Annual Survey of Massachusetts Law

Volume 1974 Article 17

1-1-1974

Chapter 14: Consumer Law

William F. Willier

Terrance J. Hamilton

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Consumer Protection Law Commons

Recommended Citation

Willier, William F. and Hamilton, Terrance J. (1974) "Chapter 14: Consumer Law," *Annual Survey of Massachusetts Law*: Vol. 1974, Article 17.

CHAPTER 14

Consumer Law

WILLIAM F. WILLIER* AND TERRANCE J. HAMILTON**

§14.1. **Consumer credit practices and charges.** In spite of the most extensive laws in the United States regulating consumer credit, some Massachusetts creditors continue to seek, and ostensibly find, loopholes which allow them to obtain a greater return for the extension of credit than the legislature had intended. Several statutory enactments have closed some of those loopholes, however.

Multiple agreements. Because ceilings on finance charges in retail sale agreements are graduated, with higher charges allowed on lower unpaid balances, it is possible for a credit seller to obtain greater finance charges by splitting a single transaction into several transactions of smaller amounts. Thus a buyer or a buyer in combination with his or her spouse might be induced to enter into several such transactions. Chapter 127 of the Acts of 1974, amending section 11 of chapter 255D of the General Laws, forbids such a practice.[1]

"Flipped" installment sales. Installment sellers of "big ticket items" such as appliances do not have the capital to sustain cumulative credit sales. They sell their retail installment sale agreements to financing institutions such as sales finance companies or banks, which in turn collect directly from the buyers. Not infrequently, such financing institutions will hold more than one retail installment sale agreement entered into by the same buyer. The financing institution is then in a position to induce the buyer to take credit in the form of a loan, paying off the unpaid balance of the installment sale agreement or agreements and often augmenting the debt with a cash loan. Thus the buyer was "flipped" from an installment sale with a maximum rate

---

*WILLIAM F. WILLIER is Professor of Law at Boston College Law School and Chairman of the Massachusetts Consumers' Council.

**TERRANCE J. HAMILTON is Counsel to the Massachusetts Consumers' Council.

§14.1. [1] Chapter 127 added new § 11(D) to G.L. c. 255D, which reads: "No installment seller shall permit any person, or any husband and wife jointly or severally, to be obligated, either directly or contingently to said seller, under more than one retail installment sales agreement executed at the same time."

ceiling of 24 or less per cent to a small loan with a maximum ceiling of 30 per cent.[2]

Chapter 137 of the Acts of 1974 in effect prohibits "flipping."[3] Financial institutions acquiring retail installment sale agreements are restricted to the same procedures for refinancing, consolidation or extensions as the original seller would be, limiting the charges for credit to those for retail installment sales. An installment buyer thus cannot be "flipped" into a loan transaction by the holder of a retail sale agreement. The Act does not prohibit a completely separate financial institution from extending credit to a buyer, the proceeds of which he may use to pay off the unpaid balance of one or more retail installment sale agreements, as long as the lender is not the holder of such agreements.

Merchandise certificates. "Merchandise certificates" probably had their origin in the company stores of the late 19th century and early 20th century. Employees were paid, rather than in cash, in "scrip," which could be used to acquire goods in stores owned and operated by the employers. In current use, "merchandise certificates" constitute the poor person's means of obtaining credit. The credit manager of a retailer determines that a credit applicant is worthy of some credit risk, but not much, and that the amount of credit must be limited and its use controlled. The attitude is paternalistic and reflects an inability to predict with any degree of accuracy the applicant's likelihood of payment. The applicant is granted a certain amount of credit plus finance charge which he or she promises to pay in installments over a period of time. The applicant is given some pieces of paper with monetary denominations totalling the amount of credit extended to be used in lieu of cash in making purchases. The installment payments must be made even if these "merchandise certificates" are never used in making purchases. The retailer collects the finance charge even though no credit is ever used or the credit used is far less than the finance charge paid.

In contrast, consumer buyers fortunate enough to have department store credit cards make payments only in accordance with purchases actually made and pay finance charges only for the period the credit is used and the outstanding balance. Indeed, they frequently are given a "free period" in which to pay without any finance charge. Consumer buyers relegated to the use of "merchandise certificates" are not as fortunate. Had such certificates not been included in the definition of "goods" in the original enactment of chapter 255D,[4] al-

---

[2] Such procedures have been severely restricted in Maine. See Maine Rev. Stat. Ann. Tit. 9-A §§ 2.301 et seq., 3.404 (1964); Maine Consumer Credit Code §§ 2.301, 3.404.

[3] Acts of 1974, c. 137, § 2, adding G.L. c. 255D, § 18A.

[4] G.L. c. 255D, § 1.

lowing their "sale" as if they were a television set, their use by retailers in the manner described probably would have been illegal.[5]

In a half-hearted attempt to remedy the discrepancy between merchandise certificates and credit cards, the General Court enacted chapter 924 of the Acts of 1973. Rather than placing merchandise certificates within the purview of a "revolving credit agreement," they were given a definition separate from that of "goods,"[6] and their issuance pursuant to a retail installment sale agreement as in the past was thus sanctioned. However, the buyer is given the explicit right to return the coupons at any time for full credit, including finance charge and insurance. The buyer must be informed of such right on the agreement and on any newly-issued certificates and wrappers containing them. Arguably, this right always existed. While not expressly stated in chapter 924, credit for finance charge upon surrender will no doubt be in accordance with the rule of 78's, as with prepayment of any retail installment sale agreement.[7] This, of course, ignores whether or when any of the certificates were actually used to purchase goods and hence obtain credit.

Chapter 924 of the Acts of 1973 also amends chapter 255D of the General Laws to extract "gift certificates" from the definition of "merchandise certificates" and place the former within the definition of "goods."[8] The only real effect of this is to remove "gift certificates" from the provisions allowing return and credit.

Some retailers do issue merchandise certificates to their regular revolving charge account customers, usually for specific purposes and with special privileges. For example, they may be issued late in the year for use to purchase holiday gifts with no payments due or finance charge accruing until the following February. The amendments to chapter 255D embodied in chapter 924 of the Acts of 1973 ex-

---

[5] Although merchandise certificates were included in the original definition of "goods", a court could still have found them illegal. In W.T. Grant v. Walsh, 100 N.J. Super. 60, 241 A.2d 47 (Middlesex Cty. Dist. Ct. 1968), a New Jersey district court held that treating "merchandise certificates" as a closed end transaction and computing finance charge without reference to when the certificates were actually used, and hence credit extended, created a usurious rate of finance charge under New Jersey's Retail Installment Sales Act, N.J.S.A. 17:16C-41. Id. at 63-64, 241 A.2d at 48. Of course, "merchandise certificates" are not included within the definition of "goods" in the New Jersey Act. Under Massachusetts law, however, "merchandise certificates" are treated as the equivalent of credit cards. See G.L. c. 255, § 12E, which deals with liability for lost or stolen credit cards, and which would give a Massachusetts court a basis for disallowing the current method of computing the finance charge on them. In any event, it is illogical to treat pieces of paper such as merchandise certificates as equivalent to goods.

[6] A "merchandise certificate" is defined as: " . . . a writing issued by a seller, not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods or services supplied by the seller . . . ." Acts of 1973, c. 924, § 2.

[7] See G.L. c. 255D, § 13.

[8] Acts of 1973, c. 924, § 1.

pressly accommodate this procedure.[9] Its purpose, of course, is to induce more purchases by the customer rather than to control the amount of credit, the usual reason for issuing merchandise certificates.

Set-off. The traditional common law concept of the relationship between a savings or checking account depositor and the depositary bank is that of creditor and debtor. The identity of funds deposited becomes lost and the bank in effect owes that money to the depositor upon whatever terms accompany the particular account. Several provisions of chapter 106 of the General Laws, the Uniform Commercial Code, embody this concept.[10] It is not unusual that the bank at the same time extends credit to the depositor by separate credit transactions such as installment loans, overdraft credit privileges, and credit cards issued by the bank.

Another common law concept is that of "set-off," under which a debtor can charge against what he owes a creditor the amount the creditor in turn owes him by other obligations. Thus, where a holder of a credit card issued by a bank is also a depositor in the bank, the bank arguably has been able to charge off what the depositor owes on the credit card against what the depositor has in the various accounts in the bank. This is not, of course, a privilege enjoyed by creditors in other kinds of transactions, such as revolving charge accounts with retail sellers, loans from small loan companies, or credit card transactions where the cards are issued by parties or institutions not having depositary facilities. In spite of section 12F of chapter 255 of the General Laws, which allows the holder and user of a credit card to assert against the issuer of a card defenses otherwise available against the merchant honoring it, banks have been free to ignore such disputes and to exercise their right of set-off as a collection device, leaving the holder-user to fight it out with the merchant. A holder-depositor whose savings or checking account has been depleted through set-off by the bank is less likely to assert his defenses against the bank.

To remedy this, the General Court enacted chapter 556 of the Acts of 1974, which provides that set-off is not permitted unless a credit card holder has previously signed a separate agreement permitting set-off against a deposit account with the bank. Such an agreement, if proffered to a potential credit card holder, must contain conspicuously a notice to the effect that signing the agreement is not a condition to obtaining the credit card. The Act, adding a new section 6C to chapter 140C of the General Laws, allows the card holder even to "suspend" such an agreement where a claim is disputed, denying the

---

[9] Id. § 4.
[10] G.L. c. 106, §§ 2-717, 4-201, 4-212.

bank the right to apply funds from a deposit account. This does not interfere with arrangements whereby the depositor-card holder wishes to have his debts to the bank paid periodically from his account, as long as his authorization is open and above board. In credit card transactions, set-off is no longer the bank's right as a matter of law. Presumably, however, the right of set-off continues to exist in the case of any other obligations of a depositor due to the bank. The General Court would have been wise to encompass all such obligations within the purview of the statute, especially in view of the forthcoming paperless transfers of money whereby accounts can be immediately debited for debts due not only to the bank but to third parties. Depositors' existing rights in such cases, such as the right to stop payment on checks or to assert defenses, must be preserved.

Finance charge computation. Holders of bank credit cards may obtain credit using such cards in two ways: by obtaining goods or services from merchants who will honor such credit cards, and by obtaining bank loans directly from the bank issuing the credit card. In 1972 the General Court put ceilings on the finance charges banks could exact by use of credit cards: 18 per cent on the first $500 of unpaid balance and 12 per cent on the unpaid balance exceeding $500.[11] In addition, the law fixed the methods by which finance charge could be computed on periodic unpaid balances. Creditors were given two options: (1) the adjusted balance, meaning the balance at the beginning of a billing period minus payments and credits received during the billing period, or (2) the average daily balance during the billing period.[12] Prior to this some banks had been computing finance charge on the previous balance without taking into account payments and credits. At least one bank in the Commonwealth has determined that the prescribed methods of computation did not apply to cash advances and continued to compute the finance charge on the previous balance of such advances without deducting payments and credits. Whether or not the law could be so construed, this was obviously not the intent of the legislature. To make that intent clear, chapter 13 of the Acts of 1974 amended section 114B of chapter 140 of the General Laws to leave no doubt that the computational methods applied to all transactions using credit cards and other open-end kinds of credit.

§14.2. Truth-in-Lending Act: Amendments. The federal Consumer Credit Protection Act[1] allows states, upon application to the Board of Governors of the Federal Reserve System, to be exempt from application of the Federal Truth-in-Lending Act[2] insofar as it

---

[11] G.L. c. 255D, § 11B(1), (2).
[12] Acts of 1972, c. 783, § 1, codified as G.L. c. 140, § 114B.

§14.2. [1] 15 U.S.C. §§ 1601 et seq. (1970).
[2] Id. §§ 1601-65.

would otherwise apply to state-chartered and regulated financial institutions.[3] To obtain exemption, a state must have a law imposing "requirements substantially similar to those imposed under this chapter" and providing for adequate enforcement.[4]

Massachusetts, the first state to have a Truth-in-Lending Law, codified as chapter 140C of the General Laws, opted to seek and did obtain an exemption. Implementation of the federal Act was achieved by extensive and intricate regulations of the Federal Reserve Board known as Regulation Z.[5] In amending its laws to conform with the federal, Massachusetts codified Regulation Z, repeating its provisions in several chapters of the General Laws which deal with different kinds of credit transactions.[6] In each year since its enactment in 1968, the Federal Reserve Board has amended Regulation Z. To maintain "substantial similarity" and hence its exemption, it is necessary for Massachusetts to amend its statutes annually to conform with the federal changes. Chapter 802 of the Acts of 1973 and chapter 17 of the Acts of 1974 had as their major purpose just that. However, some substantive variations from federal law were made.

Nothing precludes a creditor from applying a periodic rate to unpaid balances even in a credit transaction which is not strictly open-ended. Thus the definition of "periodic rate" was amended by chapter 802 of the Acts of 1973 to remove its limitation to open-end credit transactions.

An amendment to section 7 of chapter 140C requires creditors to so disclose if they do *not* give a rebate or refund of finance charge upon prepayment. Since such a refund or rebate is required by law in Massachusetts, this change has no substantive effect. However, section 7 was also amended by chapter 713 of the Acts of 1974 to require creditors extending credit in connection with the purchase of a dwelling to disclose the total amount of finance charge which will be paid over the term of the credit and the total amount the purchaser will be paying. Not infrequently, long-term home mortgages result in total interest payments which exceed the purchase price of the dwelling. For this reason, real estate creditors had been able to have this information excepted from the provisions of both the state and federal Acts. Certainly an important factor in the decision-making process for a consumer wishing to buy a home is what the total cost will be. This allows a realistic comparison of the effect of different rates offered by different creditors or over different periods of time. A fraction of a per cent difference, which can amount to hundreds or thousands of dollars over a long period of time, may seem insignificant while ex-

---

[3] Id. § 1633.
[4] Id.
[5] 12 C.F.R. § 226 (1974).
[6] See G.L. cc. 140C, 255B, C, D.

pressed as a per cent.

Depending upon how it is used in practice by mortgage lenders, this law ultimately may require greater clarification to achieve its purpose. Two practices used by some banks may not fall within the amendment to the statute. In the first such practice, the note is for a relatively short period of time, such as five years, even though payments are scheduled over a longer period such as fifteen or twenty years. Technically the note is payable in full at the end of five years, putting the lender in the position of requiring a renegotiated loan. Revelation of dollar finance charge solely for five years, even though the bank obviously intends to allow payment over a much longer time, would not give the consumer-borrower adequate information. The second practice is the use of a demand note for the early years of the loan, such as three years; the note then moves into an installment pay plan for the remainder of the term. Again, all payments are scheduled over the initially determined longer pay period. A lender operating in good faith in these two cases clearly would reveal the total finance charge in dollars for the entire anticipated pay period. Subsection (g) of section 3 of chapter 140C may already cover this second practice by providing "that where such an obligation is alternatively payable upon a stated maturity, the stated maturity shall be used for the purpose of such computations."[7] In the first case the creditor may have to label the total finance charge as "estimated" as required by subsection (e) of section 5 of chapter 140C since it is likely that the rate of finance charge will change at the end of the initial maturity of the note.

Minor liberalization of the advertising requirements of section 9 of chapter 140C will probably not increase meaningful competitive advertising of credit terms. While "annual percentage rate" and "finance charge" no longer need to stand out more conspicuously than other required information, the laundry list of what must be disclosed remains ominous for most creditors. One concession is that simple annual interest which is a component of the finance charge may be stated in addition to the annual percentage rate, and a periodic rate may be stated in addition to the annual percentage rate, so long as neither is more conspicuous than the statement of the annual percentage rate. For advertising of open-end credit plans, the advertisement does not have to state the conditions under which charges other than finance charge will be imposed or the minimum periodic payment which must be made.

Previously it was not clear whether creditors disclosing finance charge applicable to a range of balances had to reflect the point at which a minimum charge was assessed rather than the charge derived

---

[7] G.L. c. 140C, § 3(g).

from application of a rate in the schedule of such ranges. The amendments make it clear that this is not necessary. Further, while the fact that minimum charges will be imposed must be disclosed, the amendments also make it clear that a creditor need not disclose that *no* minimum charge will be imposed. Probably most creditors would want to disclose that fact for competitive reasons.

Methods for computation of finance charge in open-end credit plans are limited to two in Massachusetts.[8] Maximum minimum charges are also prescribed by law.[9] Still, to conform to federal law, section 4 of chapter 140C was amended to include a computational method where creditors add some kind of charge during a billing cycle for each transaction.

Periodic statements must be sent to consumers under open-end credit plans where there is at least $1.00 balance or a finance charge is imposed. An annual percentage rate must be disclosed computed in accordance with the provisions of section 4 of chapter 140C. A periodic rate must also be disclosed. Multiplying the periodic rate times the number of periods in a year, as also required, may not in given cases produce the identical annual percentage rate as the actual computational method. Some creditors contend that this points up the distinction between rate and yield, the latter reflecting what creditors actually get in terms of finance charge. In any event, an amendment to section 6 of chapter 140C gives creditors options in describing the rate produced by the periodic rate times the number of periods. They may refer to it as "corresponding annual percentage rate," "corresponding nominal annual percentage rate," "nominal annual percentage rate" or "annual percentage rate."[10] This probably will not result in lucidity for consumers, most of whom will not see or understand the distinction. By virtue of the prescribed methods of computation in Massachusetts, it is not likely that the distinction will exist in any event.

Finally, section 6 of chapter 140C was amended to allow in periodic statements under open-end credit plans itemization of extensions of credit, individual credits and individual applications of finance charge, and the statement of periodic rates and how the balance is determined for computing finance charge to appear on the reverse side of the statement rather than on its face.[11] *Totals*, however, of individual entries must appear on the face of the statement. This appears to be a clarification rather than a serious substantive change, although the expression "separate slips" has been omitted, leaving some doubt as to

---

[8] Finance charges may be computed by either the adjusted balance method or the average daily balance method. G.L. c. 255D, § 27C(3); G.L. c. 140C, § 6B.

[9] See G.L. c. 140C.

[10] Acts of 1973, c. 802.

[11] Id.

whether sales slips and the like evidencing individual transactions will any longer suffice. In short, this may require that information concerning each separate transaction must appear on the statement itself or on a single statement supplementing the periodic statement. The object obviously is to accommodate changing methods employed by creditors in producing periodic statements often brought about by changes in data processing equipment. It can, however, reduce the amount of paper which the consumer must scrutinize.

"Credit" is defined in section 1 of chapter 140C as "the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor."[12] The disclosure requirements of the Act are invoked when credit is extended "for which either a finance charge is or may be imposed or which, pursuant to an agreement, is or may be payable in more than four installments."[13] Consumers may and frequently do obtain insurance, the premium for which they pay in installments. For example, casualty insurance on a dwelling is frequently written under a three-year policy with the premium payable in three annual payments. If paid in this way, the premium total is usually higher than if paid in one sum for the entire three-year period. This in effect is a charge for the privilege of paying in installments. In insurance premium financing, as regulated by chapter 255C, an authorized finance charge is usually added to the actual annual amount of the insurance premium. This method is used primarily in payment for automobile insurance.

What are the consequences if a consumer fails to make an installment payment when due? The usual answer is that although the insurer can cancel the insurance coverage, it has no right to enforce payment by the consumer for coverage not already extended. If this is so, the argument goes, there is no extension of consumer credit and hence no requirement for the provider of insurance to comply with the disclosure requirements of the Truth-in-Lending Act. The Appeals Court so held in *McKinney v. Liberty Mutual Insurance Co.*,[14] which involved the sale of automobile insurance whereby the consumer was allowed to pay in nine installments with an additional monthly charge of ¾ of 1% (9% annual percentage rate).

The purpose of the Truth-in-Lending Act is to allow consumers to compare through uniform disclosures the costs and terms of credit. Since the insurance company was charging additionally for the privilege of paying a premium in installments, the purpose of the Act would seem to require that full disclosure be made even though technically there may be no enforceable obligation if the consumer failed

[12] G.L. c. 140C, § 1.
[13] Id. § 1(j).
[14] 1973 Mass. App. Ct. Adv. Sh. 679, 682, 303 N.E.2d 853, 856.

to make payments. Indeed, it was for this very reason that the Federal Reserve Board by regulation,[15] and the Massachusetts General Court through chapter 140C,[16] required full disclosure in the case of payment in more than four installments even though ostensibly there was no additional finance charge identified as such in the transaction, a literal requirement of section 1631a of the federal Act.[17] This regulation was upheld by the Supreme Court,[18] using language which no doubt would uphold a finding that payment for insurance in installments, especially where an additional charge is imposed, would be covered by the Act. It would appear, however, that insurance company interests are prevailing both with the Federal Reserve Board and in the courts.

§14.3. Quality of goods. Consumer advocates have long accused manufacturers of electric appliances of employing engineering design which makes excessive use of electricity. As both demand for and cost of electricity have gone up in the past few years, most strikingly with the advent of the "energy crisis," appliances more efficient in their energy use have begun to appear on the market, giving some substance to the accusations. Consumers concerned with the increasing cost of electricity and, more broadly, with energy consumption, should know what consequences will result from the purchase and use of particular electric appliances.

Chapter 891 of the Acts of 1973, amending chapter 94 of the General Laws, requires that information concerning energy consumption be contained on labels affixed to "an air conditioner, refrigerator, freezer or refrigerator-freezer which is not used or secondhand."[1] The manner in which such information shall be disclosed shall be determined by the secretary of the executive office of consumer affairs in conjunction with the director of the division of standards. The secretary is empowered to prescribe what must appear upon the labels in terms of energy usage. These labels may be translated into estimated dollar cost, or in terms of a formula disclosing efficiency as it relates to energy consumption. In addition, the secretary may require on the label "a brief description of testing and computation procedures used to determine" such information.[2]

In promulgating such regulations, the secretary may divide appliances into classes and subclasses as to which uniform measurements shall be required. He may place upon the "manufacturer, distributor, or importer," the burden of testing such appliances to determine the

---

[15] 12 C.F.R. § 226.2(k) (1974).
[16] G.L. c. 140C, § 1 (j).
[17] 15 U.S.C. § 1631a (1970).
[18] Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973).

§14.3. [1] Acts of 1973, c. 891, § 1, adding G.L. c. 94, § 316.
[2] Id.

information required on the label, and may suspend the sale in the Commonwealth of appliances if test results are not reported as required or if such results are "determined by the director to be false or misleading," the suspension becoming effective not fewer than five days after such suspension order.[3] The aggrieved party may demand a hearing which must be held within 45 days thereafter. The secretary may rescind the suspension if the results are forthcoming or they are found not to be deceptive or misleading.[4]

Unfortunately, the law does not specifically require that such labels appear upon floor models or demonstration samples of such appliances. Thus, if such labels appear only on the appliances contained in sealed cartons, the consumer may not acquire the information in time for it to be useful. No doubt the secretary can, by regulation, require that the labels appear upon all new appliances offered for sale. Indeed, it would no doubt be an unfair and deceptive practice under chapter 93A of the General Laws, the Consumer Protection Act, if such labels did not appear.

The secretary may use an efficiency formula for any appliance within a subclass where there is "available accurate and recent information concerning the efficiency of at least eighty per cent of the appliances in said subclass . . . ."[5] While it may be difficult for the consumer to establish whether such information is accurate or not, this new law no doubt creates an express warranty under section 2-313[6] or an implied warranty of merchantability under section 2-314[7] of the Uniform Commercial Code, chapter 106 of the General Laws. This would no doubt invoke the remedies available to a buyer, including revocation of acceptance, refund of the purchase price and consequential damages to the extent the warranty was breached or, absent revocation, consequential damages in the very least, all as provided in sections 2-711 and 2-715 of chapter 106. Section 2-717 would allow the consumer to deduct such damages from that portion of the price he has not yet paid to a seller. For example, if a consumer determined that an appliance was using 20 per cent more electricity than that indicated on the label, the cost of that electricity projected over the normal use and life of the appliance might well be deducted from the price as consequential damages. In addition, a consumer could probably invoke the remedies of chapter 93A, giving a thirty-day notice requesting an offer of settlement before pursuing the matter in court. In this case the remedies of the Uniform Commercial Code are more efficient, but since the legal theories are different, one remedy

---

[3] Id., adding G.L. c. 94, § 317.
[4] Id.
[5] Id.
[6] G.L. c. 106, § 2-313.
[7] Id. § 2-314.

need not be elected to the exclusion of the other.

Until January 1, 1975, the legislation allowed industry to rate and label the affected appliances voluntarily. Only thereafter was the secretary empowered to invoke his regulatory authority. At this writing nothing had occurred in either direction except that manufacturers had arrived at an Energy Efficiency Rating for air conditioners. Without a concerted effort by industry or government or both to inform consumers of the meaning of such ratings, they will have little impact.

Section 2-316A of chapter 106 was added in 1970 to make it clear that sellers by "boiler-plate" clauses and forms could not disclaim or modify the warranties implied by law, those of merchantability and fitness for particular purpose. That section also preserved for buyers of consumer goods their remedies under the Uniform Commercial Code in spite of any other remedies a seller may wish to offer. However, sections 1-102[8] and 1-107[9] had led some sellers or their counsel to think that buyers could by another clause in a form waive the "nonwaiver" provisions of new section 2-316A, contrary to the obvious intent of the legislature. Rather than allow the matter to be subjected to protracted litigation, the General Court enacted chapter 799 of the Acts of 1973 which amended section 2-316A to provide that "[t]he provisions of this section may not be disclaimed or waived by agreement."[10]

§14.4. Rate setting commission. In 1956 the General Court established a board of rate setting[1] to determine and set rates for convalescent nursing and rest homes. In 1968, the General Court abolished the board of rate setting and established in its place a rate setting commission with greatly expanded regulatory powers. The new commission had

> the sole responsibility for establishing fair and reasonable rates of payments to be used by governmental units, including the division of industrial accidents in the department of labor and industries, and for establishing fair and reasonable charges to be used by state institutions for general health supplies, care, services and accommodations.[2]

During the 1973 legislative session the General Court once again overhauled the statutory provisions establishing the rate setting commission by enacting chapter 1229 of the Acts of 1973, which reor-

---

[8] Id. § 1-102.
[9] Id. § 1-107.
[10] Acts of 1973, c. 799, § 1.

§14.4 [1] G.L. c. 7, § 30L.
[2] G.L. c. 7, § 30L, repealed by Acts of 1973, c. 1229, § 4. The substance of the section is now contained in G.L. c. 6A, § 32.

ganizes the rate setting commission, provides for a consumer advisory council, and requires the establishment of rates for providers of health and other services. The sections governing the operation of the commission have been moved from chapter 7 of the General Laws to chapter 6A (Executive Offices), and the commission itself is now under the jurisdiction of the executive office of human services. Only a new division of hearings officers remains within the jurisdiction of the executive office of administration and finance.

The new sections of chapter 6A will now be analyzed and compared to the old law relating to the rate setting commission, highlighting the major revisions.

Section 31.[3] This is a definitional section which remains essentially the same. The only changes are that the definition of "general health supplies, care, services and accommodations" has been changed to "general health supplies, care, social rehabilitative or educational services and accommodations" and was expanded specifically to cover "institutions including those providing treatment, training, instruction and care of children and adults."[4] The revision seems to reflect the more progressive approach the Commonwealth is taking in providing services under programs directed by the office of human services.

Section 32.[5] This section revises to a significant extent the structure and organization of the commission as it formerly existed pursuant to chapter 6, section 30D of the General Laws. The commission now consists of three members appointed by the governor with the advice of the secretary of the executive office of human services for terms of three years. Prior to the enactment of chapter 1229, the commission consisted of five members appointed to five year terms whose chairman was the commissioner of administration and finance. Under the new statute, the chairmanship has become a full-time job, requiring administrative experience and an advanced degree in business administration, public administration, or law. One of the remaining members must be a certified public accountant, while the other members must have experience in the field of medical economics, and both, like the chairman, must devote full time to their duties and avoid participation in any activity which may give rise to a conflict of interest. Other new provisions prohibit more than two commissioners being from the same political party, and require a detailed annual report to the secretary of the executive office of human services and the General Court.

Each commissioner receives an annual salary of $30,000, as opposed to a former per diem rate of $50. The upgrading of the salaries, the

---

[3] G.L. c. 6A, § 31. The former definitional section was G.L. c. 7, § 30K.

[4] G.L. c. 6A, § 31.

[5] The precursor of § 32 was G.L. c. 7, § 30L.

full-time requirement, and the qualifications for appointment all reflect the increased need for and importance of an efficient and professional decision-making body in the area of rate regulation.

The third paragraph of section 32 sets forth the duties of the rate setting commission. It requires, *inter alia*, that the commission:

> (1) shall determine, after public hearing, at least as often as annually, the rates to be paid by each governmental unit to providers of health care, social, rehabilitative or educational services and accommodations; (2) shall determine, after public hearing, at least as often as annually, the rates to be charged by each state institution for general health supplies, care, social, rehabilitative or educational services and accommodations; (3) shall certify to each affected governmental unit the rates so determined; (4) shall determine, after public hearing, at least as often as annually, and certify to the division of industrial accidents of the department of labor and industries rates of payment for general health supplies, care, social, rehabilitative or educational services and accommodations, which rates shall be paid for services under the workmen's compensation act; (5) shall upon request of the commissioner of insurance assist him in performance of his duties as set forth in [G.L. c. 176B, § 4]; (6) may establish for rest homes, nursing homes and convalescent homes, fair and reasonable classifications upon which any rates may be based.[6]

Section 32 then continues with a new section which spells out the procedures to be utilized by the commission and providers of services in determining and petitioning for rates, including a provision for establishing interim rates. Rates must be established on a prospective basis subject to rules and regulations promulgated by the commission. Providers have the right to petition the commission for an increase in an interim rate at any time, provided certain requirements are met, including an independent audit of the petitioner's accounts, unless waived by the commission. Before the interim rate determination is made, the director of the appropriate bureau must report in writing his recommendations to the commission and to the petitioner, following which the petitioner has a ten-day period to file objections, arguments and comments to the commission. Once an interim rate is filed with the state secretary and becomes effective, no appeal is allowed.

A preliminary final rate is calculated after receipt by the commission of a satisfactory financial and operating cost report from a provider of services or state institution, attested to by a licensed or certified public accountant. Again, no appeal is allowed from a preliminary final rate. Ninety per cent of the difference between the interim

---

[6] G.L. c. 6A, § 32.

rate and the preliminary final rate becomes payable by or to governmental units when certified to the state secretary.

The preliminary final rate may be promulgated as the final rate if the commission is satisfied with the provider's report. In the event that a final rate is determined without a field audit, the commission shall institute random field audits to ensure accurate reporting. If the commission is not satisfied with a provider's report, it can promulgate, within six months, a different rate of payment. Any person aggrieved by any rate determination, except as otherwise provided, has a right of appeal pursuant to section 36.[7]

Section 33.[8] This section reorganizes the bureaus within the commission. It replaces the bureau of hospitals, sanatoria, and infirmaries, and the bureau of convalescent, nursing and rest homes by "such bureaus as may be necessary to carry out its duties as set forth in the chapter, including but not limited to a bureau of hospital and clinics, a bureau of long-term care facilities, a bureau of community and home health agencies, a bureau of non-institutional medical providers and a bureau of educational and social services."[9] Each bureau will now be under the direction of a full-time director.

The commission will continue to appoint an executive secretary. The remainder of section 33 further defines civil service status concerning appointments and transfers, mandates cooperation and exchanges of information between the commission and governmental units, and permits the examination by the commission of books and accounts kept by governmental units.

Section 34. This is an entirely new section which reflects the legislature's recognition of the necessity and utility of consumer input in rate regulation by establishing an advisory council to the commission. Members of the council are the chairman of the commission, the commissioner of the department of public welfare, the commissioner of the department of public health, the commissioner of education, the secretaries of the executive offices of elder affairs, human services, and administration and finance, and sixteen members to be appointed by the commission for terms of three years. The appointed members are to be evenly split between provider representatives and consumer advocates. The second paragraph of the section spells out in greater detail the qualifications and restrictions upon these appointments.

The council must meet at least three times a year or upon the call of the chairman or on written application to the chairman by any

[7] The remainder of section 32 merely repeats the final two paragraphs of former G.L. c. 7, § 30L.

[8] The precursor of § 33 was G.L. c. 7, § 30M.

[9] G.L. c. 6A, § 33.

eight members. Each year a chairman is elected from among the consumer representatives, subcommittees are appointed for each bureau established pursuant to section 33, and recommendations can be made on matters of policy and operation of the commissions and its bureaus. Bureau directors and subcommittees are to advise and consult one another. Subcommittees report to the council following each meeting, and the council takes final action on all matters coming before it and on any requests or recommendations of a subcommittee.

The important role of the advisory council is made quite clear in the last paragraph of the section. It gives the council broad powers to advise on the overall operation and policy of the commission and its bureaus, and to consider any item recommended by the commission, the council chairman, a majority of the council, or a bureau subcommittee. Most significantly, the council has the right to at least sixty days prior review and comment on any proposed rule or regulation of the commission or any of its bureaus, with the exception of emergency regulations. Finally, the council must be notified at least ten days in advance of any public hearing or meeting scheduled by the commission or any of its bureaus.

Section 35. This section is a word for word restatement of former section 30N of chapter 7. It sets conditions upon which payments are made to providers (examination and filing requirements) and provides for fines, court orders, and license suspension when a provider fails to comply with these requirements.

Section 36. This section sets forth the procedures for appeal and judicial review, most of which remain essentially as formerly provided in chapter 7, section 300. All appeals from an interim or final rate established by the commission are, within thirty days after the rate is filed with the state secretary, to be filed with the division of hearings officer established by section 4H of chapter 7 in the executive office of administration and finance.[10] The rate determined on appeal must be adequate, fair and reasonable, and based, among other things, on the costs of the provider. The appeal is conducted as an adjudicatory proceeding under chapter 30A, and the decision of the division must be filed with the commission and the state secretary within thirty days of the conclusion of the hearing.

The division's decision must contain a statement of reasons for the decision, including a determination of each issue of fact or law on which the decision was based. If a decision results in a recommendation of a rate different from that certified, the commission shall establish a new rate. If the commission determines that the statement of reasons is inadequate, it may remand for further investigation. The superior court for the county of Suffolk is given exclusive jurisdiction

---

[10] See text at note 13 infra.

over all appeals from decisions of the commission. An aggrieved party must file such appeal within thirty days of the receipt of a decision. The appeal is in the form of a petition for review. Furthermore, a provider is given aggrieved party status when a remand does not result in final decision by the commission within 21 days of the date of remand.

The petition is to set forth the grounds upon which the decision should be set aside. The division and all the parties to the appeal are to be notified by sending a copy of the petition within seven days of its filing. The division is to file the original or a certified copy of the record under review with the court within forty days of the filing of the petition. The court has broad discretion to affirm, modify, set aside, remand or enter any other appropriate order. While the petition is being considered, the commission may grant temporary relief or, with the consent of the parties, informally adjust or settle the controversy. Judicial review is governed by the state administrative procedure act[11] to the extent it is not inconsistent with section 36.

A new and significant feature of the reorganization of the rate setting commission is the establishment of a division of hearings officers to hear all appeals.[12] The division is within the executive office of administration and finance, separating it from the commission and the executive office of human services. The secretary of administration and finance appoints the chief hearings officer, who must be (1) a resident of the state, (2) an experienced trial attorney, (3) able to devote full time to his duties, and (4) free from having any financial interest in any provider. The chief is to organize the division, establish policies, and employ other hearing officers who shall be members of the bar and have trial experience.

The division has subpoena power and may apply for an order to any justice of the superior court to compel the attendance of summoned witnesses. In addition, the division has the subpoena power provided pursuant to adjudicatory hearings authorized under the state administrative procedure act.[13]

The remainder of chapter 1229 of the Acts of 1973 includes mostly technical and corrective provisions. Section 4 repeals sections 30K to 30P of chapter 7, the former enabling statute. Sections 4A through 4T merely note the change from chapter 7 to chapter 6A. Section 5 exempts colleges, universities and other programs under the direction of the department of education from the Act. Sections 6 and 7 set forth the lengths of the initial terms of the commissioners and the advisory council members. Sections 8 and 9 deal with civil service mat-

---

[11] G.L. c. 30A, § 14.
[12] G.L. c. 7, § 4H.
[13] G.L. c. 30A, § 12.

ters, including tenure and examinations. Section 10 provides for a smooth transition from the rate setting commission established prior to chapter 1229 and the new commission established as of July 1, 1974. Custody of all property is transferred; established rates and regulations remain in full force and effect until changed, as do existing contract, leases and obligations. Section 11 is a severability clause. Section 12 states that for one year from the effective date of this Act[14] the term "general health supplies, care, social, rehabilitative, or educational services and accommodations" shall not include any services and accommodations rates of payment which were not subject to approval by the former rate setting commission, except those provided by home care agencies purchased by the executive office of elder affairs.

Thus, the reorganization of the rate setting commission accomplished by chapter 1229 represents a significant improvement in health provider rate regulation.[15] The commission itself has become more professionalized, the scope of regulation somewhat broadened, the regulatory process streamlined, and most importantly from the public's viewpoint, consumer input into the regulatory scheme has been increased.

§14.5. Home mortgages. The year 1974 saw the housing construction industry reach its lowest ebb since World War II. Money for home mortgages became increasingly scarce as the prime lending rate rose to 12% and higher. The General Court took two important steps during the closing days of the 1974 session to increase the funds available for home mortgages in an effort to help out a declining industry as well as those attempting to purchase their own homes.

Chapter 843 of the Acts of 1974 loosens some of the statutory restrictions imposed on the borrowing power of these institutions. Section 66 of chapter 168 of the General Laws, regulating savings banks, is amended in the following specific ways: (1) money may now be borrowed for a period or periods aggregating up to 15 years (the former limit was 10 years); (2) the aggregate of all borrowing allowed to be outstanding at any one time has been increased from five to ten per cent of the deposits shown on the books of the corporation; (3) the restrictions upon the sources from which a savings bank can borrow money have been abolished (formerly, the borrowing had to be from an institution regulated by state or federal authorities; this conceivably

---

[14] The effective date of Acts of 1973, c. 1229 is July 1, 1974. Id. § 13.

[15] It seems unlikely that chapter 1229 will be the last word in health regulation reorganization since the following nonbinding question put forward on the ballot in the 1974 general election was answered in the affirmative: Should the General Court enact legislation during the 1975 session reorganizing state government by creating a Department of Health Systems Regulation which shall have the power to administer the medicaid program; control and set rates for nursing homes, hospitals, and other health providers under medicaid; license and inspect health facilities; and regulate private health insurance policies, medical and hospital service plans?

empowers savings banks to borrow from private sources and governmental agencies); (4) most importantly, the commissioner of banks may by order or regulation authorize savings banks to borrow money in such amounts and upon such terms as he or she deems consistent with safe and sound banking practice.

Sections 3 and 4 of chapter 843 of the Acts of 1974 are mirror provisions enabling savings banks and cooperative banks to issue securities representing units of interest in specific mortgage loans or pools of mortgage loans; in connection with these securities, they may enter into agreements including provisions for guaranteeing collection or payment of the principal and interest on the securities. Furthermore, the commissioner is given regulatory power to govern the terms and conditions of their issuance.

Chapter 846 of the Acts of 1974 establishes a Massachusetts Home Mortgage Finance Agency (MHMFA). The original intent of this bill was to create a neighborhood stabilization and home improvement program to assist home ownership, an intent which remains evident in the law finally enacted which encompasses an even broader scope.

Mortgages covered by this law include those upon

> real property ... improved by a residential building or unimproved if the proceeds of such loan shall be used for the purpose of erecting, acquiring or rehabilitating, including home improvement loans, a residential building thereon; or for the purpose of purchasing a condominium unit or a cooperative share in a residential condominium or cooperative provided that each mortgage loan made from the proceeds of a loan made by MHMFA to such mortgage lender shall be made to an owner-occupant . . . .[1]

Section 2 is a declaration of public necessity, enumerating problems of rising costs, inadequate housing, decay of existing housing stock, and the necessity of new construction and rehabilitation. The legislature found that the major cause of the housing crisis is the lack of funds at interest rates which low and moderate income persons can afford; to remedy these conditions, a corporate agency of the Commonwealth is created to raise funds from private investors in order to make those funds available through mortgage lending institutions for new residential mortgage loans to low and moderate income persons and families, to insure such new residential mortgage loans, and to provide technical assistance to low income persons and families desiring such new residential mortgage loans.[2]

Section 3 creates the MHMFA within the department of community affairs. It consists of the commissioners of community affairs and cor-

---

§14.5. [1] Acts of 1974, c. 846, § 1.
[2] Id. § 2.

porations and taxation, the chairman of the Massachusetts Housing Finance Agency (MHFA) (who also serves as chairman of the MHMFA), and four persons to be appointed by the governor for terms of seven years. The executive director of the MHFA will also serve as the chief executive officer of the MHMFA.

A very broad general grant of powers is authorized by section 4. Among the twenty provisions listed is the power to make loans to mortgage lenders, contract with the MHFA, invest funds, borrow money, foreclose, procure insurance, make and publish rules and regulations, and do any and all things necessary or convenient to carry out the purposes of and exercise the powers expressly given and granted by the Act.

The heart of the Act controlling loans to mortgage lenders is set out in section 5. Pursuant to its regulatory authority, the MHMFA is to effectuate the purposes of the Act and the following specific objectives: (1) to expand the supply of funds in the Commonwealth available for new residential mortgages; (2) to provide the additional housing needed to remedy the shortage of adequate housing in the Commonwealth and to eliminate the existence of a large number of substandard dwellings; and (3) to encourage the effective participation by mortgage lenders in the program authorized by this Act and the restriction of the financial return and benefit thereto from such program to that which is necessary and reasonable to induce such participation.[3]

The section also places further restrictions on loans made for rehabilitation of multiple dwelling units so as to minimize residential displacement, limit rent increases and notify each tenant residing in the dwelling of the repairs or improvements to be undertaken.

District courts and housing courts are granted original jurisdiction over proceedings contesting rehabilitation under section 5 and are authorized to issue declaratory judgments to the same extent as that of the superior court pursuant to chapter 231A of the General Laws.

The major thrust toward rehabilitation in the Act is set out in this section. "MHMFA shall set requirements on participating mortgage lenders so that at least eighty per cent of the bond proceeds shall be for new residential mortgages on structures at least ten years old."[4] In this same vein, the MHMFA can approve neighborhood preservation programs proposed by cities and towns.

Section 6 empowers the agency to establish a mortgage insurance program to insure loans made by mortgage lenders, subject to regulations prepared by the Commissioner of Insurance. Section 7 allows the MHMFA to contract with nonprofit organizations or qualified

---

[3] Id. § 5.
[4] Id.

public agencies for technical assistance to potential borrowers. Such services include, among other things, consultation on construction, rehabilitation, laws, financing and management.

Section 7A creates a Resident Ownership Fund set up specifically as a subsidy program to assist low income families or persons and to provide them with special advice and assistance.

Section 8 authorizes the MHMFA to issue negotiable bonds and notes and places conditions thereon; no bond shall mature more than fifty years from the date of its issue; the aggregate principal amount outstanding at any one time shall not exceed 25 million dollars. Section 9 states the bonds and notes shall not constitute a debt of the Commonwealth, but shall be payable solely from the proceeds of loans made under this Act, reserve funds created therefor by the agency, and other available funds of the MHMFA.

A Capital Reserve Fund is created by section 10 to be used solely for the payment of the principal or annual sinking fund payment of bonds of the MHMFA as they mature or become due, the purchase of bonds of the agency, and the payment of interest or redemption premiums on such bonds. In the discretion of the agency, pursuant to section 12, the bonds and notes shall be secured by a trust agreement by and between the agency and a trustee, which may be any trust company or bank within the Commonwealth possessing the powers of a trust company.[5] Because the MHMFA is deemed to be performing an essential governmental function, section 12 exempts their bonds and notes from taxation. Finally, section 13 provides that the bonds and notes be made securities eligible for investment.

Sections 14 through 16 of chapter 846 call for the Massachusetts Housing Finance Agency Advisory Committee to assist the MHMFA in formulating policies,[6] the submission of an annual report,[7] and the inspection of books and records.[8] Section 17 provides for a liberal construction of the law, and section 18 is a severability clause.

Chapter 846 could well turn out to be one of the most significant statutes passed by the General Court in 1974. There is no question that such an agency is needed and that there is much benefit to be derived from rehabilitating old neighborhoods rather than inviting the environmental consequences of building new ones. Unfortunately, as of this writing, the General Court has not appropriated any funds for the new agency, and increasing fiscal restraint may operate to limit whatever moneys are forthcoming. The governor has just recently appointed the members of the MHMFA, and hopefully the agency can begin operations and start to fulfill its potential during 1975.

---

[5] See generally G.L. c. 172.

[6] Acts of 1974, c. 846, § 14.

[7] Id. § 15.

[8] Id. § 16.

§14.6. Administrative remedies: Chapter 93A. Chapter 939 of the Acts of 1973 has added three new paragraphs to the civil remedies section of chapter 93A.[1] The introduction of this bill was a direct result of the decision handed down the previous year by the Supreme Judicial Court in *Gordon v. Hardware Mutual Casualty Co.*[2] which held that administrative remedies must be exhausted before bringing action under chapter 93A for relief from an alleged unfair act or practice.[3] Consumer advocates were dismayed by the decision and felt that it was contrary to and inconsistent with the intent of the General Court. That intent, they believed, was to provide broad, efficient and expeditious relief in the courts, and was not intended to require the initial exhaustion of administrative remedies, real or possible, for acts not expressly permitted by such laws or even for conduct expressly prohibited by such laws, absent a clear provision in those laws requiring the exhaustion of administrative remedies.[4] *Gordon* made available the defense of exhaustion of administrative remedies to almost any respondent whose business was regulated by any local, state, or federal agency, and effectively barred a petitioner from continuing an action in the superior court for damages and equitable relief. Administrative remedies could lengthen the delay a consumer already faced in having his or her grievances redressed and, in many instances, an administrative or regulatory agency is restricted by statute in ordering appropriate relief. Against this background chapter 939 was drafted and enacted.

New subsection (6) of section 9 of chapter 93A states that "any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law . . . in order to bring an action under this section . . . ."[5] Furthermore, the subsection explicitly states that failure to exhaust administrative remedies shall not be a defense under section 9, except as provided in subsection (7).

Suspension of court proceedings are permissible under conditions narrowly circumscribed by subsection (7). This may be done upon motion by the respondent before the time for answering and after a hearing to permit the respondent to initiate action naming the petitioner as a party before an appropriate regulatory board or officer providing adjudicatory hearings. Although the statute does not explicitly so indicate, only adjudicatory hearings as defined in chapter

---

§14.6. [1] G.L. c. 93A, § 9.

[2] 1972 Mass. Adv. Sh. 757, 281 N.E.2d 573.

[3] Id. at 762, 281 N.E.2d at 577. See G.L. c. 93A, § 2.

[4] G.L. c. 93A, § 2(b). See Rice, Remedies for Consumers: The Amendment of Chapter 93A, 54 Mass. L.Q. 307 (1969); Rice, Remedies, Enforcement Procedure and the Duality of Consumer Transaction Problems, 48 B.U.L. Rev. 559 (1969).

[5] G.L. c. 93A, § 9(6).

30A of the General Laws[6] could meet the requirements of this section.

Furthermore, the respondent's evidence must indicate that there is substantial likelihood that final action by the court favorable to the petitioner would require the respondent to undertake practices inconsistent with a lawful regulatory scheme, or that the regulatory board or officer has a substantial interest in the matter and has substantial power to provide the relief sought.

Judicial proceedings may only be suspended on the ground that administrative remedies have not been exhausted when a regulatory scheme would be disrupted, or if a regulatory board has a substantial interest in the matter and can substantially provide the petitioner with the relief he seeks.

The final paragraph of subsection (7) enables the court, upon suspension of the proceeding, to enter any interlocutory or temporary orders it deems necessary and proper, or appropriate to maintain the status quo between the parties. If the court finds that the administrative proceeding is unreasonably delayed or prejudicial to a party, or that final action has not been taken within six months of the order suspending the judicial proceedings, it shall terminate the suspension and bring the matter forward for trial.

Finally, subsection (8) states that recovering or failing to recover damages or other relief in any administrative or judicial proceeding, except proceedings authorized under section 9 of chapter 93A, shall not be a bar to or a limitation upon relief authorized under section 9. The language indicates that civil remedies under the Consumer Protection Act may be sought even though a claimant has sought other administrative remedies or has pursued litigation. Hence, it may be possible for a litigant who has recovered damages in a suit brought pursuant to another section of the General Laws to bring an action under chapter 93A, section 9 to recover double or treble damages, court costs, and attorney's fees, provided that the litigant can allege an unfair or deceptive practice.

---

[6] "Adjudicatory proceeding" means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include *(a)* proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or *(b)* proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or *(c)* proceedings for the disposition of grievances of employees of the commonwealth; or *(d)* proceedings to classify or reclassify, or to allocate or reallocate, appointive offices and positions in the government of the commonwealth; or *(e)* proceedings to determine the equalized valuations of the several cities and towns; or *(f)* proceedings for the determination of wages under [G.L. c. 121, § 26T].

G.L. c. 30A, § 1(1).

In conclusion, chapter 939 of the Acts of 1973 virtually eliminates the judicially imposed requirement that any person seeking judicial relief under chapter 93A must first seek any possibly availing administrative remedies before commencing a chapter 93A suit. It reaffirms the original intent of the legislature that the civil remedies of chapter 93A constituted an independent, statutory cause of action not barred merely because other relief could have been sought.

§14.7. Prompt payment of medical benefits. Chapters 176A and 176B of the General Laws govern the organization and conduct of nonprofit hospital and medical service corporations in the Commonwealth, such as Blue Cross-Blue Shield. Pursuant to these chapters, such corporations are authorized to issue subscription certificates to their subscribers. No subscription certificate can be issued unless the Commissioner of Insurance has approved in writing the form of the certificate.

Section 8 of chapter 176A and section 6 of chapter 176B further prescribe certain provisions which must be contained in all subscription certificates. These provisions relate to such items as the length of the agreement, the terms and conditions upon which it may be extended, renewed or terminated, and the grace period allowed for making any payment due. Chapter 732 of the Acts of 1974 amends those sections by placing additional requirements on the issuer of subscription certificates. The amendment establishes steps which a chapter 176A or 176B corporation must take upon receiving notice for direct payments of benefits from a subscriber. First, it must furnish the subscriber with forms which the subscriber can fill out and return. Second, the corporation must use the information provided on the forms to make a determination of the subscriber's right to payment. Third, within forty-five days of receiving the completed forms, the corporation must either (1) pay the subscriber, (2) notify the subscriber of the reason for nonpayment, or (3) request in writing additional information from the subscriber.

Hopefully chapter 732 will correct some of the abuses that existed in this area, such as the remissness with which some payments were made or the inability of the subscriber to ascertain the reason for nonpayment. The new law is in some respects quite similar to the erroneous billing statute.[1] Section 5 of that law[2] requires a creditor, upon the opening of an account and at not less than two quarterly intervals during each year, to provide the customer with a written notice setting forth his rights under section 2 of the statute. These amendments to chapters 176A and 176B of the General Laws are expected to provide subscribers to hospital and medical service plans with the

§14.7. [1] G.L. c. 93C.
[2] Id. § 5.

necessary information to facilitate and accelerate the payment of these benefits.

§14.8. Small claims trial bond. Chapter 166 of the Acts of 1974 makes a minor corrective change in the Commonwealth's small claims laws. Section 23 of chapter 218 of the General Laws had been substantially rewritten by section 2 of chapter 748 of the Acts of 1973 to correct some of the abuses that previously existed in small claims procedure. For example, although defendants were once able to remove a cause of action to the superior court, chapter 748 provided that every cause of action commenced in the district court must now initially be determined in the district court.[1]

Prior to 1973, a party could file a claim for a jury trial any time prior to the day upon which he or she was notified to appear. Such a claim was to be accompanied by an affidavit specifying that there were questions of fact requiring trial and that such trial was intended in good faith, together with the sum of five dollars for the entry of the cause in superior court. In addition, the claimant was required to secure a bond in the penal sum of one hundred dollars, with such surety or sureties as may be approved by the plaintiff or a clerk of the district court, payable to the other party or parties to the cause, conditioned to satisfy any judgment which might be entered against him in the superior court.

Chapter 748 of the Acts of 1973 changed this by allowing the defendant, within ten days after the receipt of the district court's finding, to file a claim of trial by jury, again accompanied by an affidavit and a five dollar entry fee. Under this chapter, however, the required bond was to be in the amount of the judgment in the district court, rather than a flat one hundred dollars. Chapter 166 of the Acts of 1974 struck the requirement that the bond be in the amount of the judgment in the district court, and reinserted the old standard that the bond be in the penal sum of one hundred dollars, with such surety or sureties as may be approved by the plaintiff or the clerk or an assistant clerk of the district court. The amendment appears to be merely corrective, ostensibly facilitating administration, and reflects a determination that one hundred dollars is a fair and sufficient amount.

§14.9. Legislation: Miscellaneous.

Disclosure in selling motor vehicles and funeral services. Chapter 619 of the Acts of 1974 requires that "[a]ny motor vehicle dealer advertising the price of vehicles shall include all charges of any type, except taxes, and shall include, without limitation, any charges for freight, handling or preparation necessary or usual prior to delivery to the consumer."[1]

---

§14.8. [1] G.L. c. 218, § 23.

§14.9. [1] Acts of 1974, c. 619, adding G.L. c. 93B, § 5A.

Thus the asterisk next to a quoted price referring to an obscure statement that such charges are extra will either disappear, or those charges will have to appear in such statement. One alternative, of course, is for the quoted price to include all such charges; no doubt wise dealers will put this to good advantage by proclaiming "price all-inclusive" or "no extra charges." A clear implication of the statute is that if such charges are not disclosed in the advertisement, they may not be assessed against a buyer. At the least, nondisclosure would constitute an unfair and deceptive practice under chapter 93A of the General Laws, giving the buyer the remedies provided in that chapter. Regulations promulgated under that chapter define "advertising" to include just about any public statement, oral or visual.[2] This means that signs in windows, display rooms and on vehicles themselves must contain the charges which are added to the price.

The statute does not apply to advertisements by manufacturers. Thus, they may continue to advertise a price on television, "tagging" at the end of the commercial in rapid narration "freight, handling and dealer prep extra." They may do the same in printed advertisements. When, however, such ads are run in connection with dealers within the Commonwealth, the statute would apply and require disclosure of those charges.

At times of bereavement, friends or relatives making funeral arrangements are usually not in an appropriate emotional or mental state to inquire of options open to them in funeral services and their respective costs. Chapter 688 of the Acts of 1974 requires cemetery corporations to disclose or to cause the funeral director designated by a representative of the deceased to disclose three options available at the cemetery in the course of burial if such options exist: services within a chapel, gravesite services with observation of the lowering of a casket, and services without such observation. Noncomplying cemetery corporations are subject to a fine of $100 to $500.

Honesty in the market place. Merchants who short weight or overcharge buyers are subject to fines under section 177 of chapter 94 of the General Laws. Such acts occur when the merchant (a) gives a false or insufficient weight or measure, (b) quotes a price which indicates a weight or measure in excess of that actually received, or (c) demands or accepts payment of a price in excess of a quoted selling price based upon a weight or measure. Similar penalties apply to a buyer who provides a measuring device in such a manner to achieve more than he is entitled to at the agreed price. Section 177 of chapter 94 formerly provided penalties of $50 for a first offense, $200 for a second offense, and $50 and imprisonment for from one to three months for a subsequent offense. Chapter 115 of the Acts of 1974 amends section 177 to increase the penalties to maximums of $250 for a first offense

[2] Regulations of the Attorney General pursuant to G.L. c. 93A, § 2(c).

and $500 plus imprisonment for from one to six months for a subsequent offense committed within two years of the first. The object, obviously, is one of deterrence.

Anti-burglary measure. It is axiomatic that burglars who intend to convert their loot into cash must have someone or some place by which to do so. Pawnbrokers, even though legitimate, are frequently the outlets for stolen goods since in most cases they have no way of determining that the goods are stolen. If such goods are discovered and identified by police, insurance companies or owners, pawnbrokers must give them up. The thieves, however, often go unapprehended. To deter the pawning of stolen goods and aid in apprehension of thieves, chapter 238 of the Acts of 1974 requires pawnbrokers to photograph every person pawning goods and to keep such photographs.