller;
- C. Payments made and other credits;
- D. The amount of the service charge and its equivalent expressed as a percentage in annual simple interest; and
- E. A legend stating that the buyer may pay his total indebtedness.⁷⁷

73. N.D. CENT. CODE § 51-13-06 (1960).

74. N.D. CENT. CODE § 51-13-07 (1960).

75. Compare N.D. CENT. CODE § 51-13-01 and § 51-14-01 (1960).

76. N.D. CENT. CODE § 51-14-02 (1960).

77. *Id.*

The credit service charge is limited to one and one-half per cent per month, computed on the outstanding indebtedness from month to month,⁷⁸ which amounts to an eighteen per cent annual rate. This maximum rate is effective only after July 1, 1959, unless the seller or holder of an agreement executed prior to that date delivers a copy of an agreement in conformity with Chapter 51-14 and thereafter complies with the provisions of the Chapter.⁷⁹

Violating Chapter 51-14 is a misdemeanor that may be punished by a fine not to exceed \$500, by imprisonment in the county jail for not more than one year, or both. A revolving charge account or any act in the making or collection of such an account in violation of Chapter 51-14 will result in forfeiture of all credit service charges paid or coming due. If the violation is willful, the seller shall have no right to any of the funds collected, including principal, credit service charges, interest, or other fees and charges.⁸⁰ Such penalties are comparable to the penalties imposed by Chapter 51-13 discussed above. However, the penalties in both Chapters 51-13 and 51-14 may be inadequate as deterrents because of the relatively lenient penalties they impose and because small counties are hesitant to prosecute out-of-state violators due to the cost of extradition and prosecution.

IV. NEW LEGISLATION

The 1973 North Dakota legislature considered over twenty consumer-oriented bills and resolutions. Those which were passed give North Dakota consumers more protection and an opportunity to receive more information.

A. REFERRAL OR CHAIN REFERRAL SALES PROHIBITED

Perhaps the most important step forward in the area of consumer protection was the prohibition of chain referral sales in North Dakota. In the single test case in this area under Chapter 51-15, it became clear that Chapter 51-15 did not provide adequate protection against the widespread chain referral schemes employed by large out-of-state corporations.⁸¹ Although the court issued a temporary injunction, it was reluctant to set up a receivership, even though the Attorney General could show that the alleged fraud involved large amounts of money, that hundreds of North Dakota con-

78. N.D. CENT. CODE § 51-14-03 (1960).

79. N.D. CENT. CODE § 51-14-04 (1960).

80. N.D. CENT. CODE § 51-14-05 (1960).

81. *State ex rel. Johanneson v. Glenn W. Turner Enterprises*, No. 44131 (1st Dist., N.D., filed July 18, 1972).

sumers were involved, and that several other states had taken or were contemplating action against the same defendant (which would possibly have limited any recovery for North Dakota consumers).⁸²

1. *Definition and Operation of Chain Referral Sales*

A chain referral sales scheme operates like a chain letter. [A] referral sale is a scheme whereby a purchaser is induced to buy a product upon the understanding that he will receive money or credit on his purchase if he induces others to make similar purchases.⁸³

The actual scheme works upon a geometric progression. The buyer is approached in the following manner:

The potential purchaser is told that if he will submit a certain number of names of persons who might make similar purchases, he will receive a specified commission, to be applied against his debt to the seller. The prospects will be given a similar opportunity. Under a commission agreement the earnings will not only pay for the item purchased, but also will yield an indeterminate amount of profit. . . .⁸⁴

Such sales approaches are frequently used by encyclopedia, pots and pans, and small appliances companies.

Several corporations utilizing high-pressure sales techniques, misrepresentation of high profits, and chain referral sales schemes are operating in North Dakota. They offer franchises for dealerships as their only product. The costs of such franchises vary from \$421 to \$5,000.⁸⁵ For the buyer of a franchise or other products under a referral scheme to pay for his purchase and realize large profits, he must induce others to make a similar purchase. If a buyer must bring in five people to recover his investment, the progression develops as follows:

<i>Number of Persons in the Scheme</i>	<i>Level</i>
5	1
25	2
125	3
625	4
3,125	5

82. See Brief for Plaintiff, State *ex rel.* Johanneson v. Glenn W. Turner Enterprises, No. 44131 (1st Dist., N.D., filed July 18, 1972).

83. Note, *Let the "Seller" Beware—Another Approach to the Referral Sales Scheme*, 22 U. MIAMI L. REV. 861 (1968).

84. *Id.*

85. Interview with Robert P. Brady.

15,625	6
78,125	7
390,625	8
1,953,125	9
9,765,625	10

It must be remembered that such a scheme must proceed into infinity to work effectively, rather than just to ten levels. In a short time, all the available consumers would be exhausted in a state that has a limited population. In *Norman v. World Wide Distributors, Inc.*,⁸⁶ evidence was introduced showing that at the end of twenty months of operation, seventeen trillion salesmen would be required to carry on the referral program espoused by the defendant.⁸⁷

2. Approaches Taken to Referral Sales

The danger posed to consumers by referral sales has been recognized by several states, as well as the National Better Business Bureau. Different devices have been employed to combat referral sales schemes. These include the use of fraud theories, lottery statutes, the unconscionability clause of the Uniform Commercial Code (UCC), and consumer protection statutes.

Although suits brought under fraud theories have often proven successful against referral sales,⁸⁸ there are serious problems involved with this approach. First, there is a proof problem. All the elements of fraud must be shown, including injury.⁸⁹ These elements may be difficult to prove and the recovery may be limited. Second, for a misrepresentation to be the basis of a claim, "it must relate to a past or existing fact. Statements of expectation are not grounds for fraud, where the parties are dealing at arm's length."⁹⁰ This may serve to correct past wrongs but is of little use in stopping future acts. Third, there is little deterrence involved. Damages may be small so that it may be cheaper for a corporation to pay damages in a suit than to comply with the law. Fourth, few suits will probably be brought by individuals because many consumers are ignorant of their legal rights; those that are aware of their rights often feel that the costs of litigation are prohibitive.⁹¹ Often

86. *Norman v. World Wide Distributors, Inc.*, 202 Pa. Super 53, 195 A.2d 115 (1963).

87. *Id.* at 117.

88. See, e.g., *Matthews v. Aluminum Acceptance Corp.*, 1 Mich. App. 570, 137 N.W.2d 280 (1965); *Schow v. Guardtone*, 18 Utah 2d 135, 417 P.2d 643 (1966). But see *Lundstrom v. Radio Corp. of America*, 17 Utah 2d 114, 405 P.2d 339 (1965).

89. See text accompanying notes 8-12 *supra*.

90. Chapter 51-15 has eliminated the need to show damage as was necessary in a common law action for deceit. Note, *supra* note 83, at 871.

91. Note, *supra* note 15, at 532.

a buyer has gone deeply into debt to finance his purchase, and he cannot afford a further outlay of money during prolonged litigation. Many people who go for these get-rich-quick schemes are totally ignorant of the law.⁹²

Efforts to stop referral sales by prosecution under lottery statutes have not always been successful. In North Dakota, lotteries consist of these elements: prize, chance, and consideration.⁹³ In *State v. Glenn W. Turner Enterprises, Inc.*⁹⁴ the Attorney General argued:

In this situation the consideration is the necessity of paying thousands of dollars before one is allowed to participate. The prize is the fee or commission which participants receive if persons whom they sponsor are successfully induced into buying a position with the scheme, whether it be that of Koscot or Dare To Be Great. The element of chance is present in that the "sponsor" leaves the selling of the prospective participant to the agents and officers of the defendant, taking no significant part in the proceedings which take place at these sales meetings.⁹⁵

The court rejected this argument. It said that no element of chance was involved, since the purchaser's compensation depended directly on the success of his own efforts.⁹⁶

The unconscionability provision of the UCC has been suggested as an alternative means of challenging referral sales methods.⁹⁷

92. Interview with Robert P. Brady.

93. N.D. CENT. CODE § 12-24 (1960). Chapter 12-24-01 defines lotteries:

A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid, promised, or agreed to pay, any valuable consideration for the chance of obtaining such property or a portion of it, or for any share of or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, a raffle, a gift enterprise, or by whatever name the same might be known. Every lottery is a common nuisance and is unlawful.

94. *State ex rel. Johanneson v. Glenn W. Turner Enterprises*, No. 44131 (1st Dist., N.D. filed July 18, 1972).

95. *Id.*, Brief for Plaintiff, at 3.

96. *State ex rel. Johanneson v. Glenn W. Turner Enterprises*, No. 44131 (1st Dist., filed July 18, 1972).

97. N.D. CENT. CODE § 41-02-19 (1968) (U.C.C. § 2-302) states:

1. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

2. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

However, the term "unconscionable" is not defined, and the courts must go on a case-by-case determination. Thus, the effect of N.D. CENT. CODE § 41-02-19 upon referral sales is questionable. See Note, *Roundtable Discussion of Unconscionability, Etcetera*, 31 U. PITT. L. REV. 547 (1970) for a discussion of unconscionability in a broad context.

[T]he unconscionable approach to business promotional schemes would be better suited for the purpose than the lottery approach. his approach would enable the court to focus its attention on the unfairness and deception of a particular scheme as opposed to concentrating on the elements (prize, chance, and consideration) necessary for a lottery. . . . The lottery concept is ill-suited for the commercial world, whereas the unconscionability doctrine is especially applicable to a business setting and for the regulation of economic activity.⁹⁸

This theory was used by the state in *Lefkowitz v. ITM, Inc.*,⁹⁹ but apparently few other cases have used the unconscionability theory. Here again proof of what is unconscionable is difficult because there is no statutory definition of the term.

In combatting referral sales through the use of legislation, states have taken two different approaches: (1) The use of general consumer protection laws, such as the Uniform Deceptive Trade Practices Act; (2) The use of specific laws aimed at the particular problem of referral sales.

The use of statutes based on the Uniform Deceptive Trade Practices Act does not eliminate the general problems of proof and the individual problem of damage recovery any more than the private remedies which it supplements.¹⁰⁰ Idaho originally adopted the Uniform Deceptive Model Practices Act,¹⁰¹ but found it inadequate¹⁰² and adopted stronger consumer protection provisions.¹⁰³

The constitutionality of Iowa's referral sales statute was upheld¹⁰⁴ by the Iowa Supreme Court in *State ex rel. Turner v. Koscot Interplanetary, Inc.*:¹⁰⁵

This court has repeatedly held that the State may, under its police power, constitutionally regulate a legitimate business which is detrimental to the people if not properly conducted, or even prohibit a business activity found to be essentially injurious to public welfare.¹⁰⁶

The court also rejected the defendant's contention that such a statute infringed upon his constitutionally protected liberty of contract.¹⁰⁷

98. Note, *supra* note 83, at 870.

99. *Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S. 2d 303 (1966).

100. Note, *supra* note 18, at 715.

101. Mueleman, *supra* note 42, at 322.

102. "Action for enforcing the provisions of the Uniform Deceptive Trade Act was left exclusively to the individual consumer who may have fallen victim to improper business practices. This cause of action was in the form of injunctive relief and/or damages." Mueleman, *supra* note 34, at 322.

103. See IDAHO CODE § 48-6 (Supp. 1972).

104. IOWA CODE ANN. § 713, 24(2)(b) (Supp. 1973).

105. *State v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624 (Iowa 1971).

106. *Id.* at 630.

107. *Id.*

A number of states have adopted specific legislation banning referral sales.¹⁰⁸ North Dakota did not adopt such specific legislation until the 1973 legislative session, although the state has had the general consumer protection statute since 1965.

3. *An Analysis of the Statute*

The statute prohibiting referral and chain referral sales in North Dakota is based somewhat on a Minnesota statute.¹⁰⁹ It was the desire of the Consumer Fraud Division of the Office of the Attorney General that any proposed legislation on referral sales be general rather than specific. Operations utilizing such sales schemes have a propensity for challenging such laws on technicalities. It was the Attorney General's feeling that this problem could be avoided by a general statute prohibiting *all* referral sales.¹¹⁰

The act prohibits referral sales, multi-level sales distributorships, and chain sale schemes on any sale or lease. The first section prohibits a seller or lessor from giving or offering a rebate or discount in any form to induce the buyer or lessor to enter into a sale or lease if the rebate or discount is given for supplying the seller or lessor the names of prospective purchasers or lessees. Aiding the seller or lessor in making another sale or lease is also prohibited if the earnings of such efforts are contingent upon the occurrence of an *event subsequent* to the making of the sale or lease. Whether the event is subsequent is determined by the date of the sale or lease concerned.¹¹¹

The second section bans plans or schemes involving multi-level distributorships of property, franchises, or both. To be in violation of this section, the purchaser or lessee must have given or agreed to give valuable consideration *for a chance* to receive "something of value"¹¹² for inducing a person also to give a valuable consideration to participate in the scheme or *for a chance* to receive "something of value" when a person induced by the purchaser or lessee induces another person to give such valuable consideration. These two qualifications follow the progression of a referral sale to include different levels of the chain.

108. *E.g.*, MINN. STAT. ANN. § 355.79(2)(a) (Supp. 1972); REV. STAT. NEB. § 69-1401 (1971).

109. Compare MINN. STAT. ANN. § 355.79(2)(a) (Supp. 1972).

110. Interview with Robert P. Brady, Assistant Attorney General, in Bismarck, North Dakota, Jan. 5, 1973 [hereinafter referred to as Interview No. 2 with Robert P. Brady].

111. Senate Bill 2244 § 1(1) (1973). The news media is exempted entirely from the provisions of the act if there is no involvement in the scheme. Senate Bill 2244 § 5 (1973). See N.D. CENT. CODE ch. 51-12 regarding false advertising.

112. Senate Bill 2244 § 1(2)(b) (1973) excludes from the term "something of value" a payment based upon sales made to persons who are not purchasing to enable them to participate in the scheme.

A sale or lease in violation of the act is unenforceable, and the buyer or lessee may, at his option, rescind the agreement. If the buyer or lessee returns the property received or any remaining portion, he may obtain a full or proportional refund. The buyer or lessee may also retain the goods delivered and the benefit of any services performed without any further obligation to pay for them if he chooses not to return them.¹¹³ This serves to protect the buyer who has been induced to enter into such a contract. It also puts the seller on guard because he may lose a good deal if he violates this act. However, this is not as great a threat as it may seem, since operations selling franchises usually offer little more than the opportunity to sell other franchises, and thus, they have little to lose. In *State v. Glenn W. Turner Enterprises*,¹¹⁴ the contract provided the buyer only with the right to sell dealerships in various degrees, the right to receive "kick-backs" from these sales, and a leather case containing a cheap cassette player, a set of tapes espousing the Turner philosophy, and a set of booklets. The estimated cost of these items was about \$110, but buyers paid \$2000 to \$5000.¹¹⁵

Another important feature of the act is the change in the holder in due course doctrine. This change is designed to protect the buyer who is induced to enter into a contract in violation of the act. In a typical situation the seller will make a sale and offer the contract immediately to a finance company. Assignment of the contract destroys any right of action against the assignee (the finance company) to whom the buyer must make payments. Although the buyer still has a remedy against the seller, the buyer cannot sue the finance company.¹¹⁶ Often the buyer cannot afford to sue the seller, and the seller may not have property within the state which can be attached. The buyer may also fear legal action by the finance company and a subsequent loss of his credit rating.¹¹⁷

The assignee of the rights of the seller or lessor is subject to all the claims and defenses of the buyer or lessee arising out of the contract, *notwithstanding an agreement to the contrary*. However, the assignee's liability is limited to the amount owing to the assignee at the time the claim or defense is asserted against

113. Senate Bill 2244 § 1(3) (1973).

114. See note 6 *supra*.

115. See *State ex rel Johanneson v. Glenn W. Turner Enterprises*, No. 44131 (1st Dist., filed July 18, 1972). Brief for Plaintiff; Interview with Robert P. Brady. Also present at this interview was a victim of the scheme, who shall remain anonymous. The author personally inspected his case and listened to several of the tapes, which are of doubtful value as selling aids.

116. See N.D. CENT. CODE § 41-02-17 (1968) (U.C.C. 2-210).

117. Note, *supra* note 15, at 532.

him. Such rights can only be asserted as a defense or as a set-off against a claim by the assignee.¹¹⁸

The strongest and most innovative feature of the act is the provision concerning the possible penalties for violation of the act. The penalty may be a misdemeanor or a felony at the option of the sentencing judge. Thus, counties are encouraged to extradite and prosecute violators of the act. It also enables the state to reach out of state operations which have been able to avoid criminal prosecution within the state. A fine of not less than \$500 nor more than \$5000 may also be imposed.¹¹⁹

A person is not barred by the act from bringing any statutory or common law action. A person injured by a violation of the act may recover treble damages plus costs and reasonable attorney's fees.¹²⁰

Unless the Attorney General intercedes under the authority granted to him by this act, enforcement will fall upon the states' attorneys.¹²¹ Chapter 51-15 merely states that fraudulent practices are unlawful, a civil matter, while violation of the act prohibiting referral sales is a criminal offense. As a practical matter, however, the Consumer Fraud Division will continue investigating referral sales with other fraudulent practices and will strongly urge states' attorneys to prosecute violators.¹²²

B. ALTERATION OF ODOMETERS

Other consumer protection legislation passed by the 1973 North Dakota Legislature provides that any person who alters an odometer to deceive another is guilty of a misdemeanor punishable by a fine not to exceed \$500.¹²³ While Chapter 51-15 similarly prohibited alteration of odometers with the intent to deceive another, this statute imposes an additional fine.¹²⁴

C. REGULATION OF HOME SOLICITATION

Sales made in the home have proven to be a problem because a high-pressure salesman can use the situation to back a prospective buyer into a corner from which he may find it difficult to escape.

118. Senate Bill 2244 § 1(4) (1973).

119. *Id.* at § 2.

120. *Id.*

121. N.D. CENT. CODE § 54-12-01 (5) (1960) directs the Attorney General to "attend the trial of any party accused of crime and assist in the prosecution when in his judgment the interests of the state may require it."

122. Interview with Robert P. Brady, Assistant Attorney General, at Bismarck, North Dakota, March 5, 1973.

123. Senate Bill 2114 (1973).

124. See text accompanying notes 15-23 *supra*.

Statutes passed in North Dakota's 1973 legislative session grant the buyer on a cash or installment sale a statutory period to cancel the contract, provided that all claims and defenses of the buyer against the seller shall be applicable against the transferee where a note of indebtedness has been transferred. In addition, referral selling in conjunction with home solicitation sales are prohibited.¹²⁵ Under this statute, the buyer is given three business days from the date of the sale to cancel the contract. Cancellation may be made by ordinary mail receipt received on form 3817 or by registered mail, return receipt requested, on form 3806-S. But any notice of cancellation is effective if it indicates an intention by the buyer not to be bound by the sale.¹²⁶ A Federal Trade Commission ruling also provides a three-day rescission period.¹²⁷

If a rescission has been made, the seller must return any payments and any note of indebtedness to the buyer within ten days. Any trade-ins must be returned in substantially the same condition as they were in when received. If they are not, the buyer may elect to recover an amount equal to the trade-in allowance stated in the contract. The buyer may also keep any goods received under the contract until the seller complies with these obligations.¹²⁸ Such goods become the property of the buyer twenty days after cancellation if the seller does not pick up the goods at the buyer's address.¹²⁹

The seller is also afforded rights under the statute. If he has performed any services prior to a cancellation, he may receive a cancellation fee of five per cent of the cash price, fifteen dollars, or the amount of the cash down payment, whichever is less.¹³⁰ If the buyer requests the seller to provide goods or services immediately because of a claimed emergency, and the seller makes substantial beginning performance before notice of cancellation, and the goods cannot be returned to the seller in substantially as good condition as the buyer received them, the buyer may not cancel.¹³¹

The act also alters the holder in due course doctrine to protect the buyer. Any transfer of a note of indebtedness under this act is deemed an assignment and the transferee is subject to all claims and defenses of the buyer against the seller.¹³² A note of indebtedness must contain on its face conspicuous notice that the

125. Senate Bill 2109 (1973). Insurance is exempted from the provision of the act. Senate Bill 2109 § 8 (1973).

126. Senate Bill 2109 § 2 (1973).

127. 37 F.R. 3551 (1972). However, there is some doubt as to the validity of the ruling.

128. Senate Bill 2109 § 6 (1973).

129. Senate Bill 2109 § 7 (A) (1973).

130. Senate Bill 2109 § 7 (C) (1973).

131. Senate Bill 2109 § 7 (D) (1973).

132. Senate Bill 2109 § 5 (A) (1973).

instrument is based upon a home solicitation sale.¹³³ Compliance with the terms of this section is a condition precedent to a right of action by a seller or transferee against a buyer.¹³⁴

Referral sales¹³⁵ are prohibited by the act. Any such sale is voidable at the option of the buyer.¹³⁶ Violation of any provision of the act is a misdemeanor punishable by a fine of not more than \$300, imprisonment not to exceed ninety days, or both.¹³⁷ Such penalty is in addition to the general penalties provided for referral sales: a fine of not less than \$500 nor more than \$5000, imprisonment in the penitentiary for not more than five years or in the county jail for not more than one year, or both.¹³⁸

D. REGULATION OF CONTRACTS BETWEEN EMPLOYMENT AGENCIES AND PERSONS SEEKING EMPLOYMENT

In several instances involving employment agency contracts, there has been evidence of collusion between the employment agency and the employer. The employer hires an applicant through the agency and does not notify the applicant that the position is temporary. The person is then released, i.e., fired. The employment agency has turned the employment contract over to a finance company, usually for half the face value of the contract, and the person who has been fired has no recourse against the finance company.¹³⁹

The Code provision relating to contracts between applicants for employment and employment agencies was amended to provide for regulation of employment agency contracts by the state labor commissioner. If the employment position terminates or the employee is released before a three month period expires, the employee is to receive a refund of all charges made by the employment agency in excess of twenty per cent of the gross wages he "received prior to" his termination or release.¹⁴⁰ This language may mean that any money received after termination, i.e., wages received at a later date than the termination or release, are not to be figured into the gross wage of the employee. This matter is likely to be litigated in the near future. Contracts which have service charges

133. Senate Bill 2109 § 5 (B) (1973).

134. Senate Bill 2109 § 5 (C) (1973).

135. See text accompanying notes 81-123 *supra*.

136. Senate Bill 2109 § 3 (1973).

137. Senate Bill 2109 § 9 (1973).

138. Senate Bill 2244 § 2 (1973).

139. Interview with Dwight Cuffe, Attorney for the Legal Aid Society of North Dakota, at Fargo, North Dakota, Dec. 12, 1972 [hereinafter referred to as Interview with Dwight Cuffe].

140. N.D. CENT. CODE § 34-13-13.1 (1), (2) (1973).

of less than \$100 are exempt from the act¹⁴¹ and a contract or fee of over \$100 is not valid unless approved by the state labor commissioner.¹⁴² However, the employment agency may receive full service charges at the time of referral, subject to the refund.¹⁴³

A penalty for violation of the entire chapter relating to employment agencies has been added. Violation of the chapter constitutes a misdemeanor punishable by a fine of not less than \$100 nor more than \$1000, by imprisonment not to exceed one year, or both.¹⁴⁴ Also, the employer damaged by a violation of section 31-13-13.1 may recover the entire service charge.¹⁴⁵

This legislation serves as a protection for people who are looking for work. When unemployed, such people are in a situation where they are least able to protect themselves and least able to afford to contest a violation. The limitation of a twenty per cent charge of the gross wages during the first three months also serves to protect the employee during this vulnerable period.

V. CHANGES IN CONSUMER PROTECTION

A. LEGISLATIVE TRENDS

Despite the significance of the gains discussed in this note to the North Dakota consumer, the 43rd Legislative Assembly passed very few consumer-oriented bills. "Practically every bill designed to help the people and the consumer has been axed . . ." commented Senator Francis Barth. "Anything that has to do with the environment or the welfare of the people has tough sledding here."¹⁴⁶ However, certain trends in consumerism have appeared and will be presented to the next legislative assembly when it convenes in 1975.

Perhaps the most readily apparent need for change, but most difficult piece of legislation to pass, is the abolition of the holder in due course doctrine. While total abolition may not yet be feasible or acceptable, application of the doctrine in certain areas will be curtailed. This is evidenced by provisions within the bills passed this session which allowed the buyer, in limited situations, to assert a claim against an assignee. Arguments against abolition of the holder in due course doctrine are centered around the idea that banks will not be able to afford to buy negotiable instruments.

141. N.D. CENT. CODE § 34-31-13.1 (4) (1973) (As identified in Senate Bill 2108 (1973)).

142. N.D. CENT. CODE § 34-13-13.1 (3) (1973) (As identified in Senate Bill 2108 (1973)).

143. N.D. CENT. CODE § 34-13-13.1 (2) (1973) (As identified in Senate Bill 2108 (1973)).

144. N.D. CENT. CODE § 34-13-16 (1973) (As identified in Senate Bill 2108 (1973)).

145. See generally note 140-144 *supra*.

146. Fargo Forum, Feb. 28, 1973, at 16, col. 2.

However, proponents of such legislation assert that banks and finance companies are in a better position to investigate the seller of such instruments and may refuse to buy notes from companies that have a history of defrauding consumers.¹⁴⁷

Future legislative sessions should consider further supplementation of the present consumer protection laws. In addition to the limited remedies available under Chapter 51-15, the statute should provide for a fine and for payment of treble damages to those injured by a deceptive act or practice. The Attorney General should be given authority by statute to accept an assurance of voluntary discontinuance of an alleged violation of Chapter 51-15. All assurances should be filed with the district court and subject to its approval. No assurance should be approved unless all persons damaged by the alleged violations have been adequately reimbursed. Any subsequent violation of the terms of an assurance should be treated as if it were a violation of Chapter 51-15. The Attorney General should be allowed to reopen any file settled by an assurance at any time he believes it to be in the public interest.

The conditions under which a receivership may be obtained should be re-examined to assure that all North Dakota consumers receive adequate compensation for violations of Chapter 51-15. Upon application by the Attorney General and proof that a person has engaged in repeated substantial and willful violations of Chapter 51-15, the district court should be allowed to appoint a receiver.

The Attorney General should also be allowed to initiate class actions on behalf of consumers.¹⁴⁸ This would allow the Attorney General to obtain a recovery for defrauded consumers and would serve to protect the poor and ignorant who cannot afford legal services.

147. Interview with Dwight Cuffe. See generally Hartman & Walker, *The Holder in Due Course Doctrine and the Consumer*, 77 Com. L.J. 116 (1972). Ziegel, *Canada Regulates Consumer Notes*, 26 BUS. LAW. 1455 (1971). The problems involved with and the confusion created by the holder in due course doctrine are shown in the following example:

Mr. Hector Garcia, an unemployed cook and the father of two children, purchased a used automobile in Phoenix, Arizona. The car proved to be defective, and he repeatedly returned it to the dealer, and was repeatedly disappointed by poor service. After each repair, the car broke down within twenty-four hours. The bank, holding Mr. Garcia's note for purchase of the car, demanded payment, which Mr. Garcia refused. The car was repossessed and sold at auction for less than twenty-five percent of what Garcia had paid. The bank then obtained a deficiency judgment, and obtained an attachment on Garcia's mobile home. Garcia's repeated attempts to gain relief through legal channels proved fruitless, and he was perplexed at the idea of losing his home for a debt on a defective car. When sheriff's deputies arrived to take away his home, he shot and killed two of them and was himself shot and killed.

Id.

148. Senate Bill 2349 (1973), which contained the provisions of the Uniform Consumer Sales Practice Act, was introduced during the 1973 legislative session. The bill allowed both the Attorney General and the consumer himself to initiate a class action for viola-

B. CHANGES WITHIN THE CONSUMER FRAUD DIVISION AND IN THE STRUCTURE OF CONSUMER PROTECTION

During the legislative session a bill was introduced to create an office of consumer affairs.¹⁴⁹ This bill would have created a consumer affairs office under the supervision of the governor, to conduct research, provide educational services for consumers, and investigate consumer complaints. While the concept of the bill was applauded, many people involved in the field felt that the bill was poorly drafted,¹⁵⁰ and the bill was indefinitely postponed. However, the Attorney General has indicated that such a concept should be examined more closely to allow various branches of state government to coordinate their functions into an over-all program of consumer protection. This would allow utilization of the state laboratory and other facilities designed to allow testing to examine products on the market (or before they reached the market) to determine their suitability for use by North Dakota consumers.¹⁵¹

Appropriations for the Consumer Fraud Division were cut in 1973 but funds will be allocated from the general office funds. To conserve money, the makeup of the division will be changed.¹⁵² The Bureau of Criminal Investigation is empowered to act as a consumer fraud bureau¹⁵³ and agents from the Bureau will now conduct investigations rather than the special investigator. The special investigator will assume the role of the administrator of the entire consumer fraud division. This will help coordinate activities and will save the expense of sending an investigator from Bismarck for every complaint,¹⁵⁴ since the agents are already assigned to certain areas across the state and investigate crimes within the state under authorization of the North Dakota Century Code.¹⁵⁵

There are, however, several problems with this reorganization that must be considered. The first is that Crime Bureau agents have a large workload and that the additional duties will impose a further burden. In addition, few agents have any expertise in consumer protection; how many people know the difference between

tions of the provisions of the bill. The bill was indefinitely postponed because Chapter 51-15 covered essentially the same type of offenses. Over twenty other bills in the area of consumer protection were also indefinitely postponed. See Smit, *Are Class Actions for Consumer Frauds a Fraud on the Consumer*, 26 BUS. LAW. 1053 (1971) for a discussion of the inadequacies of bringing a class action under FED. R. CIV. P. 23 or similar state statutes.

149. House Bill 1349 (1973).

150. *E.g.*, Interview No. 2 with Robert P. Brady.

151. Interview with Allen I. Olson, Attorney General, at Bismarck, North Dakota, March 8, 1973 [hereinafter referred to as Interview with Allen I. Olson].

152. *Id.*

153. N.D. CENT. CODE § 12-60-20 (Supp. 1971).

154. Interview with Allen I. Olson.

155. N.D. CENT. CODE ch. 12-60 (Supp. 1971).

bait-and-switch tactics and legitimate sales techniques? But agents of the Bureau of Criminal Investigation are professionals who can be retrained for this task. A program to accomplish this should be established. Many excellent articles have been published which will be useful in providing Crime Bureau agents with a background in consumer protection, but seminars and on-the-job training would be an even more helpful preparation.

C. PROCEDURE UPON REGISTRATION OF A COMPLAINT WITH THE ATTORNEY GENERAL

While the organization of the Consumer Fraud Division of the Attorney General's office may change in the near future, the general procedure followed in dealing with a complaint will remain unchanged. When a complaint is received, the complainant is sent a consumer complaint form which asks for details concerning the alleged fraud. When the form is returned, it is reviewed and a determination is made as to whether the complaint is well founded and whether it falls within the jurisdiction of the Attorney General. If the complaint is not well founded, it is dismissed; if it is not within the Attorney General's jurisdiction, it is returned or forwarded to the proper authority. If the complaint appears to be well founded and within the Attorney General's jurisdiction, a file is established and a number is assigned. After a file has been established, a determination is made whether any further information is needed, and the complainant is requested to provide the information in affidavit form.

The next step is to contact the respondent. This is done either with a form letter or an individual letter, depending upon the needs of a particular file. After the additional information is received from the respondent, the file is again reviewed. If there is sufficient evidence to support a successful action, the respondent is advised that he should settle the matter. At this point the vast majority of complaints are settled, and each file is thereafter handled on its own merits. If legal action is taken, the file is turned over to an Assistant Attorney General.¹⁵⁶

Each file is checked on a weekly basis. An efficient method of filing complaints makes this weekly review an easy matter, and form letters have been established to handle most situations, enabling the small staff to handle a relatively large number of files.

156. Letter from Curt Hansen.

VI. CONCLUSION

North Dakota has taken great strides in consumer protection in the last few years. Recent consumer fraud legislation has demonstrated that offenders will be dealt with harshly. The trend of future legislation will be directed toward remedying specific evils. This trend is evidenced by the recent passage of bills focusing on the narrow spheres of regulation of home solicitation sales and contracts with employment agencies, and prohibition of referral sales and alteration of odometers. There will always be someone "out for a fast buck" who will be able to find loopholes in existing law that will then have to be closed. In all likelihood, there will be further strengthening of the rights of buyers against assignees of contracts and increased utilization of present laws and facilities to protect the consumer. In doing so, there must be a balancing of interests between sellers and consumers. The rights of the merchant will have to be examined and protected where it is possible, since the purpose of consumer protection laws is to promote rather than hinder the sale of goods.

A review of the Attorney General's complaint files reveals one outstanding characteristic: *most consumer complaints are registered against out-of-state concerns*. Rarely is a complaint filed against an established business in North Dakota, and this is reflected in the low crime rate in the state. In all, both consumers and sellers will benefit from honest business practices and above board disclosure of facts material to a transaction. But if a seller is not honest, then let the seller beware!

RUSSELL J. MYHRE*

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APPENDIX A

ATTORNEY GENERAL OF NORTH DAKOTA—
 CONSUMER FRAUD DIVISION
 STATISTICAL REPORT FOR CALENDAR YEAR 1972

Complaints Received	2,047
Complaints (Out of Scope or Unfounded)	939
Files Established	1,108
Files Closed	1,066
Files Pending (12-29-72)	71
Dollars Recovered for Complainants	\$1,113,482.23

MONTHLY BREAKDOWN OF DOLLARS RECOVERED

Month	Amount Recovered	Total Recovered
October 1971	\$ 76,805.47	
November 1971	24,331.94	\$ 101,137.41
December 1971	36,645.36	137,728.77
January 1972	34,886.81	172,649.58
February 1972	52,942.58	225,592.16
March 1972	50,734.86	276,327.02
April 1972	91,888.85	368,215.87
May 1972	94,052.55	462,268.42
June 1972	94,731.28	556,999.70
July 1972	122,537.21	679,536.91
August 1972	79,558.36	759,095.27
September 1972	103,131.22	862,226.49
October 1972	138,090.31	1,000,316.80
November 1972	90,230.40	1,090,547.20
December 1972	160,718.80	1,251,265.00

APPENDIX B

ATTORNEY'S CHECKLIST

HOW TO GET ACTION ON CONSUMER COMPLAINTS

When a client comes into a lawyer's office with a complaint concerning goods and services, often the lawyer does not know or is unfamiliar with the necessary procedures to obtain relief for his client. Hereafter follows a checklist, or more exactly, a progression of methods to use. Often complaints can be resolved in the first few steps because most merchants are honest and wish to rectify any errors on their part.

The idea of most consumer protection legislation is to promote resolution of these matters on a direct consumer-merchant level, and this checklist is meant to accomplish this end. However, if a merchant is reluctant or refuses to come to any agreement, utilization of the measures described below will serve to apply a good deal of pressure upon him to resolve the matter out of court.

Perhaps a warning should be issued—use these methods with caution, since an effective campaign may seriously cut into a merchant's sales and force him to withdraw from business because of adverse publicity. Such laws in the consumer protection area are not toys, but serious weapons.

1. **Interview your client closely.** Go over his allegations closely because some consumers, as laymen, tend to omit vital information. Some consumers also take advantage of honest merchants.

2. **Make a determination** if the complaint is a valid claim in violation of North Dakota laws. The most commonly abused laws are Chapters 51-12, 51-13, 51-14, 51-14.1, and 51-15. (Check the new sections described in the note above.) If damages are under \$200, inform your client of the Small Claims Court Act, Chapter 27-08.1 of the North Dakota Century Code, which provides a relatively inexpensive means of recovery if he wishes to handle the case himself.

3. Have your client **gather all materials** he may have in his possession which have to do with the incident, i.e., receipts, contracts, brochures, advertisements, sales slips, letters, estimates, etc. If possible, have persons who repair damaged articles detail the damage and cause on the bill they present. Examine any retail installment contract for a violation of Chapter 51-13, especially as it has to do with interest rates and service charges.

4. **Advise your client not to pay** any outstanding bills to the merchant on that item. In certain cases, the client should make no payments whatsoever. Stop payment on all checks to that merchant.

5. **Phone the merchant** and advise him of your client's complaint. At this point, most misunderstandings are resolved.

6. **Send a letter** to the merchant, if matters are not cleared up. Briefly outline the facts, conclude that his actions are violative of the relevant section(s) of the Code, and enclose a copy of damages (see below). Specifically request a reply, since some merchants will not reply unless a request is spelled out for them, especially car dealers and garage operators.

7. **Give the merchant a reasonable time to reply.** Remember this at all stages.

8. If there is not a satisfactory reply, **begin a letter-writing campaign.** The purpose of this tactic is to bring the acts of the merchant to the attention of people who can apply pressure. At this point, the costs of responding to the people enumerated below becomes prohibitive for small claims, and a settlement is usually made. All you need is a cover letter and a copy of the letter mentioned above in step 6. Mail letters to the following people:

(a) The area, district, and/or regional manager. Most reputable companies will be glad to assist a consumer in coming to an agreement and want to know if their retail dealers are not living up to company standards. Write to all, not just one.

(b) The national company, for the same reasons listed above. An extra letter will never hurt. Get pressure coming down from the top.

(c) The local Better Business Bureau or Chamber of Commerce. These organizations do limited investigation and warn consumers if repeated complaints come in about one organization or merchant.

(d) Any local consumer action group. These groups often publicize such complaints.

(e) The Attorney General of North Dakota. The address is as follows:

Mr. C. B. Hansen, Special Investigator
Consumer Fraud Division
Attorney General's Office
Capitol Building
Bismarck, North Dakota 58501

(f) The Attorney General of any other state involved.

In addition to other information, when you write the Attorney General of North Dakota, send a **sworn** statement detailing the fraud or misrepresentation upon your client. Have your client sign the statement and have it **notarized**.

9. **Send the merchant notice that you are filing an action.** Also notify the Attorney General.

10. **After a reasonable time, file an action.** Attempt to use Chapter 51-15 in addition to common law remedies.

11. **File for a temporary injunction** to prevent further frauds on other consumers.

12. **If you are dealing with a fly-by-night operation** (and if you have reached this stage, chances are that the company is less than reputable), **attempt to freeze any property in North Dakota** prior to actual trial, i.e., receivership, court order, etc.

13. **Always attempt to settle out of court.** However, if litigation is necessary, pursue it actively.

14. **Once you get the merchant to admit liability, you will probably have to start negotiating again with the insurance company.**

DAMAGES

Allegation of damages should include some or all of the following:

1. Actual damages
2. Out-of-pocket damages
(i.e., mileage; towing charges; repairs to correct damage; phone calls; lost earnings; meals, lodging; copying charges for bills, receipts, etc.; mailing fees; etc.)
3. Projected damages
(i.e., statements from experts; estimates; decline in value of item)
4. Restitution for item purchased.