

# Annual Survey of Massachusetts Law

---

Volume 1975

Article 13

---

1-1-1975

## Chapter 9: Consumer Law

William F. Willier

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

 Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Willier, William F. (1975) "Chapter 9: Consumer Law," *Annual Survey of Massachusetts Law*: Vol. 1975, Article 13.

## C H A P T E R 9

# Consumer Law

WILLIAM F. WILLIER\*

**§9.1. Chapter 93A, The Consumer Protection Act.** Chapter 93A<sup>1</sup> of the General Laws, entitled the “Regulation of Business Practice and Consumer Protection Act,”<sup>2</sup> would appear to have raised as many legal questions as it has answered.<sup>3</sup> These questions have concerned both substance and procedure, although the overlap between the two categories is apparent. During the *Survey* year, the Supreme Judicial Court addressed both issues.

*A new and distinct cause of action.* In two cases decided during the *Survey* year, *Commonwealth v. DeCotis*<sup>4</sup> and *Slaney v. Westwood Auto, Inc.*,<sup>5</sup> the Supreme Judicial Court made clear that the cause of action under chapter 93A is a new and distinct one created by statute and not derivative of any common law cause of action in either contract or tort.<sup>6</sup> In *Slaney*, the Court stated:

The absence from the foregoing discussion of any mention of the common law action for fraud and deceit is entirely intentional. . . . [T]he definition of an actionable “unfair or deceptive act or practice” goes far beyond the scope of the common law action for fraud and deceit. To cite only a few distinctions, in a statutory action proof of actual reliance by the plaintiff on a representation is not required, . . . and it is not necessary to establish that the defendant knew that the representation was false . . . . [A section 9 claim for relief] is, therefore, *sui generis*. It is neither wholly tortious nor wholly contractual in nature, and is not subject

---

\*WILLIAM F. WILLIER is a Professor of Law at Boston College Law School. Talmadge D. Veale, a student at the law school, assisted Professor Willier in the preparation of this chapter.

§ 9.1. <sup>1</sup> G.L. c. 93A (originally enacted as Acts of 1967, c. 813, § 1).

<sup>2</sup> Acts of 1967, c. 813, § 2.

<sup>3</sup> See, e.g., Willier & Hamilton, *Consumer Law*, 1974 ANN. SURV. MASS. LAW § 14.6, at 311-13; Willier, *Consumer Law*, 1972 ANN. SURVEY MASS. LAW §§ 10.6, 10.7, at 271-76.

<sup>4</sup> 1974 Mass. Adv. Sh. 1425, 316 N.E.2d 748.

<sup>5</sup> 1975 Mass. Adv. Sh. 175, 322 N.E.2d 768.

<sup>6</sup> *Slaney*, 1975 Mass. Adv. Sh. at 198-99, 322 N.E.2d at 779; *DeCotis*, 1974 Mass. Adv. Sh. at 1434 n.8, 316 N.E.2d at 755 n.8.

to the traditional limitations of pre-existing causes of action such as tort for fraud and deceit.<sup>7</sup>

For the same reason, the Court in *DeCotis* rejected the Attorney General's argument that chapter 93A could be applied retroactively since it simply codified the common law causes of action and merely provided new procedural methods for their vindication.<sup>8</sup> The act determined to be "unfair" in *DeCotis*—the extraction of commissions by owners of a mobile home park upon the sale of mobile homes by mobile home owners—was not technically a cause of action under any other theory. Some owners had, in fact, signed rental forms that specifically provided for the commission.<sup>9</sup>

This is not to say, however, that a cause of action brought under chapter 93A could not contain elements of a more traditional cause of action. Indeed, the *Slaney* case involved a breach of an oral express warranty under section 2-313 of chapter 106 of the General Laws, the Uniform Commercial Code.<sup>10</sup> By regulation of the Attorney General, failure to honor a warranty obligation is an unfair or deceptive practice.<sup>11</sup>

The Court has left unanswered, however, the question whether a party can combine a traditional cause of action, with a chapter 93A action, which is an action that invokes the equity jurisdiction of the superior court.<sup>12</sup> For example, if a plaintiff buyer could establish a warranty and its breach, he could, under the Uniform Commercial Code, revoke acceptance, cancel, and recover the price paid and damages.<sup>13</sup> At the least, he could recover damages under section 2-714. Certainly pleadings held by a court to be sufficient under chapter 93A to withstand a demurrer are sufficiently broad to encompass such claims for relief. In any event, the "actual damages" recoverable by the consumer under chapter 93A<sup>14</sup> could well be measured by the recovery allowed under the Uniform Commercial Code.<sup>15</sup>

*Elements of a cause of action.* The Court in *Slaney* traced the legislative history of chapter 93A and articulated the pleading requirements of that chapter. In order to state a claim upon which relief can be granted, a party must allege facts that would establish the following:

(1) that there was a purchase or lease of goods, services, or real or personal property;<sup>16</sup>

<sup>7</sup> 1975 Mass. Adv. Sh. at 198-99, 322 N.E.2d at 779.

<sup>8</sup> 1974 Mass. Adv. Sh. at 1434 n.8, 316 N.E.2d at 755 n.8. See *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1, 3, 107 N.E. 426, 427-28 (1914).

<sup>9</sup> 1974 Mass. Adv. Sh. at 1427, 316 N.E.2d at 751.

<sup>10</sup> 1975 Mass. Adv. Sh. at 176-77, 322 N.E.2d at 771.

<sup>11</sup> REGULATIONS OF THE ATTORNEY GENERAL § IV, A.

<sup>12</sup> G.L. c. 93A, § 9.

<sup>13</sup> G.L. c. 106, §§ 2-601, 2-608, 2-711.

<sup>14</sup> G.L. c. 93A, § 9(3).

<sup>15</sup> See G.L. c. 106, § 2-714.

<sup>16</sup> 1975 Mass. Adv. Sh. at 194, 322 N.E.2d at 777. See G.L. c. 93A, § 9(1).

(2) that the transaction was primarily for a consumer purpose, *i.e.*, for either personal, family, or household purposes;<sup>17</sup>

(3) that in connection with the transaction the defendant engaged in an unfair or deceptive act or practice;<sup>18</sup>

(4) that a demand for an offer of settlement was sent by the plaintiff and that, within thirty days, he either received no response or rejected the defendant's offer as unreasonable;<sup>19</sup> and

(5) that a loss has been suffered as a result of the alleged unfair or deceptive act or practice.<sup>20</sup>

Although the plaintiff's pleadings in *Slaney* were not precise in all of these elements, the Court held that they were sufficient to withstand a demurrer since the necessary inferences could be derived from those pleadings.<sup>21</sup> The Court cautioned, however, that "the pleader may be well advised to avoid undue reliance on inferences which can only invite a motion to dismiss for failure to state a claim on which relief can be granted."<sup>22</sup> In short, the Court has announced that it will be liberal in interpreting pleadings under the new Massachusetts Rules of Civil Procedure, but that a party should not depend too much upon that liberality.<sup>23</sup>

*Scope of chapter 93A: Judicial Developments.* Section 2 of chapter 93A declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." In *Commonwealth v. DeCotis*, the Court indicated that there are virtually no limitations to what can constitute such unfair or deceptive acts or practices. The Court honored the statutory mandate to look to Federal Trade Commission rules and decisions,<sup>24</sup> and stated:

Unfairness under the Federal act has not been limited to practices forbidden at common law or by criminal statute. . . .

The existence of unfair acts and practices must be determined from the circumstances of each case. We do not now undertake to establish general rules which may be applied in other situations. The nature of the statute and the development of the law under the comparable Federal statute indicate that such an attempt would be undesirable.<sup>25</sup>

The Court also showed a willingness to look to decisions in other states construing statutes similar to chapter 93A.<sup>26</sup> In addition, the

<sup>17</sup> 1975 Mass. Adv. Sh. at 194, 322 N.E.2d at 777. See G.L. c. 93A, § 9(1).

<sup>18</sup> 1975 Mass. Adv. Sh. at 195-96, 322 N.E.2d at 778. See G.L. c. 93A, §9(1).

<sup>19</sup> 1975 Mass. Adv. Sh. at 199, 322 N.E.2d at 779. See G.L. c. 93A, § 9(3).

<sup>20</sup> See 1975 Mass. Adv. Sh. at 199, 322 N.E.2d at 779. See G.L. c. 93A, § 9(3).

<sup>21</sup> 1975 Mass. Adv. Sh. at 194-95, 322 N.E.2d at 777-78.

<sup>22</sup> *Id.* at 195, 322 N.E.2d at 778.

<sup>23</sup> *Id.*

<sup>24</sup> G.L. c. 93A, § 2(b).

<sup>25</sup> 1974 Mass. Adv. Sh. at 1432, 316 N.E.2d at 754.

<sup>26</sup> *Id.* at 1433, 316 N.E.2d at 754-55. The Court several times cited with approval *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

Court rejected two arguments made by the defendant, holding that (1) the mere fact that all or most merchants engage in the challenged act or practice does not save such conduct from being unfair or deceptive,<sup>27</sup> and (2) that licensing or regulation by a state or local agency that has nothing to do with, and does not sanction, the challenged act or practice, does not bring it within the exemption of section 3(1)(a) of chapter 93A. That section exempts transactions “otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth . . .”<sup>28</sup>

Moreover, in construing the phrase “any trade or commerce directly or indirectly affecting the people of this Commonwealth”<sup>29</sup>—the Act’s statutory definition of “trade or commerce”—the Court stated: “A wide range of activities has been included within the word ‘commerce’ as used in § 5(a)(1) of the Federal Trade Commission Act,”<sup>30</sup> indicating that it would not be constrained in finding such activities.

From the sweeping language of *DeCotis*, it is clear that the Attorney General has authority to attack a wide range of heretofore sacrosanct business activities. It is not so clear that the individual victims themselves may do so. Subsection (1) of section 9 begins: “Any person who purchases or leases goods, services or property, real or personal . . . and thereby suffers any loss of money or property . . . may, as hereinafter provided, bring an action . . .” This language raises the question whether a consumer injured by an unfair or deceptive act or practice is foreclosed from bringing an action under chapter 93A where his injury has not resulted from a purchase or lease.<sup>31</sup> A consumer may well discover that he or she has been victimized after a transaction is consummated but before a “sale” or a “purchase” has occurred. For example, under the Uniform Commercial Code, the term “purchase” is defined as a transaction “creating an interest in property,”<sup>32</sup> and the concept of “sale” involves the passing of title.<sup>33</sup> A contract for sale calling for future performance by the seller is not a sale,<sup>34</sup> yet an unfair act or practice with respect to that contract—*e.g.*, the merchant’s failure to make a timely delivery of the product<sup>35</sup>—could adversely affect the consumer. This issue did not arise in *Slaney* because the buyer had in fact purchased the product involved; it would appear that its resolution must await further con-

<sup>27</sup> 1974 Mass. Adv. Sh. at 1430-33, 316 N.E.2d at 753.

<sup>28</sup> G.L. c. 93A, § 3(1)(a).

<sup>29</sup> G.L. c. 93A, § 1(b).

<sup>30</sup> 1974 Mass. Adv. Sh. at 1429, 316 N.E.2d at 752.

<sup>31</sup> Although this issue was not before the Court in *Slaney*, the Court there indicated that a purchase or lease was a required element of a private 93A action. 1975 Mass. Adv. Sh. at 194, 322 N.E.2d at 777.

<sup>32</sup> G.L. c. 106, § 1-201(32).

<sup>33</sup> *Id.* § 2-106(1).

<sup>34</sup> *Id.*

<sup>35</sup> REGULATIONS OF THE ATTORNEY GENERAL § XIV, C.

sideration by the Court of the construction of the terms “purchase” and “lease.”

In *Baldassari v. Public Finance Trust*,<sup>36</sup> decided subsequent to the close of the *Survey* year, the Supreme Judicial Court held that courts must construe literally section 9(1), which requires that a loss of “money or property” be suffered by the consumer.<sup>37</sup> The Court affirmed the dismissal of claims brought pursuant to chapter 93A for “severe emotional distress”<sup>38</sup> suffered by the plaintiffs as a result of unlawful collection practices.<sup>39</sup> Nonetheless, Justice Braucher, writing for the Court, observed: “We recognize that our disposition of this case is not entirely satisfactory. The plaintiffs allege clear, serious and continuing violations of G.L. c. 93, § 49, and there must be some remedy.”<sup>40</sup> The Court noted that causes of action apart from chapter 93A, such as those in tort, might have existed,<sup>41</sup> but that the plaintiffs’ sole reliance on chapter 93A was fatal error since they did not allege a loss of “money or property.”<sup>42</sup>

Thus, chapter 93A, as construed by the Court in *Baldassari*, provides inadequate remedies for certain obvious consumer abuses. The message is clear: unless the General Court amends the statute, plaintiffs who suffer losses in a form other than money or property must pursue their claims under another theory.

*Scope of Chapter 93A: Legislative Developments.* Section XV of the regulations of the Attorney General provides that “an act or practice is a violation of Chapter 93A, Section 2 if: . . . [i]t fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public’s health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection . . . .”<sup>43</sup> The rationale of this regulation would appear to be that conduct proscribed by the Legislature or a local governing body has been determined, through a proper legislative process, to be against the public policy of the Commonwealth. Thus, such conduct should fall within the broad concept of “unfairness.” During the *Survey* year, this reasoning was expressly adopted by the General Court with respect to certain specified provisions intended to protect the consumer. Chapter 88 of the Acts of 1975 has amended chapters 255B, 255C, and 255D of the General Laws to provide that a violation of those chapters is also a violation of chapter 93A. Those chapters regulate the install-

<sup>36</sup> 1975 Mass. Adv. Sh. 3188, 337 N.E.2d 701.

<sup>37</sup> *Id.* at 3202-03, 337 N.E.2d at 708-09.

<sup>38</sup> *Id.* at 3203, 337 N.E.2d at 708.

<sup>39</sup> Violation of G.L. c. 93, § 49 (relating to unfair or unreasonable collection procedures) is expressly made a violation of G.L. c. 93A. G.L. c. 93, § 49.

<sup>40</sup> 1975 Mass. Adv. Sh. at 3189, 337 N.E.2d at 703.

<sup>41</sup> *Id.* at 3194-95, 337 N.E.2d at 705.

<sup>42</sup> *Id.* at 3206, 337 N.E.2d at 709.

<sup>43</sup> REGULATIONS OF THE ATTORNEY GENERAL § XV.

ment sales of automobiles, insurance, and other goods or services.

*The remedy in equity.* It is safe to conclude that the Supreme Judicial Court has given the superior court a virtual *carte blanche* in fashioning appropriate remedies for litigants bringing an action under chapter 93A. The Court in *Slaney* held that it was irrelevant to a private 93A action—an action in equity<sup>44</sup>—that the plaintiff had an adequate remedy at law.<sup>45</sup> In *DeCotis*, the Court sustained the lower court's broad order, which: (1) required the restitution of commissions determined to have been unlawfully collected; (2) required the defendant to seek out those persons who had paid such unlawful commissions; (3) required the payment into escrow of such fees collected from persons who could not be located, with unclaimed funds to escheat to the state; and (4) enjoined the collection of future commissions.<sup>46</sup> Further, the *DeCotis* Court held that the superior court has power to provide remedies even beyond those specifically sought by the petitioner.<sup>47</sup>

*Class actions.* Neither *DeCotis* nor *Slaney* involved a true class action, although the *DeCotis* case did involve what has come to be called "mass restitution" at the behest of the Attorney General on behalf of all persons victimized by the unfair act or practice.<sup>48</sup> In *DeCotis*, the Court rejected the defendant's contention that only those parties specifically named in the Attorney General's complaint could recover,<sup>49</sup> and upheld the lower court's order of restitution to all persons who were wronged and who could be identified.<sup>50</sup> In *Slaney*, however, the Court did volunteer the following in a footnote:

It is interesting to note that neither §§9(2) and 11 (3d par.) nor Rule 23 of the Mass. R. Civ. P. . . . contains all the procedural strictures which have limited the practicality of class actions in the Federal Courts. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) . . . Rule 23(d) of the Mass. R. Civ. P. . . . seems to permit the flexibility in notification of class members which, before the *Eisen* case was decided, many commentators had urged be allowed under the Federal rule.<sup>51</sup>

This language would seem to instruct the superior courts to be liberal ("flexible") in their requirements for notification to members of a class in a class action brought under chapter 93A. Thus, either simple notification by publication, notification as part of a defendant's

<sup>44</sup> G.L. c. 93, § 9(1).

<sup>45</sup> 1975 Mass. Adv. Sh. at 193, 322 N.E.2d at 777.

<sup>46</sup> 1974 Mass. Adv. Sh. at 1426 nn.2, 3, 1434-36, 316 N.E.2d at 750-51 nn.2, 3, 755-56.

<sup>47</sup> *Id.* at 1437, 316 N.E.2d at 757.

<sup>48</sup> See text at note 46 *supra*.

<sup>49</sup> 1974 Mass. Adv. Sh. at 1435, 316 N.E.2d at 756.

<sup>50</sup> *Id.* at 1436, 316 N.E.2d at 756. See text at note 46 *supra*.

<sup>51</sup> 1975 Mass. Adv. Sh. at 192 n.16, 322 N.E.2d at 777 n.16.

regular mailing to its customers, or where the class is limited in number, more formal notice at the defendant's expense, could be found to constitute sufficient notification to the members of a class in a chapter 93A proceeding. As the Court stated in *Slaney*, chapter 93A was designed to give consumers an efficient and expedient remedy in matters of relatively small moment.<sup>52</sup> That goal would be frustrated by unduly complicated and expensive requirements of notification to members of a class similarly affected by an unfair or deceptive act or practice.

Subsequent to the close of the *Survey* year, the Court further discussed class actions in *Baldassari v. Public Finance Trust*,<sup>53</sup> holding that a motion to certify that the action could proceed as a class action, although not provided for by Rule 23 of the Massachusetts Rules of Civil Procedure, was within the discretion of the trial judge to approve.<sup>54</sup> Although a hearing is required by section 9(2) of chapter 93A to determine if the class is adequately represented, the Court held that the plaintiff need only show that the members of the class are numerous, that there are common questions of law or fact, and that the plaintiff is typical of the members represented, *i.e.*, that they are similarly situated.<sup>55</sup> The Court held, however, that chapter 93A overrides Rule 23, which requires the plaintiff to show that the common question "predominate[s]"<sup>56</sup> and that the class action is "superior"<sup>57</sup> to other methods of redress.<sup>58</sup> Finally, the Court held that any number of plaintiffs may join in the suit as named parties, taking advantage of a single demand letter sent by one plaintiff demanding settlement for the class.<sup>59</sup>

*Conclusion.* Both *Slaney* and *DeCotis* should give inspiration and guidance to those attorneys who have hitherto been reluctant to use the remedies of chapter 93A because of its apparent complexity and untried provisions. The Supreme Judicial Court has shown every indication that the courts of the Commonwealth should aid in achieving the intended goals of the Consumer Protection Act.

**§9.2. Consumer Protection: Limitation on Actions.** During the *Survey* year, the Supreme Judicial Court, in *Lynch v. Signal Finance Co.*,<sup>1</sup> was called upon to determine the statute of limitations applicable to an action by a creditor against a debtor under section 10(b) of chapter 140C of the General Laws, the Truth-in-Lending Act. The

<sup>52</sup> *Id.* at 191, 322 N.E.2d at 776.

<sup>53</sup> 1975 Mass. Adv. Sh. at 3188, 337 N.E.2d at 701.

<sup>54</sup> *Id.* at 3195, 337 N.E.2d at 705.

<sup>55</sup> *Id.* at 3195-96, 337 N.E.2d at 705-06.

<sup>56</sup> MASS. R. CIV. P. 23(b).

<sup>57</sup> *Id.*

<sup>58</sup> 1975 Mass. Adv. Sh. at 3195-96, 337 N.E.2d at 706.

<sup>59</sup> *Id.* at 3198-99, 337 N.E.2d at 707.

§ 9.2. <sup>1</sup> 1975 Mass. Adv. Sh. 1182, 327 N.E.2d 732.



Court held that the amount recoverable under section 10(b)—twice the amount of the finance charge, but not less than \$100 nor more than \$1000<sup>2</sup>—constituted a “penalty” within the purview of section 5 of chapter 260 of the General Laws, and thus required the action to be brought within one year of the violation.<sup>3</sup> Section 5 of chapter 260 provides: “Actions for penalties . . . if brought by a person to whom the penalty . . . is given in whole or in part, shall be commenced only within one year next after the offense is committed.”

A violation of chapter 140C can occur in one of two situations: (1) a total failure to disclose as required by the Act, or (2) a disclosure that does not comply with the Act’s requirements. The point at which the limitation period begins to run is relatively simple to determine in the latter case, since the date on which the noncomplying disclosures were made can, in most cases, be readily discovered. Where *no* disclosure is made, however, the running of the statute of limitations would appear to commence upon the consummation of the transaction, since initial disclosures may be made at any time prior to the time the transaction is “made”<sup>4</sup> or “consummated.”<sup>5</sup>

The Court in *Lynch* rejected plaintiff’s contention that the action was one in contract and hence within the longer statute of limitation period for contract actions.<sup>6</sup> The Court’s holding puts a severe restriction on actions brought under the Truth-in-Lending Act, especially where the transaction involved is a long-term credit arrangement. Since a consumer would not know of the violation until informed of it by counsel after a dispute arose, the statute is likely to have run by the time the consumer realized that he was entitled to recovery. The Court’s decision is inconsistent with the requirements of both the regulations<sup>7</sup> under the federal Truth-in-Lending Act<sup>8</sup> and the state law<sup>9</sup> that records of disclosures be retained for two years after they were required to be made.

By contrast, the Court in *Baldassari v. Public Finance Trust*<sup>10</sup> held that an action under the chapter 93A that was essentially an action for personal injuries was subject to the two-year statute of limitations applicable to actions in tort and actions in contract for personal injuries.<sup>11</sup> Although section 9(3) of chapter 93A allows a minimum re-

<sup>2</sup> G.L. c. 140C, § 10(b).

<sup>3</sup> 1975 Mass. Adv. Sh. at 1187, 327 N.E.2d at 734.

<sup>4</sup> G.L. c. 140C, § 6(a).

<sup>5</sup> *Id.* § 7(a).

<sup>6</sup> 1975 Mass. Adv. Sh. at 1186-87, 327 N.E.2d at 734. See G.L. c. 260, § 2.

<sup>7</sup> 12 C.F.R. 226.6(i) (1976).

<sup>8</sup> 15 U.S.C. § 1601 *et seq.* (1970).

<sup>9</sup> G.L. c. 140C, § 5(h).

<sup>10</sup> 1975 Mass. Adv. Sh. 3188, 337 N.E.2d 701.

<sup>11</sup> *Id.* at 3201, 337 N.E.2d at 708. See G.L. c. 260, § 2A. The Court in *Baldassari* made clear that “the sending of a demand letter [is] not the commencement of an action so as to satisfy the requirement of the statute of limitations.” 1975 Mass. Adv. Sh. at 3202, 337 N.E.2d at 708.

covery of twenty-five dollars, which could be construed as a penalty similar to that in the Truth-in-Lending Act, the Court did not even cite *Lynch*.

The matter would appear to have been mooted, however, by chapter 432 of the Acts of 1975, which inserts section 5A in chapter 260, effective July 15, 1975. Section 5A applies a four-year statute of limitations to all actions brought under statutes "intended for the protection of consumers," including the Truth-in-Lending Act and chapter 93A. The limitation period begins to run "after the cause of action accrues." This four-year limitation period, however, will apply only to causes of action that were not barred prior to the enactment of chapter 432: the Supreme Judicial Court held that the act "does not serve to revive actions barred before its effective date."<sup>12</sup>

Another change in statutes of limitations for consumer actions was effected by chapter 592 of the Acts of 1974, which puts a four-year statute of limitations on the right to rescind certain real estate transactions.<sup>13</sup> The federal Truth-in-Lending Act<sup>14</sup> was amended in 1974<sup>15</sup> to provide for a three-year statute of limitations on such rescissions. Thus, there is a longer period of time in the Commonwealth to exercise such rights. Under both provisions, the statute begins to run from the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier.<sup>16</sup>

**§9.3. Money and Property Exempt from Creditors.** During the *Survey* year, persons with low and moderate incomes received substantial assistance from the Legislature by its amendments to chapters 223, 224, 235, and 246 of the General Laws. The kinds of property and amounts of money exempt from attachment and execution were expanded and increased by chapter 501 of the Acts of 1975. The following is a summary of the exemptions under section 34 of chapter 235 of the General Laws, as amended:

<i>Property for Personal Use</i>	<i>Monetary Limitation</i>
Wearing apparel for family	None
Uniforms for military personnel	None
Heating unit for dwelling	None
Household furniture	\$3,000
Sewing machine	\$200
Bible and books	\$200
Provisions (food, etc.)	\$300
Burial rights and tombs	None
Share in agricultural cooperative	\$100

<sup>12</sup> *Baldassari v. Public Fin. Trust*, 1975 Mass. Adv. Sh. 3188, 3201, 337 N.E.2d 701, 708.

<sup>13</sup> Acts of 1975, c. 592, § 8A. See G.L. c. 140C, § 8.

<sup>14</sup> 15 U.S.C. § 1601 *et seq.* (1970).

<sup>15</sup> Pub. L. No. 93-495, § 405 (codified at 15 U.S.C.A. § 1635(f) (Supp. 1976)).

<sup>16</sup> 15 U.S.C.A. § 1635(f) (Supp. 1976); G.L. c. 140C, § 8.

Automobile for family use	\$700
Homestead	\$24,000
Church pew	None
<i>Property for Business Use</i>	<i>Monetary Limitation</i>
Tools of trade	\$500
Stock and inventory	\$500
Equipment of fishermen	\$500
Two cows, twelve sheep, two swine, and four tons of hay	None
<i>Money or Rights to Money</i>	
Balance for family provisions	\$300
Rent	\$200 per month
Utilities	\$75 per month
Savings or wages due	\$125
Money due or received from Public assistance	None

The new provisions are those that provide exemptions for: (1) monies aggregated to pay for utilities, rent, and food; (2) bank deposits or wages due; (3) monies traceable to public assistance income; and (4) automobiles. Clearly, the object of the amendments is to give wage earners a greater degree of security in their ability to maintain themselves and their families.

In light of rental costs in urban areas in Massachusetts, the \$200 per month exemption for rent is modest. Nonetheless, it should give protection to many families in the lower income brackets. The purpose of the new law may have been better served had the exemption also applied to purchase money mortgages on the debtor's dwelling.

It can only be assumed that the \$700 exemption for the family automobile applies to the debtor's equity in the automobile, *i.e.*, the value of the vehicle over and above the amount due under any purchase money obligation. Otherwise, in view of today's prices for motor vehicles, only a debtor owning a derelict motor vehicle would qualify for the exemption.

Chapter 501 of the Acts of 1975 will also affect the use of supplementary process<sup>1</sup> in the enforcement of judgments. By that process, a court may require a debtor to produce a statement of affairs in order to determine what money and property he owns.<sup>2</sup> If "after a full hearing at which the creditor shall have the burden of proof the court finds that the debtor has property not exempt under section thirty-four of chapter two hundred and thirty-five from being taken on execution, the court may order him . . . to produce it . . ."<sup>3</sup> If such

§ 9.3. <sup>1</sup> G.L. c. 224, § 14 *et seq.*

<sup>2</sup> *Id.* §§ 15, 16.

<sup>3</sup> Acts of 1975, c. 501, § 3, *amending* G.L. c. 224, § 16.

nonexempt property is insufficient to satisfy the judgment, then the court may order the debtor to make partial payments to the creditor. The 1975 amendments make clear that such payments may be ordered only to the extent that the debtor's income exceeds the amount exempted by either federal<sup>4</sup> or state<sup>5</sup> garnishment provisions, whichever is greater.<sup>6</sup> No payments can be ordered to be made out of income derived from federal or state assistance payments.<sup>7</sup>

By reading the "exempt property" restriction in conjunction with the limitation on partial payments that can be ordered by the court, it is probable that a debtor may aggregate, *in addition to* money, exempt as wages, cash for the purpose of acquiring family provisions to the extent of \$300, and for the purposes of paying rent of \$200 and utilities of \$75 each month. Monies aggregated for these purposes are exempt from execution under section 34 of chapter 235 of the General Laws, and hence constitute "property" that cannot be taken from the debtor in supplementary process. For a person of moderate or low income, these provisions could grant a total exemption of all money due, or held as cash on deposit.

Chapter 501 of the Acts of 1975 also makes clear that no suit can be commenced by the attachment of property that is exempt from execution under section 34 of chapter 235 of the General Laws.<sup>8</sup> Furthermore, under section 32 of chapter 246 of the General Laws, the attachment of wages not otherwise exempted by federal or state law is permitted only after judgment against the debtor, and only if "authorized in advance by written permission endorsed upon the writ or complaint and signed by a justice, associate justice or special justice of the court in which the action is commenced."<sup>9</sup> The 1975 amendments provide that such amounts may be attached only to the extent that they are "upon money or credits not exempt from execution pursuant to [G.L. c. 235, § 34]."<sup>10</sup> Such "money or credits" must refer to the amounts that may be aggregated for necessities under section 34 of chapter 235 of the General Laws. Otherwise, this addition would have little meaning.

**§9.4. Credit Card Users' Claims and Defenses: Federal Limitations.** Parties who pay for goods or services by check have the right to stop payment on those checks if they do not receive what they paid for.<sup>1</sup> Increasingly, bank and other third-party credit cards have supplanted checks as a means of payment. The issue thus arose whether

<sup>4</sup> 15 U.S.C. §§ 1671-77 (1970).

<sup>5</sup> G.L. c. 246, § 28.

<sup>6</sup> Acts of 1975, c. 501, § 3, *amending* G.L. c. 224, § 16.

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

<sup>8</sup> Acts of 1975, c. 501, § 1, *amending* G.L. c.223, § 42.

<sup>9</sup> G.L. c. 246, § 32.

<sup>10</sup> Acts of 1975, c. 501, § 9, *amending* G.L. c. 246, § 32.

§ 9.4. <sup>1</sup> See G.L. c. 106, § 4-403.

a card user could refuse payment to the card issuer or otherwise assert against it rights that the user was entitled to assert against the merchant. Card issuers argued against such rights, on the grounds that the issuers were innocent third parties with no responsibility for the actions of merchants who honored their cards.

The Massachusetts Legislature took the opposite view, and in 1970 enacted section 12F of Chapter 255 of the General Laws, which provides:

A creditor in consumer loan transactions shall be subject to all of the defenses of the borrower arising from the consumer sale or lease for which the proceeds of the loan are used, if the creditor knowingly participated in or was directly connected with the consumer sale or lease transaction.

. . . [A] creditor shall be deemed to have knowingly participated in or to have been directly connected with a consumer sale or lease transaction if: . . . (e) the creditor was the issuer of a credit card which may be used by the consumer in the sale or lease transaction as a result of a prior agreement between the issuer and the seller or lessor.<sup>2</sup>

During the *Survey* year, the United States Congress, in its 1974 amendments to the federal Consumer Credit Protection Act,<sup>3</sup> adopted a similar approach, but tempered it with severe if not unworkable limitations. A card holder may now, under federal law, assert claims or defenses against the card issuer only if: (1) the amount of the transaction exceeds fifty dollars, (2) the transaction took place in the same state as the address of the card holder or within 100 miles of that address, and (3) the card holder "has made a good faith attempt to obtain satisfactory resolution . . . from the person honoring the credit card."<sup>4</sup> The geographical and fifty dollar limitations do not apply, however, where the transaction is with a person who is the same as the card issuer, is controlled by the card issuer, or is a franchised dealer of the card issuer, or where the transaction results from a mail solicitation participated in or made by the card issuer.<sup>5</sup>

Furthermore, the claim or defense may be asserted only to the extent that, with respect to the particular transaction in dispute, there was credit outstanding "at the time the card holder first notif[i]e[d] the card issuer or the person honoring the credit card of such claim or defense."<sup>6</sup> In determining the amount of such credit outstanding, all amounts paid are deemed to have been applied first to late charges,

---

<sup>2</sup> G.L. c. 255, § 12F.

<sup>3</sup> 15 U.S.C. § 1601 *et seq.* (1970).

<sup>4</sup> 15 U.S.C.A. § 1666i(a) (Supp. 1976).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* § 1666 i(b).

then to finance charges, and then to debits in the order that they were entered into the account—a first-entered—first-paid concept.<sup>7</sup>

The Massachusetts law provides greater protection than the new federal law: there are no monetary or geographical limitations and there is no requirement of an effort to resolve the dispute with the merchant. Indeed, under the federal law, the greater the “good faith” effort of a card holder to resolve the dispute with the merchant, the greater the chance for the diminution of his claim against the card issuer if payments are being made and are applied against the debit for the challenged transaction.

The crucial question presented is: to what extent does the new federal law preempt section 12F of chapter 255? The federal Act retains the benefits of state law except to the extent and only to the extent they are inconsistent.<sup>8</sup> The Act also provides, however, that “[t]he [Federal Reserve] Board may not determine that any State law is inconsistent with any provision of this Chapter . . . if the Board determines that such law gives greater protection to the consumer.”<sup>9</sup> Regulations promulgated by the Federal Reserve Board provide: “A State, through its Governor, Attorney General, or other appropriate official having primary enforcement or interpretive responsibilities for its credit billing practices law, may apply to the Board for a determination that the State law offers greater protection to the consumer . . . or is otherwise not inconsistent [with the federal law] . . . .”<sup>10</sup>

The Board’s test for inconsistency is whether a creditor can comply with state law without violating any provision of the federal law.<sup>11</sup> Since the Massachusetts law contains no limitations on the right to assert defenses, it would seem that a creditor can comply with that law without violating the federal statute. Thus, card holders using credit cards issued in Massachusetts may continue to assert defenses irrespective of the amount of the transaction, of where it took place, or of the unpaid amount still due for that transaction.

**§9.5. Correction of Erroneous Billings.** In 1971, the Legislature enacted chapter 93C of the General Laws, which became effective on January 5, 1972.<sup>1</sup> This law was designed to deal with the problems faced by consumers when they attempt to correct billing errors made by creditors whose only response is turned out by computers. Upon written notice by a customer, stating the fact of the error, the amount of the error, and the reasons for the error, chapter 93C requires a

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

<sup>8</sup> *Id.* § 1666 j(a).

<sup>9</sup> *Id.*

<sup>10</sup> 12 C.F.R. § 226.6(b)(2)(iv) (1976).

<sup>11</sup> *Id.* § 226.6(b)(2)(ii).

§ 9.5. <sup>1</sup> Acts of 1971, c. 860, § 1.

creditor to acknowledge, within 14 days, the receipt of such notice and, within 60 days after receipt of such notice, to either correct the error or explain why the creditor believed there was no error.<sup>2</sup> The creditor is entitled to an additional 30 days if he requires additional information from the customer, or an additional 60 days if information is required from a third party to the transaction.<sup>3</sup> During this 60-, 90-, or 120-day period, the creditor may not attempt to collect the amount in dispute.<sup>4</sup> A noncomplying creditor forfeits finance charges with respect to the disputed amount, and if that amount is determined to be in error, the creditor is also liable for the greater of (1) actual damages, or (2) a penalty of from \$100 to \$300.<sup>5</sup> The creditor is required to inform the customer of the right to have billing errors corrected under these provisions at least once each quarter in which a billing statement is sent to the customer.<sup>6</sup>

During the *Survey* year, the United States Congress, again following Massachusetts's lead as it did in the case of truth in lending, added chapter 4 (sections 1666-1666j), Credit Billing, to Title I of the Consumer Credit Protection Act,<sup>7</sup> effective October 28, 1975.<sup>8</sup> Section 1666 tracks the general concepts embodied in chapter 93C of the General Laws. Section 1666j preserves application of state law "except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency."<sup>9</sup>

The Federal Reserve Board is authorized to determine the extent of the inconsistency of state laws;<sup>10</sup> without reference to specific state laws, it has done so through amendments to Regulation Z (12 C.F.R. 226). By recent amendment to regulation section 226.6(b), the Board has preempted chapter 93C as it applies to any initial procedures that the customer and creditor must take with reference to correcting billing errors.<sup>11</sup> The Board has ruled that any "differences" between state and federal law constitute inconsistency and that the federal law has preempted the state law.<sup>12</sup>

The differences between the federal and state enactments are not great, but they nonetheless exist. Under the federal law, a customer must send written notice of an alleged error within 60 days after a bill is sent;<sup>13</sup> Massachusetts law has no such time limitation.<sup>14</sup> The

<sup>2</sup> G.L. c. 93C, § 2.

<sup>3</sup> G.L. c. 93C, § 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* § 4.

<sup>6</sup> *Id.* § 5.

<sup>7</sup> 15 U.S.C. §§ 1601 *et seq.* (1970).

<sup>8</sup> Pub. L. No. 93-495, § 306 (Oct. 28, 1974) (codified at 15 U.S.C.A. §§ 1666-66j (Supp. 1976)).

<sup>9</sup> 15 U.S.C.A. § 1666j(a) (Supp. 1976).

<sup>10</sup> *Id.*

<sup>11</sup> 12 C.F.R. § 226.6(b)(2)(i) (1976).

<sup>12</sup> *Id.*

<sup>13</sup> 15 U.S.C.A. § 1666(a) (Supp. 1976).

<sup>14</sup> G.L. c. 93C, § 2.

creditor's acknowledgement of receipt of such notice must be sent within 30 days under the federal law,<sup>15</sup> rather than 14 days under Massachusetts law.<sup>16</sup> The maximum time for resolution under federal law is 90 days,<sup>17</sup> rather than the 120 days provided by Massachusetts law.<sup>18</sup> The "forfeiture" for creditor noncompliance under federal law is the amount of the disputed item plus the finance charge thereon, not to exceed \$50.<sup>19</sup> Chapter 93C provides that the noncomplying creditor will forfeit all finance charges with respect to the challenged item, and, if there was an error, the greater of either actual damages or a penalty of from \$100 to \$300.<sup>20</sup> The statement of a customer's rights under the federal law must be sent semiannually<sup>21</sup> rather than quarterly as provided in chapter 93C<sup>22</sup> and a creditor may, by proper written disclaimer, disallow notice of error which is received on a payment receipt or stub sent by the customer,<sup>23</sup> whereas Massachusetts law has no such permissible limitation. Chapter 93C has no definition of "billing error," whereas the federal law and the regulations of the Federal Reserve Board define that term in some detail.

"Billing error" as defined in the federal Act<sup>24</sup> and refined in the regulations<sup>25</sup> includes the obvious kinds of errors that can appear upon a periodic statement: credit not extended or extended to an unauthorized person, inadequate identification, incorrect failure to credit payments or returns, computational errors, and improper mailing address.<sup>26</sup> In addition, the statutory concept of billing error includes "[a] reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction."<sup>27</sup> The regulations expand upon this, stating that this definition includes not only nondelivery, but also delivery of property or services different from that described in any agreement, delivery of the wrong quantity, late delivery, or delivery to the wrong location.<sup>28</sup> Excluded, however, is "any dispute with respect to the quality of property in the physical possession of the customer or services performed for the customer . . ."<sup>29</sup> Thus, the Board's construction of the

<sup>15</sup> 15 U.S.C.A. § 1666(a) (Supp. 1976).

<sup>16</sup> G.L. c. 93C, § 2.

<sup>17</sup> 15 U.S.C.A. § 1666(a) (Supp. 1976).

<sup>18</sup> G.L. c. 93C, § 3.

<sup>19</sup> 15 U.S.C.A. § 1666(e) (Supp. 1976).

<sup>20</sup> G.L. c. 93C, § 4.

<sup>21</sup> 12 C.F.R. § 226.7(d)(1) (1976).

<sup>22</sup> G.L. c. 93C, § 5.

<sup>23</sup> 15 U.S.C.A. § 1666(a) (Supp. 1976).

<sup>24</sup> *Id.* § 1666(b).

<sup>25</sup> 12 C.F.R. § 226.2(j) (1976).

<sup>26</sup> 15 U.S.C.A. § 1666(b) (Supp. 1976).

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

<sup>28</sup> 12 C.F.R. § 226.2(j)(3) n.1. (1976).

<sup>29</sup> *Id.*



term “accepted”<sup>30</sup> as used in the Act is considerably more restrictive than that used in the Uniform Commercial Code, which provides, in simplified terms, that a buyer has accepted if, after inspection, he has indicated a desire to keep the goods as his own or has otherwise failed to reject the goods for any nonconformity.<sup>31</sup> Such nonconformity would, of course, include defects in quality.

There is no such limitation on the definition of billing error in the Massachusetts law, and it can therefore be assumed to include disputes concerning quality. For example, a customer may be in the process of either attempting to get an item repaired or replaced, or trying to get a refund, when the billing statement arrives. Under the federal Act, the customer has no right to “put the brakes on” collection of the amount due until the problem is resolved, whereas under Massachusetts law, attempts by the creditor to collect would be proscribed.

The regulations, however, allow “inconsistent” state law to become operative at the end of the time period when the federal law is operative.<sup>32</sup> It requires creditors to inform customers of this and to apprise them of the danger that they may lose valuable federal rights by failing to notify the creditor within sixty days—the time allowed by the federal law.<sup>33</sup> Thus, a customer who does not act within that time would still be able to take advantage of the Massachusetts law after sixty days, since there is no time limitation specified in chapter 93C. In Massachusetts, it would not appear that the customer would *lose* any rights by waiting until the end of the federal sixty-day period. In fact, the customer may obtain more favorable rights by waiting until the end of that period. This would appear to be the case in situations where the quality of a purchased item is at issue, due to the restricted definition of “billing error” in the federal law as refined by regulations of the Board.<sup>34</sup>

Because Massachusetts law cannot be invoked until sixty days after the allegedly incorrect statement was sent (the time for notice of error under the federal Act), it would appear that collection procedures could be commenced during that period. The solution to this quandary may be for the customer to invoke the federal Act within sixty days, and in turn, the state law at the end of sixty days. How this matter would ultimately be resolved by a recalcitrant creditor is unclear.

Massachusetts, “through its Governor, Attorney General or other appropriate official,” may apply for a determination by the Board of the extent to which its law is not inconsistent with the federal Act or

---

<sup>30</sup> See text at note 27 *supra*.

<sup>31</sup> G.L. c. 106, § 2-606.

<sup>32</sup> 12 C.F.R. § 226.6(b)(2)(i) (1976).

<sup>33</sup> *Id.* § 226.6(b)(2)(iii).

<sup>34</sup> See text at notes 24-31 *supra*.

that its protections for consumers are greater than those of the federal Act.<sup>35</sup> For the above reasons, however, it is doubtful that the Board would find sufficient consistency for the Massachusetts law to prevail during the initial sixty-day period. The preemption in this respect is absolute.

**§9.6. Door-to-Door Sales: Cancellation of Contracts.** Massachusetts was one of the first states to provide a consumer with the right to cancel, within a stated period, a credit sale he entered into as a result of a door-to-door solicitation.<sup>1</sup> The cancellation period, initially twenty-four hours,<sup>2</sup> was expanded to three business days,<sup>3</sup> and the right to cancel was extended to noncredit consumer transactions that exceeded twenty-five dollars.<sup>4</sup> To inform the buyer of his right to cancel, a conspicuous, although not entirely comprehensible, clause was required to be included in the agreement.<sup>5</sup>

In 1972, the Federal Trade Commission held hearings on, and ultimately promulgated, a trade regulation rule effective June 7, 1974, to achieve throughout the United States results similar to those provided by the Massachusetts enactments.<sup>6</sup> The FTC rule, however, required the seller to furnish, *separate* from the agreement or sales receipt, the notice of the right to cancel the sale.<sup>7</sup> This separate form could be used by the purchaser to notify the seller that he wished to cancel the transaction.<sup>8</sup> In addition, oral notice of the right to cancel was required to be given at the time of the transaction.<sup>9</sup>

In response to complaints by door-to-door sellers<sup>10</sup> of inconsistency between Massachusetts law and the FTC rule, the Legislature enacted chapter 90 of the Acts of 1975. That act brings Massachusetts law into line with the FTC rule by requiring a separate notice form identical to that required by the FTC rule.<sup>11</sup> Massachusetts law now also requires

<sup>35</sup> 12 C.F.R. § 226.6(b)(2)(iv) (1976).

§ 9.6. <sup>1</sup> Acts of 1966, c. 284, as amended, G.L. c. 255D, § 14A(2).

<sup>2</sup> *Id.*

<sup>3</sup> Acts of 1969, c. 517, § 39, amending G.L. c. 255D, § 14A(2).

<sup>4</sup> Acts of 1970, c. 272, as amended, G.L. c. 93, § 48.

<sup>5</sup> *Id.*

<sup>6</sup> 16 C.F.R. § 429.1(b) (1974).

<sup>7</sup> 16 C.F.R. § 429.1(b) (1974).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* § 429.1(e) (1974).

<sup>10</sup> Representatives of the Direct Sellers Association vehemently opposed the "cooling off period" concept when it was being heard in committee in 1965 and 1966. By 1975 they had learned to live with the concept and themselves advocated amendments to the Massachusetts statute to bring it into compliance with the FTC rule. Their greater fear seemed to be of the provisions contained in the National Consumer Act (proposed by the National Consumer Law Center) with respect to "outside approval transactions." Under those provisions, consumers would be entitled to three days in which to approve a transaction consummated outside the seller's place of business. If the transaction were not reaffirmed, it would, by law, be cancelled. See National Consumer Act §§ 2.501-2.505.

<sup>11</sup> Acts of 1975, c. 90, §§ 1, 6.

oral notice<sup>12</sup> and gives the seller, upon proper demand or instruction, the same rights to recover any goods delivered to the buyer that the FTC rule affords him.<sup>13</sup> After twenty days without word from the seller, the buyer may keep any goods received.<sup>14</sup> Moreover, chapter 90 made the Massachusetts law consistent with the FTC rule by prohibiting the transfer of any solicited agreement or obligation, prior to the fifth business day after it was signed.<sup>15</sup> The Massachusetts statute, as amended, however, would appear to have surpassed the protections afforded by the FTC rule in that it makes an assignee of the seller subject, at any time, to the buyer's cancellation, if the seller had originally failed to provide the buyer with a signed sales agreement containing the statutory right-to-cancel notice.<sup>16</sup>

The Massachusetts statute provides greater protection than the FTC rule, because the former applies to transactions consummated by either party at other than the seller's place of business,<sup>17</sup> whereas the FTC rule requires personal solicitation by the seller.<sup>18</sup> Furthermore, the FTC rule exempts transactions that are: (1) consummated after the buyer first called on the seller at the latter's place of business; (2) covered by the right to rescind certain real estate transactions under the federal Consumer Credit Protection Act;<sup>19</sup> (3) those in which the goods or services are needed in an emergency and the buyer so certifies; (4) consummated entirely by mail or telephone; (5) those in which home improvements are specifically requested at the buyer's initiation; or (6) sales or rentals of real property, sales of insurance, or the sale of securities or commodities that are otherwise regulated.<sup>20</sup>

**§9.7. Warranties.** The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act<sup>1</sup> (the "Act"), which became effective July 4, 1975,<sup>2</sup> does not require a manufacturer or other merchant of consumer goods to give an express warranty of any kind concerning the quality of his goods. What it *does* require is that, when a *written* warranty is given to a consumer, it be one of two kinds and that it be labeled "full warranty" or "limited warranty."<sup>3</sup> The term "consumer" is defined to include not only the original buyer of a product "nor-

<sup>12</sup> *Id.* §§ 3, 6.

<sup>13</sup> *Id.* §§ 2, 8.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* §§ 3, 6.

<sup>16</sup> *Id.* § 3.

<sup>17</sup> G.L. c. 93, § 48A.

<sup>18</sup> 16 C.F.R. § 429.1 n.1 (1974).

<sup>19</sup> 15 U.S.C. § 1635 (1970).

<sup>20</sup> 16 C.F.R. § 429.1 n.1 (1974).

§9.7. <sup>1</sup> 15 U.S.C.A. §§ 2301 *et seq.* (Supp. 1976).

<sup>2</sup> *Id.* § 2312(a).

<sup>3</sup> *Id.* §§ 2303, 2304. The Act also confers upon the Federal Trade Commission the authority to regulate disclosure with respect to service contracts. *Id.* § 2306(a).

mally used for personal, family, or household purposes,"<sup>4</sup> but his successor owners as well.<sup>5</sup> The Act applies only to products manufactured after its effective date.<sup>6</sup>

A warranty labeled "full warranty" must (and, by law, will)<sup>7</sup> include certain minimum benefits to consumers. As defined by the Act, such warranty is, in legal terms, a combination of apples and oranges, mixing obligations as to quality with a consumer's remedies when those obligations are not met. The "Federal minimum standards" for a "full warranty" require:

(1) that the warrantor either repair the product "within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty,"<sup>8</sup> or allow the consumer to elect between a replacement or a refund of the purchase price if the defects remain "after a reasonable number of attempts" by the warrantor to repair them;<sup>9</sup>

(2) that implied warranties not be limited in duration;<sup>10</sup> and

(3) that any exclusion or limitation of consequential damages for breach of any warranty appear conspicuously on the face of the written warranty.<sup>11</sup>

The Federal Trade Commission is given broad regulatory authority to refine the statutory requirements of the Act. For example, the Commission may establish by regulation the number of attempts that constitute a "reasonable" number of attempts to repair;<sup>12</sup> may determine what reasonable duties other than notification to the warrantor may be placed upon the consumer;<sup>13</sup> and may prescribe minimum requirements for informal dispute settlement mechanisms that a warrantor may include and require as part of the warranty.<sup>14</sup> The Commission quickly promulgated regulations to go into effect on the effective date of the Act.<sup>15</sup>

Although the Act is aimed primarily at manufacturers who provide written warranties with their products, the term "warrantor" is defined to include "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty."<sup>16</sup> Thus, the Act applies to any person in the distribu-

<sup>4</sup> *Id.* § 2301(1).

<sup>5</sup> *Id.* § 2301(3).

<sup>6</sup> *Id.* § 2312(a).

<sup>7</sup> *Id.* § 2304(e).

<sup>8</sup> *Id.* § 2304(a)(1).

<sup>9</sup> *Id.* § 2304(a)(4).

<sup>10</sup> *Id.* § 2304(a)(2).

<sup>11</sup> *Id.* § 2304(a)(3).

<sup>12</sup> *Id.* § 2304(a)(4). See text at note 9 *supra*.

<sup>13</sup> 15 U.S.C.A. § 2304(b)(1) (Supp. 1976).

<sup>14</sup> *Id.* § 2310(a)(2). See text at notes 28-29 *infra*.

<sup>15</sup> 40 Fed. Reg. 29892 (July 16, 1975).

<sup>16</sup> 15 U.S.C.A. § 2301(5) (Supp. 1976).

tive chain who sees fit to reduce to writing some affirmation as to the product's quality or an obligation to repair, replace, or refund should a defect arise. Even the dealer in used cars or appliances who gives a "quickie" short-term warranty, such as "50-50 for 30 days" falls within the ambit of the Act. In order to avoid noncompliance, retail sellers must determine when a product they sell has been manufactured. If the product has been manufactured after July 4, 1975, then its written warranty, if any, must comply with the Act.<sup>17</sup>

A "limited warranty" is anything less than a "full warranty" as prescribed by the "Federal minimum standards" described above.<sup>18</sup> A warrantor may give both a "full warranty" and a "limited warranty" if each is so labeled.<sup>19</sup>

Among the many problems posed by the Act is its relationship to the provisions of the Uniform Commercial Code.<sup>20</sup> First, the Code recognizes only specific remedies for a buyer as to whom a warranty, express or implied, has been breached: he can reject the goods or revoke his acceptance, obtain a refund of the purchase price, and recover any damages suffered due to the breach.<sup>21</sup> If the buyer has accepted the goods and must keep them, he may recover damages.<sup>22</sup> Repair or replacement is not among the remedies provided by the Uniform Commercial Code.

The issue is thus presented whether a buyer *must* accept those remedies when provided in either a "full warranty" or "limited warranty" which complies with the federal Act. Subsection (b)(1) of section 2311 of the Act provides that "[n]othing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." Taken at face value, this would seem to preserve the Code's remedies as an option always open to Massachusetts consumers.<sup>23</sup> On the other hand, subsection (b)(2) goes on to provide that nothing in the Act, "other than sections [2308] and [2304(a)(2) and (4)] shall . . . supersede any provision of State law regarding consequential damages for injury to the person . . ."<sup>24</sup> Those specified sections allow a warrantor giving only a "limited warranty" to limit the duration of implied warranties. Thus, it would appear that under federal law, a "limited" warrantor may limit his liability with respect to personal injury, notwithstanding that this limitation would be in direct contradiction to section 2-316A, added to the Code in Massachusetts, which prohibits sellers from modifying or disclaiming implied warranties or remedies for their breach.<sup>25</sup>

<sup>17</sup> *Id.* § 2312(a).

<sup>18</sup> *Id.* § 2303(a)(2).

<sup>19</sup> *Id.* § 2305.

<sup>20</sup> *E.g.*, G.L. c. 106.

<sup>21</sup> *Id.* §§ 2-601, 2-608, 2-711.

<sup>22</sup> *Id.* § 2-714.

<sup>23</sup> *See* G.L. c. 106, § 2-316A.

<sup>24</sup> 15 U.S.C.A. § 2311(b)(2) (Supp. 1976) (emphasis added).

<sup>25</sup> G.L. c. 106, § 2-316A.

Nonetheless, the Act provides: if “upon application of an appropriate State agency the [Federal Trade] Commission determines . . . that any requirement of such State covering any transaction . . . (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable . . . .”<sup>26</sup> Thus, relief for personal injury could not be foreclosed by a warrantor if Massachusetts applies to the Commission for the nonpreemption of section 2-316A, and the Commission responds favorably.

A consumer aggrieved by a violation of the Act may, subject to certain limitations, bring an action in either state or federal court.<sup>27</sup> The Act allows a warrantor, as part of the written warranty, to establish an informal dispute settlement mechanism pursuant to standards promulgated by the Federal Trade Commission,<sup>28</sup> and a consumer is required to use such mechanism before invoking the Act’s legal remedies.<sup>29</sup> Following an unsuccessful attempt to resolve the dispute through these informal procedures, the aggrieved consumer may then bring suit “in any court of competent jurisdiction in any State or the District of Columbia . . . or . . . in an appropriate district court of the United States . . . .”<sup>30</sup> The right to sue in the federal district court is severely limited, however. First, no such claim may be brought unless the matter in controversy exceeds \$50,000 (exclusive of interest and costs).<sup>31</sup> Second, no individual claims smaller than \$25 may be aggregated by joinder or by a class action.<sup>32</sup> In addition to these two requirements, there must be at least one hundred named plaintiffs in any action brought as a class action.<sup>33</sup> Because of these stringent requirements, the bulk of litigation under this federal provision will be brought in the state courts.

The informal dispute settlement procedures provided by the warrantor<sup>34</sup> need not necessarily be used by the consumer if he wishes to bring suit under the Uniform Commercial Code, instead of under the federal Act. The provision in a warranty requiring that the consumer use such procedures may be without effect under section 2-316A of the Uniform Commercial Code since such a provision would have the effect of constituting a restriction upon the

---

<sup>26</sup> 15 U.S.C.A. § 2311(c)(2) (Supp. 1976).

<sup>27</sup> *Id.* § 2310(d)(1).

<sup>28</sup> *Id.* § 2310(a).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 2310(d)(1).

<sup>31</sup> *Id.* § 2310(d)(3)(B).

<sup>32</sup> *Id.* § 2310(d)(3)(A).

<sup>33</sup> *Id.* § 2310(d)(3)(C).

<sup>34</sup> See text at notes 28-29 *supra*.

consumer's Code remedies.<sup>35</sup> As noted above,<sup>36</sup> the Act will not affect this state consumer right.

It appears that a consumer could choose between his state or federal law remedies, but that one would not preclude the other. A consumer could use his remedies under the Uniform Commercial Code, and before fully prosecuting them, could revert to remedies provided by the federal Act. Conversely, making use of the remedies provided by the federal Act should not preclude a consumer from later electing to proceed under state law.

**§9.8. Debt Collections.** Section 49 of chapter 93 of the General Laws which prohibits a creditor from collecting or attempting to collect a consumer debt "in an unfair, deceptive or unreasonable manner," has been amended by chapter 155 of the Acts of 1975 to proscribe such acts by the attorney of the creditor as well. The operative effect of this amendment is to subject the creditor's attorney, as well as the creditor, to the remedial provisions of chapter 93A.<sup>1</sup>

The Commissioner of Banks, under the authority vested in him by section 24 of chapter 93, has enumerated fourteen practices that collection agencies, as defined by that section, may not engage in.<sup>2</sup> Although these regulations may not expressly be applicable to creditors, their attorneys, and assignees, they clearly provide guidance for such persons in the kinds of conduct prohibited by section 49.

---

<sup>35</sup> Such provisions would presumably be valid with respect to express warranties if the warrantor was the manufacturer of the product and "maintain[ed] facilities within the Commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations." G.L. c. 106, § 2-316A.

<sup>36</sup> See text at note 23 *supra*.

§9.8. <sup>1</sup> G.L. c. 93, § 49 provides that "[f]ailure to comply with the provisions of this section shall constitute an unfair or deceptive act or practice under the provisions of chapter ninety-three A."

<sup>2</sup> REGULATIONS OF THE COMMISSIONER OF BANKS, REGULATIONS RELATIVE TO THE CONDUCT OF THE BUSINESS OF COLLECTION AGENCIES, §§ 8-18 (1969).