

Annual Survey of Massachusetts Law

Volume 1970

Article 12

1-1-1970

Chapter 9: Consumer Protection

William F. Willier

Robert W. Russell

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Recommended Citation

Willier, William F. and Russell, Robert W. (1970) "Chapter 9: Consumer Protection," *Annual Survey of Massachusetts Law*: Vol. 1970, Article 12.

C H A P T E R 9

Consumer Protection

WILLIAM F. WILLIER *and* ROBERT W. RUSSELL

§9.1. Introduction. The 1970 SURVEY year witnessed a continuation of legislative activity in the area of consumer protection with the enactment of several significant statutes aimed at promoting and protecting the interests of Massachusetts consumers. These statutes will provide the focus of this chapter.

§9.2. Consumer sales: Warranties: Attempted exclusion or modification. Chapter 880 of the Acts of 1970 amends Chapter 106 of the General Laws, the Massachusetts Uniform Commercial Code,¹ by inserting Section 2-316A, entitled "Exception as to Exclusion or Modification of Warranties, etc., in Sales of Consumer Goods." This new section, though rather simple in form, substantially circumscribes the scope of Section 2-316. Specifically, Section 2-316A states that the provisions of Section 2-316 which allow a seller to disclaim or modify an implied warranty of merchantability² or an implied warranty of fitness

WILLIAM F. WILLIER is Professor of Law and Director of the National Consumer Law Center at Boston College Law School.

ROBERT W. RUSSELL is a third year student at Boston College Law School and a staff assistant at the National Consumer Law Center.

§9.2. ¹The UCC was enacted as Chapter 106 of Massachusetts General Laws. As corresponding section numbers are identical, all future references, unless otherwise indicated, are to the 1962 Official Text of the Uniform Commercial Code.

² UCC §2-314 defines *implied warranty of merchantability* as follows:

"(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

"(2) Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract descriptions; and
- (b) in the case of fungible goods, are of fair average quality within the descriptions; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

"(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade."

for a particular purpose³ shall not apply to sales of consumer goods⁴ or services or both. The section further limits the capacity of a seller or a manufacturer of consumer goods and services to exclude or modify a consumer's remedies for breach of those warranties.⁵ Additionally, manufacturers of consumer goods are no longer able to so limit consumer's remedies for breach of *express* warranties⁶ "unless such manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations."⁷

The circumscription of the power of the seller or manufacturer to exclude or modify consumer's remedies for breach will have significant impact on the Code provisions allowing for modification of remedy. Sections 2-718 and 2-719 allow the buyer and seller flexibility in contracting for remedies which are not found in the Code itself. Section 2-718 allows the parties to a contract to fix the amount to be paid as damages in the event of a future breach. Section 2-719 provides that the parties may resort to an agreed-to remedy in addition to or in substitution for those remedies provided in Article 2. Both of these sections provide for a determination that the modification or limitation of remedies is unconscionable and therefore unenforceable in the event of personal injuries. Section 2-316A renders it unnecessary to make this initial determination that an exclusion or modification is

³ UCC §2-315 defines *implied warranty of fitness for a particular purpose* as follows: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

⁴ The definition of *consumer goods*, which applies to Article 2 of the UCC through Section 2-103(3), is given in Section 9-109: "Goods are . . . 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes."

⁵ The remedy provisions of the UCC are found in §§2-701 through 2-725.

⁶ UCC §2-313 defines *express warranty of merchantability* as follows:

"(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

"(2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

⁷ G.L., c. 106, §2-316A.

unconscionable. The modification of a remedy, such as the fixing of liquidated damages, or the exclusion of a remedy, such as recovery for consequential damages, is unenforceable as a result of Section 2-316A.

However, the new section does not proscribe the *addition* of remedies not found in the Code. What often appears in boilerplate contracts to be a limitation of remedies constitutes no more than the providing of remedies in addition to those otherwise provided by law. For example, the law does not provide a remedy calling for replacement of defective parts or repair of goods. It is arguable that such a contracted-for remedy is valid if it is considered an addition to the Code remedies. This analysis does not do violence to the new section because the addition of a separate remedy does not "exclude or modify" the existing remedies. So long as it is established that the contracted-for remedies are supplementary to the Code remedies, there is no difficulty.

It is important to distinguish between (a) the implied warranties of merchantability and of fitness for a particular purpose and (b) express warranties, which generally arise from oral or written affirmations of fact, descriptions, or samples.⁸ Attempted disclaimers of express warranties are governed by Section 2-316(1) and are not affected by the amendment. As to implied warranties, the amendment is prospective in its treatment of attempted disclaimers *and* exclusions or modifications of remedies. Both practices are rendered unenforceable per se in consumer sales transactions.

There are two limitations to recovery for breach of the warranty of merchantability or the warranty of fitness for a particular purpose. First, neither warranty can extend for more than four years beyond the delivery date under Section 2-725. Second, there is a requirement under Sections 2-607 and 2-608 that the buyer give notice of a breach to the merchant within a reasonable time after the buyer discovers, or should have discovered, the breach. Failure to discover the defects and to give notice bars recovery in an action for damages. Except for these limitations, the consumer may rely upon implied warranties of merchantability and implied warranties of fitness for a particular purpose, notwithstanding any disclaimer or modification made by the merchant under Section 2-316.

The new amendment will not affect the majority of merchants who recognize warranties of merchantability and of fitness for a particular purpose and honor them without question. However, those merchants who deal in unmerchantable "consumer goods and services"⁹ will feel the brunt of the amendment because it is they who traditionally disclaim any and all implied warranties by complying with the provisions of Section 2-316. The mechanics of the disclaimer provisions

⁸ UCC §2-313.

⁹ G.L., c. 106, §316A.

of Section 2-316 are important to an understanding of the impact the amendment will have upon these less reputable merchants. Warranties of merchantability and of fitness for a particular purpose may be excluded or modified by the seller under Section 2-316. To be effective, the disclaimer must not be "unconscionable" under Section 2-302. Additionally:

. . . the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."¹⁰

Any or all implied warranties may also be excluded under the following conditions:

(a) unless the circumstances indicate otherwise . . . by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) . . . by course of dealing or course of performance or usage of trade.¹¹

Section 2-316(4) allows the merchant to limit remedies for breach of warranty in accordance with the provisions of Sections 2-718 and 2-719. The first paragraph of Section 2-316A precludes the use of Section 2-316 to disclaim or modify any implied warranty with respect to the sale of *consumer goods or services*. The second paragraph invalidates any limitation of remedies made by the manufacturer "unless such manufacturer maintains facilities within the Commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations."¹²

Article 2 of the Uniform Commercial Code has not been construed to embrace the sale of consumer services.¹³ Therefore, the use of the

¹⁰ UCC §2-316(2).

¹¹ Id. §2-316. The definitions of *course of dealing*, *usage of trade* and *course of performance* may be found in §§1-205(1), 1-205(2) and 2-208, respectively.

¹² G.L., c. 106, §2-316A.

¹³ See *Epstein v. Giannattasio*, 25 Conn. Sup. 109, 197 A.2d 342 (1963), finding that the predominant feature of a beauty treatment was a service rather than a sale of goods and that under §§2-102, 2-105 and 2-106 a warranty action could not lie; and *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954), in which the

term *services* in the amendment raises a most perplexing problem of statutory construction. One may argue that the amendment, so worded, simply broadens the scope of Article 2 to include the sale of consumer services. Such an argument, a radical departure from the accepted view of Article 2, is not without merit.

The Code makes specific and repeated reference to the term *goods*. However, a very different impression is conveyed by several provisions. At the very outset, the tone of Article 2 is set in rather liberal, if not flexible, terms. The scope section begins: "Unless the context otherwise requires, this Article applies to transactions in goods . . ." ¹⁴ The Code gives no guidance for determining when the "context otherwise requires." ¹⁵ However, for purposes of the warranty sections, the use of the term *services* in the amendment is suggestive of such a "context." Moreover, until the enactment of Section 2-316A, the Code had been silent with respect to services. This silence represented neutrality. Comment 2 of Section 2-313 states:

. . . the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances. . . .

This comment serves notice that the Code's silence on this subject does not prohibit the development of warranty protection through case law. It can be fairly said, therefore, that since the Code takes no position on whether implied warranties of merchantability or of fitness for a particular purpose arise in a contract for services, the courts are free to develop common law principles in this area. However, the comment should not be read to suggest that the Code cannot supplant specific common law principles. Section 1-103 provides: "Unless *displaced* by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." [Emphasis added.] If the amendment is construed as one which considerably broadens the scope of Article 2, such a broadening would supersede any inconsistent common law principles. Likewise, if the amendment does not take on such a construction, it is not inconceivable that common law principles could be developed to provide this type of warranty protection for consumers.

Finally, an interpretation of the amendment which expands the scope of the warranty provisions to encompass services would comport

New York Court of Appeals denied recovery based on warranty of merchantability of blood, finding that the predominant aspect of the patient-hospital contract was for the service of restoring the patient's health.

¹⁴ UCC §2-102.

¹⁵ See generally Mellinkoff, *The Language of the Uniform Commercial Code*, 77 *Yale L.J.* 185 (1967).

well with language of the Code. The definition of *merchant*¹⁶ is flexible enough to include the seller of a service as one who holds himself out as having knowledge or skill particular to the "practice" involved in the transaction. Section 2-314 provides that the implied warranty of merchantability applies only to one who is a merchant with respect to goods of that kind. Since the definition of *merchant* includes one who "practices,"¹⁷ insertion of the service concept into Section 2-314 would not do violence to the definitional construction of the Code. This interpretation of the term *services* would also be consistent with the latter portion of the scope section which adds "nor does this Article impair or repeal any statute regulating sales to consumers . . ."¹⁸ The amendment may be considered a new statutory regulation of sales to consumers which originates within the provisions of the Code itself.

Under this view of the amendment, the purchaser of a consumer service would be released from the burden of having to prove negligence in the performance of the service in order to recover in an action for damages. There would arise, as a matter of law, a warranty that the service is merchantable or is fit for a particular purpose. For example, an instructor at an Arthur Murray Dance Studio would impliedly warrant that he could teach dancing. If he knew a customer wanted to learn the samba, he would warrant that he could teach that dance as well.

This analysis of the amendment, however, turns to a great extent on legislative intent. It is possible to interpret the amendment, as demonstrated above, to incorporate the sale of services into the Code. However, it is questionable that the legislature would intend to so drastically alter the scope of Article 2 without expressing a more specific mandate to that end. On the other hand, it is likewise doubtful that the legislature would include a term so foreign to Article 2 without intending to create a significant impact.

A clue to the intention of the legislature may be found in case law development. One basic issue at common law has been whether a technical sale of goods is required in order to invoke the protection of the Code's warranty provisions.¹⁹ Much of this litigation has centered around the transfer of goods incident to a service.²⁰ The trend

¹⁶ UCC §2-104(1) defines *merchant*: "(1) 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

¹⁷ *Ibid.*

¹⁸ *Id.* §2-102.

¹⁹ See generally Farnsworth, *Implied Warranties of Quality in Non-sales Cases*, 57 *Colum. L. Rev.* 653 (1957):

²⁰ See generally *Cintrone v. Hertz Truck Leasing*, 45 N.J. 434, 212 A.2d 769 (1965);

of these cases may best be observed in the seminal case of *Newmark v. Gimble's Inc.*,²¹ involving the patron of a beauty parlor who was injured when a waving solution caused her hair to fall out. The Supreme Court of New Jersey stated:

The transaction, in our judgment, is a hybrid partaking of incidents of a sale and a service. It is really partly the rendering of service, and partly the supplying of goods for a consideration. Accordingly, we agree with the Appellate Division that an implied warranty of fitness of the products used in giving the permanent wave exists with no less force than it would have in the case of a simple sale.²²

The reasoning of the *Newmark* decision could be incorporated into the warranty provisions of the Code through the amendment. Such an incorporation would render it unnecessary for Massachusetts courts to undertake the rather tedious analysis found in the *Newmark* decision in order to find an implied warranty of goods transferred incident to a service. In short, it would codify the view that the legal niceties of a sale of goods are not essential to the warranty protection offered by the Code.

Another problem raised by the amendment concerns the use of the term *manufacturer*. The code remains neutral on the issue of vertical privity, that is, it does not reach back along the chain of distribution assigning liability to the various links.²³ The Code does, however, define the boundaries of horizontal privity, the extent to which parties other than the original purchaser may invoke the Code's protection.²⁴ Until passage of the amendment, the scope of the privity defense was determined by the Code's horizontal privity section²⁵ and the applicable case law of the state. A reading of the pertinent cases reveals that Massachusetts continues to honor the vertical privity doctrine.²⁶ Thus, a manufacturer who does not sell his product directly to the public is not bound by any implied warranties of merchantability or of fitness for a particular purpose except to his immediate buyer. He is free, of course, to extend express warranties as an inducement for the consumer to buy his product.

Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967).

²¹ 54 N.J. 585, 258 A.2d 697 (1969).

²² *Id.* at 593, 258 A.2d at 701.

²³ See UCC §2-318, Comment 3.

²⁴ *Id.* §2-318.

²⁵ *Ibid.*

²⁶ See generally *Pearl v. William Filene's Sons Co.*, 317 Mass. 529, 58 N.E.2d 825, (1945); *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946); *Vessel Judith Lee Rose, Inc. v. Paulsen-Webber Cordage Corp.*, 376 F.2d 415 (1st Cir. 1967); *Cooper v. R. J. Reynolds Tobacco Co.*, 158 F. Supp. 22, *aff'd*, 256 F.2d 464 (1st Cir. 1958), *cert. denied*, 358 U.S. 875 (1958); *Kenney v. Sears Roebuck & Co.*, 355 Mass. 604, 246 N.E.2d 649 (1969). Most recently see *Necktas v. General Motors Corp.*, 1970 Mass. Adv. Sh. 843, 259 N.E.2d 234.

However, the Massachusetts Commercial Code is no longer neutral with respect to vertical privity, unless it is assumed that the term *manufacturer* was written into the amendment inadvertently. The reference to manufacturers plainly implies that the legislature intended that the consumer goods manufacturer warrant merchantability and fitness for a particular purpose as a matter of law. In order to limit the ability of manufacturers to disclaim implied warranties or limit remedies for breach, the legislature necessarily must have presupposed an implied warranty obligation on the part of manufacturers. Thus, since the amendment treats the manufacturer in the same manner as the seller, the legislature appears to have abolished the vertical privity defense with respect to the sale of consumer goods.

§9.3. Motor vehicles: Inspection sticker test: Voidability of contracts of sale. Acts of 1970, c. 635, §1, amends Chapter 90 of the General Laws by inserting Section 7N, entitled "Certain Motor Vehicle Sales Voidable Where Vehicle Fails to Pass Inspection Test; Procedure." This section allows the purchaser of an automobile intended for immediate personal or family use to "void" the contract of sale, notwithstanding any disclaimer of warranty, if the vehicle fails to pass the state inspection sticker test within seven days from the date of sale.

In order to void a contract for failure to pass an inspection test, the purchaser must comply with certain rather technical requirements: first, purchaser must notify the seller of his intention to void the contract and deliver the vehicle to the seller within three days following receipt of a written statement that the vehicle failed the inspection test; second, and at the same time, he must present to the seller an estimate of the repair costs. Additionally, the provisions of this section apply only if (1) the reason for failure to issue the sticker was not caused by the purchaser's negligent operation of the motor vehicle and (2) the repair costs necessary in order to pass the inspection test exceed 10 percent of the purchase price of the vehicle.

Section 7N does not provide the consumer with meaningful protection. The state inspection system is so perfunctory that it is hardly an adequate measure of the merchantability of an automobile. Moreover, inspection commonly fails to discover some of the major problems, such as engine and transmission difficulties, which often beset used automobiles. It is precisely this sort of defect with which the consumer may be most concerned; that the windshield wipers and the brake lights function adequately is of relatively little consequence to him. Today it is fair to say that most used automobiles are purchased for more than \$500. One who makes such a purchase, in order to trigger the remedy provisions of this statute, would have to demonstrate that the automobile required over \$50 in repair costs to pass the inspection test. Furthermore, the used car dealers will probably have the automobile inspected or at least provide it with a current sticker before the customer sees it, much less purchases and drives it.

Although the customer would be entitled to have the vehicle re-inspected at an inspection station selected by him, there would be little or no incentive for him to do so.

The intent of the statute doubtless was to give minimum protection to buyers of used automobiles even when the seller had disclaimed all warranties. But Section 7N, in view of the new Section 2-316A added to the Massachusetts Commercial Code,¹ will have little use or effect. It may well suggest an additional criterion for testing merchantability under Section 2-314 of the Code.

The new section also raises the question of what effect it might have on a buyer's existing rights and remedies under the Uniform Commercial Code. For example, under UCC Section 2-513, the buyer has a right to inspect goods before he accepts them. It might well be asked whether this new provision indicates how—and how soon—that inspection can or must be made. While it provides *one* means and *one* time period, Section 7N clearly does not supersede UCC §2-514. Furthermore, even if inspected and accepted, goods are subject to the buyer's revocation of acceptance if the defects were difficult to discover and substantially impaired the value of the goods.² A court might well use this new provision by analogy to determine "substantial" impairment of value (over 10 percent of the price). Finally, neither the seven-day inspection period nor the manner of notifying the seller can logically supplant the Code's more liberal "reasonable time" and notice provisions.³

In short, the section adds little if anything to existing law. It has all the earmarks of a law written by automobile dealers, one giving buyers the appearance of a new right while effectively denying any realistic chance of their exercising it.

§9.4. Unit pricing. In the 1970 SURVEY year, the Massachusetts legislature enacted the Unit Pricing Law,¹ giving the Massachusetts

§9.3. ¹ G.L., c. 106, §2-316A, added by Acts of 1970, c. 880, is discussed in §9.2 *supra*.

² UCC §2-608.

³ *Id.* §2-602.

§9.4. ¹ Acts of 1970, c. 885, §1, amending G.L., c. 6, by inserting §115A:

"The council may adopt regulations establishing lists of packaged commodities necessary for personal, family or household use to be offered for sale at retail and which may not be sold in retail stores unless there is posted in a conspicuous place at or near the point of sale the price per pound, pint or other unit or measurement of contents and the total sales price. Such regulations shall exempt any packaged commodity whose net weight is one whole unit or two whole units and which has the retail price plainly marked thereon. No packaged commodity shall be included in these regulations which must be individually marked with the cost per unit of weight, liquid, or dry measure, as provided in section one hundred and eighty-one of chapter ninety-four. Said council may adopt such further regulations as are necessary to carry out the intent of this section, provided that a public hearing shall be held relative to any packaged commodity proposed to be regulated. The director of standards shall enforce any regulation

Consumers' Council authority to require disclosure of price per unit of certain packaged commodities "necessary for personal, family or household use." The statute itself does not directly affect the marketplace unless and until the Consumers' Council exercises its authority. The statute provides a very limited basis upon which the consumer may expect meaningful uniformity in pricing. The permissive wording of the section leaves significant discretionary latitude with the council in some areas while actually limiting the council's authority in others.

This statute first provides that the council "may adopt regulations establishing lists of packaged commodities, necessary for personal, family or household use which may not be sold in retail stores unless there is posted in a conspicuous place at or near the point of sale the price per pound, pint or other unit or measurement of contents and the total sales price." This provision gives no indication of the scope of the lists to be established or of the criteria the council may use to include or exclude certain commodities. Conceivably, the statute could have required unit pricing for all packaged commodities, or at least could have set guidelines for the general inclusion of all packaged commodities particularly suited to cost-per-unit comparative shopping. Both the Model Unit Pricing Law prepared by the National Consumer Law Center and a bill offered by Representative Robert Creedon of Brockton² in the 1970 legislative session provide the statutory requirement of unit pricing and authorize the Consumers' Council to administer the statutory imperative. The Creedon bill, for instance, lists certain consumer commodities for which unit pricing would be required and defines the term *appropriate price per measure*.³ The National Consumer Law Center's Model Unit Pricing Law, in addition to defining the scope of the Consumers' Council's (administrator's) authority to promulgate regulations,⁴ also defines

adopted pursuant to the authorization contained in this section. Whoever violates any provisions of this section shall for the first offense be punished by a fine of not less than ten nor more than fifty dollars, and for a subsequent offense not less than twenty-five nor more than one hundred dollars.

"Said council shall annually report to the general court on or before the last Wednesday in January of each year relative to any action taken by it pursuant to this section in the preceding year.

"The provisions of this section shall not apply to any retail establishment operated by a person as his sole place of business."

² House Bill 3020.

³ *Appropriate price per measure* is defined in the Creedon bill as "the price per pound for non-liquid items where the declaration of quantity is in terms of weight, the price per quart where the declaration of quantity is in terms of liquid measure, and the price per fifty units for non-liquid items where the declaration of quantity is in terms of numerical or linear measure."

⁴ Following public hearings, the administrator may, under Section 6 of the National Consumer Law Center's Model Unit Pricing Law, promulgate rules and regulations which: "(a) modify or change but do not exclude the measure required by this [Act, Chapter, Section] if the administrator finds that the required measure does not adequately inform the consumer and that the new measure is clearly listed on the package or contents in such a manner as to satisfy the re-

the term *consumer commodity*,⁵ thereby clearly outlining a regulatory mandate to the administrator and facilitating the conduct of his task.

The unit pricing statute provides that "such regulations shall exempt any packaged commodity whose net weight is one whole unit or two whole units and which has the retail price plainly marked." This scheme of exemption may tend to create confusion for the shopper by requiring him to ascertain which commodities are priced by unit weight in a conspicuous place and which ones are priced in a similar manner on the package itself. Additionally, this scheme requires the consumer to compute the cost per unit for those items packaged in two whole units.

The statute further provides that "no packaged commodity shall be included in these regulations which must be individually marked with the cost per unit weight, liquid, or dry measure as provided in Section 181 of Chapter 94." General Laws, c. 94, §181 contains the traditional prohibitions against the sale of food in packages unless the net quantity of the contents is plainly and conspicuously marked on the outside of the package, and it requires that meat, poultry or edible fish, except soft-shelled clams and oysters, be sold in packages on which there is plainly and conspicuously marked the price per pound of the contents and the total sales price.

The statute also allows the council to adopt such further regulations as are "necessary to carry out the intent of this section, provided that a public hearing shall be held relative to any packaged commodity proposed to be regulated." Any regulation which the council may promulgate would be controlled by the restrictions imposed by the statute. Thus, the council probably could neither require cost-per-unit labeling on all packages individually nor summarily require cost-per-unit disclosures for all commodities.

Finally, the statute exempts the sole proprietorship store from the provisions of the section.⁶ Although the sole proprietor is least able

quirement of Section 1453, Title 15, U.S. Code; (b) provide for disclosure of the price per measure which is more effective than the means prescribed in Section 4; (c) adds to but does not exclude the commodities subject to the requirements of this [Act, Chapter, Section]."

⁵The National Consumer Law Center's Model Unit Pricing Law defines *consumer commodity* as "any food, drug, device or cosmetic and any other article, product, or commodity of any kind or class (a) which is customarily produced for sale to retail sales agencies or instrumentalities for consumption by individuals, for use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and (b) which usually is consumed or expended in the course of such consumption or use, and (c) as to which a unit of measurement as described in Section 5 is employed on the package or label or in the display or exposure for sale or as the means of making the offer for sale or calculating the price."

⁶Another bill presented by Representative Creedon (House 6022) contained a provision that any sole proprietorship store would receive an exemption from unit

to pay the cost of computation and disclosure of unit pricing requirements, he most often deals with the poorest members of the consuming public and traditionally engages in the practice of inflating prices. It could be convincingly argued, therefore, that the sole proprietor should be a prime target for unit pricing legislation.

The authority to enforce any regulation made pursuant to the Unit Pricing Law is granted to the director of standards. A penalty in the form of a mild fine is provided for first and subsequent violations of the statute,⁷ but consumers are given no remedy for failure of a merchant to comply.

At this writing, the Consumer's Council has held one public hearing and has promulgated regulations which are set out as an Appendix at the end of this chapter. These regulations prescribe the size of the unit for which the price is to be disclosed; require that the disclosure be on a conspicuous orange tag uniformly used by all merchants; and list groups of commodities generically to be covered by the law, differing groups to be "phased in" over three periods of time. Thus, the regulations generally achieve the goals of the Model Unit Pricing Act. The regulations allow the council to grant extensions of time to individual merchants who, for cause shown, cannot meet the requirements. Such extensions cannot exceed 30 days.

§9.5. Contracts: Right of buyer to cancel. Chapter 272 of the Acts of 1970 amends Chapter 93 of the General Laws by adding Section 48. This section extends the right of cancellation in a retail installment sales contract¹ to include cash sales, provided: (1) it is an agreement for the sale or lease of goods, or the rendering of services, primarily for personal, family or household purposes; (2) the agreement is valued in excess of \$25; (3) the agreement is consummated at a place other than the address of the seller or lessor; (4) the buyer, not later than midnight of the third business day following execution of the agreement, notifies the seller or lessor that he is canceling.

Each agreement must be in writing and signed by the seller or lessor. Additionally, each must contain the seller's or lessor's address and all the terms agreed to by the parties, or required by law, including the following statement:

You may cancel this agreement if it has been consummated by a party thereto at a place other than an address of the seller which may be his main office or branch thereof, by a written notice di-

pricing disclosure requirements only if its gross annual income did not exceed \$500,000.

⁷ The statute provides: "Whoever violates any provisions of this section shall for the first offense be punished by a fine of not less than ten nor more than fifty dollars, and for a subsequent offense by a fine of not less than twenty-five nor more than one hundred dollars."

§9.5. 1 G.L., c. 255D, §14.

rected to the seller at his main or branch office by ordinary mail posted, by telegram sent or by delivery, not later than midnight of the third business day following the signing of this agreement.²

The time period during which the buyer may cancel does not commence unless and until a copy of the agreement containing all the terms agreed to, or required by law, has been delivered to the buyer or lessee.

Within ten days after cancellation of an agreement pursuant to this section, the seller or lessor must: (1) refund to the buyer all deposits including any down payment, less any reasonable costs actually incurred in making the goods ready for sale; (2) redeliver any goods traded in on account or in contemplation of the agreement; (3) return any copies of the agreement signed by the buyer with a notation that it has been cancelled.

The seller or lessor is entitled to reclaim any goods received by the buyer under the agreement. The buyer must return any goods whenever possible, or hold them for the seller.

Measurement of the three-day right of cancellation may present several interesting problems. The three-day period during which the buyer may cancel the agreement begins on the first business day *following* execution of the agreement. To illustrate, if an agreement were entered into on a Saturday, the three-day period would begin to run on the following Monday. Assuming that that Monday happens to be a holiday, the period would then not begin until Tuesday. The question arises, what would be the latest time the buyer could effectively cancel the agreement? The section provides that a notice posted, telegraphed, or delivered to the seller at his place of business within three business days is valid. Since the ordinary meaning of the term *posted* is the placing of a letter in a mailbox, a notice so placed at midnight on Thursday would comply with the section. A telegram sent at that time or a letter delivered to the seller's place of business would also constitute a valid cancellation. If the mail is taken from the mailbox on Friday, it is entirely possible that the seller would not receive the notice until the following Monday. From the seller's point of view, the time between the making of an agreement and the receipt of a valid notice of cancellation could be considerably longer than three days.

A further question concerns the effect of a posted letter or a delivered notice which the seller claims never to have received. The problem of proving that the letter was posted or that the notice was delivered by midnight of the third business day would be difficult. Since Western Union retains a record of each message sent and the time of transmission, it may be a good practice to encourage the use of telegrams for the purpose of cancellation.

² Id. c. 93, §48.

The new section affords particular protection to the consumer who is solicited for sale in the home. The three-day right of cancellation allows the consumer to reflect upon the desirability of the purchase. The policy rationale behind the section is that consumers are particularly susceptible to the high-pressure sales tactics often employed by so-called direct sellers. Perhaps the underlying assumption in this section is that the consumer has given only a qualified assent to the contract and may withdraw that assent within three days. One might wonder whether the consumer who contracts in a retail store should not be afforded the same protection. Although he has actively sought out the retail merchant, he is also susceptible to high-pressure sales techniques and is therefore liable to purchase goods which he cannot afford or which he does not need.

The National Consumer Act³ adopts this more innovative approach to the problem. The NCA distinguishes home solicitation transactions from ordinary retail transactions entered into at the merchant's place of business, but affords the consumer protection in both instances. The home solicitation transaction, referred to as an "outside consumer approval transaction," is treated as a "sale on approval."⁴ In order to complete this type of transaction, the consumer is required to affirm it in writing within three business days.⁵ The consumer in an ordinary retail transaction, referred to as an "inside [consumer] approval transaction," is granted a three-day right of cancellation.⁶ In the NCA, it is assumed that consumers purchase goods and services only to satisfy real needs and desires and that they should not be bound to purchases which, within a reasonable time, they find are not desirable or are not needed.

Since many reputable retail stores, as a matter of good customer relations, allow up to a seven-day period in which a customer may return items purchased, an extension of the protection offered by the new section to include transactions entered into at the seller's place of business would not be disruptive of ordinary business practices. In fact, such an extension would serve to require the less reputable merchants to provide a minimal "cooling-off" period. Moreover, it would create more symmetry in the existing law which allows a three-day right of cancellation in all consumer transactions,⁷ except retail

³ The National Consumer Act [hereinafter cited as NCA] is a model act prepared by the National Consumer Law Center, Boston College Law School, Brighton, Mass. 02135.

⁴ NCA §2.501(2), Comment 1.

⁵ *Id.* §2.502. Section 2.502(6) provides that the consumer need not affirm in writing within three business days if the consumer requests the money, property, or services without delay in an emergency.

⁶ *Id.* §2.505. Section 2.505(1) provides that the consumer is not granted this three-day right of cancellation if the consumer requests the money, property, or services without delay in an emergency.

⁷ G.L., c. 255D, §14, which provides for a three-day right of cancellation on retail installment sales agreements.

Chapter 457 of the Acts of 1970 may be viewed as a companion to Chapter 202, discussed in Section 9.6 *supra*. The nature of consumer financing is such that most transactions are arranged in one of two ways. The merchant may extend credit himself and transfer the consumer's obligations to a third party, or he may require the consumer to arrange his own financing from a lender or by other third-party arrangements. The discussion of Chapter 202 involved the first situation; the present discussion of "interlocking sales and loans" concerns the second.

From a merchant's point of view, one of the primary considerations in the financing of a sales contract is the creation of insulation between the obligation and the defenses. Traditionally, the holder in due course doctrine has provided such insulation.² In a typical transaction, the merchant would negotiate³ the note representing the consumer's obligation to a holder.⁴ The holder, in turn, would seek to enforce the obligation against the consumer. The defenses the consumer may have on the contract, for example, breach of warranty of merchantability,⁵ would not be available to him against the holder. The result of this arrangement was mutually satisfactory to the merchant who has received payment and to the holder who is free from the consumer's defenses, but it left the consumer without protection. The legislature has provided the consumer with a solution to this problem in the form of the two sections discussed in Section 9.6 *supra*.⁶

The merchant and the holder, faced with the impossibility of creating insulation from the consumer's defenses by way of the traditional arrangement, may choose to require the consumer to arrange his own financing and pay cash for consumer items. The same result is achieved. The merchant is paid in cash, and the creditor as a non-participant in the sale or lease is free of the consumer's defenses. In

other relative, by blood or marriage, of the individual or his spouse who shares the same home with the individual."

Person related to "with respect to an organization" is defined as "(a) a person directly or indirectly controlling, controlled by or under common control with the organization, (b) an officer or director of the organization or a person performing similar functions with respect to the organization or to a person related to the organization, (c) the spouse of a person related to the organization, and (d) a relative by blood or marriage of a person related to the organization who shares the same home with him."

² For an exhaustive discussion of the holder in due course doctrine see Note, Judicial and Statutory Limitations on the Rights of a "Holder in Due Course," 11 B.C. Ind. & Com. L. Rev. 90 (1969).

³ UCC §3-202 defines *negotiations* as "the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary endorsement; if payable to bearer it is negotiated by delivery."

⁴ Id. §1-201(20) defines *holder* as "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or endorsed to him or to his order or to bearer or in blank."

⁵ Id. §2-314.

⁶ G.L., c. 255, §12C; Acts of 1970, c. 202, adding §25A to G.L., c. 255D.

response to this type of arrangement, the legislature has extended the scope of the consumer's contractual defenses to include the creditor who "participated in" or "was directly connected with" the consumer sale or lease transaction.

This new statute raises a number of questions. One involves the interstate transaction in which the sale or lease occurs in one state and the credit is extended in another. For example, if a Massachusetts resident uses his bank credit card issued in Massachusetts to obtain goods or services in New York, would Massachusetts or New York law govern his rights to raise defenses against the issuer? The question can be reversed: May non-Massachusetts residents similarly avail themselves of the new section as to purchases made within Massachusetts using out-of-state financing?

The answers inevitably must turn upon how these consumer-defense issues arise, and in what forum. Clearly, the new section should apply to the first kind of transaction — credit extended by a Massachusetts creditor to a Massachusetts resident though the proceeds are used out of state. The forum would doubtless be Massachusetts.

The second transaction is more difficult. The statute seems aimed at creditors and not at the transaction itself. An argument can be made that it does not apply to non-Massachusetts credit card issuers or lenders. Further, the forum is likely to be the creditor's and debtor's state rather than Massachusetts. On the other hand, the law can be said to protect consumers doing business in Massachusetts irrespective of the locus of their source of credit. A Massachusetts court could so hold with little conflict of laws difficulty.

The variations on this theme do not stop there. It is possible for a nonresident to possess a credit card from a Massachusetts bank which he uses in another state, or for a Massachusetts resident to possess a credit card from a bank in another state which he uses in Massachusetts. It is plain that the courts must devise new conflict of laws rules to deal both with the relatively new three-party interstate credit transaction and statutes such as the instant one, which is certain to become law in other states.⁷

Another question unanswered by the new statute is how the consumer asserts his "defenses" either apart from, or in connection with, a court proceeding. There is no requirement of notice to either creditor or merchant prior to such assertion. Of course, if the defense is breach of warranty, Section 2-602 of the Uniform Commercial Code requires notice to the seller. Can the consumer in any case simply remain silent toward the creditor and wait to be sued? The term *defenses* indicates that he can. As a practical matter, however, he will want to attempt to mollify the creditor before legal action is taken and will somehow inform the creditor of his dispute with the merchant.

⁷ See, for instance, N.Y. S. INT. 5172, A. INT. 6552. See also the proposed Federal Fair Credit Billing Act §652.

installment sales of automobiles⁸ and those in cash initiated at the seller's place of business.

§9.6. Installment sales agreements: Real and personal defenses. Chapter 202 of the Acts of 1970 amends Chapter 255D of the General Laws by inserting a new section which extends the scope of defenses available to the retail buyer.¹ Under Section 25A, the retail installment buyer may assert against the holder of a retail installment sales agreement all the defenses, real and personal, he may assert against the installment seller.

The provisions found in this new section are intertwined with similar provisions in G.L., c. 255, §12C. Section 12C provides that a note executed with a contract for sale of consumer goods shall be labeled "Consumer Note" and shall not be a negotiable instrument within the meaning of Article 3 of Uniform Commercial Code.² Section 12C further provides that any person who obtains a note without such a label shall be punished by a fine³ and shall not recover any finance, delinquency, collection, repossession or refinancing charges in any action based on the contract. An instrument which is properly labeled and thereby not negotiable is automatically removed from the purview of Article 3.

Section 3-202(1) of the Uniform Commercial Code defines *negotiation* as "the transfer of an instrument in such a form that the transferee becomes a holder. . . ." Comment 1 to Section 3-202 makes it clear that "[n]egotiation is merely a special form of transfer, the importance of which lies entirely in the fact that it makes the transferee a holder. . . ." Thus, since under G.L., c. 255, §12C, a consumer note is not negotiable, a person who takes such a note would not qualify as a holder, much less a holder in due course. Under this analysis, the taker would be subject to the buyer's defenses.

General Laws, c. 255, §12C, has always posed some interesting questions: (1) Can there be a holder in due course of an instrument not properly labeled "consumer note" and taken in violation of the section by a credit seller? (2) While subjecting a person who "obtains" such an instrument to both civil and criminal penalties, does the statute so subject *subsequent* takers who also can be said to "obtain" the instrument? (3) The prohibition or recovery of any finance charge is not limited exclusively to one who "obtains" the instrument and, if it is to have any effect, would it not have to apply to subsequent takers as well as sellers? (4) Does a buyer in a consumer credit transaction have a cause of action against a seller or subsequent taker for a violation of the statute?

Even in view of these questions, the purpose of new Section 25A in

⁸ Id. c. 255B.

^{§9.6.} ¹ In regard to motor vehicles, Acts of 1970, c. 107, amends G.L., c. 255B, §1.

² UCC §§3-101 et seq.

³ The applicable fine is not less than \$100 nor more than \$500.

Chapter 255D is not entirely clear. Section 10 of that chapter already prohibits any waiver-of-defense clauses in a retail installment sale agreement, and Section 26 subjects holders to all of the provisions of that chapter. These provisions, along with Section 12C of Chapter 255, were undoubtedly intended to achieve the same result as the instant section. Therefore the enactment of the new section raises some question about the status of the previously existing law. Are contracts which were entered into prior to the effective date of the new section now subject to doubt in terms of legislative intent? This seems to be a case where the obvious intent of the legislature in enacting Section 12C of Chapter 255 in 1961 and Chapter 255D in 1966 was obscured by bad draftsmanship. The legislature attempted to clarify these provisions with the enactment of Section 25A. However, it is clear from this analysis that appropriate amendment to the existing provisions would have been a preferable means of achieving that end.

§9.7. Interlocking sales and loans: Consumer's defenses. Chapter 457 of the Acts of 1970 amends Chapter 255 of the General Laws by the addition of Section 12F, entitled "Certain Creditors in Consumer Transactions Subject to Debtor's Defenses." Under this section, dealing with what are sometimes called "interlocking sales and loans," if a creditor "knowingly participated in" or "was directly connected with" a consumer sale or lease transaction, he is subject to all the defenses of the buyer arising from the consumer sale or lease for which the proceeds of the loan are used.

To determine whether a creditor knowingly participated in or was directly connected with a consumer sale or lease, the section offers the following unqualified criteria:

. . . (a) he was a person related to the seller or lessor; (b) the seller or lessor prepared documents used in connection with the loan; (c) the creditor supplied forms to the seller or lessor which were used by the consumer in obtaining the loan; (d) the creditor was specifically recommended by the seller or lessor to the borrower and made two or more loans in any calendar year, the proceeds of which are used in transactions with the same seller or lessor, or with a person related to the same seller or lessor; or (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.

The section also defines certain terms as used therein.¹

§9.7. ¹ *Organization* is defined in G.L., c. 255, §12F, as "a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association."

Person related to "with respect to an individual" is defined as "(a) the spouse of the individual, (b) a brother, brother-in-law, sister, or sister-in-law of the individual, (c) an ancestor or lineal descendant of the individual or his spouse, and (d) any

For his own protection, he should notify both parties in writing, setting forth his defense.

The term *subject to defenses* indicates that the consumer may only use his remedies defensively against the creditor, although he may otherwise have an affirmative cause of action against the merchant. This language does not preclude a counterclaim in a suit by the creditor, and the statute sets no limits on the amount recoverable. Since the statute is defensive only, it is arguable that recovery must be limited to the amount of the initial obligation to the creditor. Any further relief must come from the merchant.

In credit card transactions, this procedure is not as onerous as it appears, since the issuer's agreement with the merchant usually allows "recourse," or return of the obligation to the merchant, so that the merchant and consumer might resolve their differences between themselves. In the straight loan transaction, the effect of the statute may be to require that the lender secure the merchant's obligation as a surety so that the same result will obtain. In any event, the most important right of the consumer — not to pay when he has been cheated — has been preserved.

§9.8. Credit cards: Liability of holder. Chapter 665 of the Acts of 1970 amends Chapter 255 of the General Laws by striking out old Section 12E and inserting in its place a new, slightly different section. The new Section 12E, like its 1968 counterpart,¹ defines the liability of a holder of a credit card. The section provides that absolutely no liability attaches to the holder of an unsolicited² credit card and that the maximum liability for the unauthorized use of an accepted credit card is \$100.

The definition of an accepted credit card is, then, the central provision of the act. Truth-in-Lending disclosure under Chapter 140C of the General Laws is a prerequisite to the acceptance of a credit card. Any cardholder who has not received a timely disclosure of the credit terms required by Chapter 140C cannot be said to have accepted the card and apparently may use it without fear of liability.

New Section 12E provides that, once the credit cost disclosure requirements are satisfied, a credit card may be considered "accepted" when one or more of the following events has occurred:

- (i) the cardholder has requested the card in writing;
- (ii) the cardholder has signed a cardholder agreement;
- (iii) the cardholder has had his picture taken for imprinting on the card;
- (iv) the cardholder has signed or has used, or authorized another

§9.8. ¹ Acts of 1968, c. 394, §1, added the original §12E.

² This is not to imply that an unsolicited credit card cannot become accepted. An unsolicited card is defined as one which has been mailed or distributed to a cardholder but which has not been accepted. Under the section, once a card is determined "accepted" it is no longer considered "unsolicited."

to use, the card for purposes of obtaining money, property, labor or services on credit;

(v) the card has been issued in substitution or renewal of an accepted credit card; or

(vi) the card has been issued in connection with a merger, acquisition or the like of card issuers or credit card services in substitution for an accepted credit card.

A cardholder³ may be held liable for the unauthorized use⁴ of a credit card under certain circumstances set out in Section 12E(2). This subsection provides that the card issuer may impose liability on a cardholder only if: (1) the card is an accepted credit card; (2) the liability imposed is not in excess of \$100; (3) the card issuer gives adequate notice to the cardholder of the potential liability; (4) the unauthorized use occurs before the cardholder has notified the card issuer of the loss or theft of the card or of any unauthorized use, and; (5) the card issuer has provided a method whereby the user of the credit card can be identified as the person authorized to use it, including but without limitation a place on the card for the photo or signature of the holder.

It should be reiterated that the new section 12E adds the stipulation that the disclosure required by the Massachusetts Truth-in-Lending Act⁵ be made before a credit card may be considered "accepted." From the consumer's perspective, this change strengthens the 1968 amendment. In a different sense, however, the new section tends to weaken the protection afforded by the 1968 amendment by removing the one-year time limitation on the substitution of a new card. Under the new provision, a person who has become the holder of an "accepted" credit card may have "accepted" substitution cards sent to him at any time, notwithstanding the fact that he may have long since discarded the original. Furthermore, the new section adds two new elements to the definition of an accepted credit card. The first is that the cardholder has signed a cardholder agreement; the second, that he has had his picture taken for imprinting on the card.

The new Section 12E also defines an unsolicited credit card as one which the issuer has mailed or distributed but which has not been accepted. In addition, it redundantly underscores the conditions of liability set out in subsection (2) by stating that "[N]o finance charge shall be imposed for credit extended on an unsolicited credit card."

The 1968 version of Section 12E was designed to discourage the

³ *Cardholder* is defined in §12E as "any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person."

⁴ *Unauthorized use* is defined in §12E as "a use of a credit card by a person other than the cardholder who does not have actual, implied or apparent authority for such use and from which the cardholder receives no benefit."

⁵ G.L., c. 140C.

mailing of unsolicited credit cards by placing liability on the issuer until such time as the card was accepted. However, unsolicited plastic continued to flood the Massachusetts consumer market apparently because the credit industry found that the liability imposed by the 1968 section was not prohibitive. One would expect the 1970 amendment to strengthen its predecessor, but, as discussed above, the new section makes only minor changes.

Some of the weakness inherent in Massachusetts credit card legislation, however, may be rectified by federal legislation. The new federal provisions concerning credit cards amend the Federal Truth in Lending Act⁶ by the addition of several sections. The main point of difference between the Massachusetts and the federal legislation is simply that the federal provisions prohibit the issuance of a credit card except in response to a request or in renewal or substitution of an accepted card.⁷ The Massachusetts law makes no such prohibition. The federal law, however, apparently does not preclude the acceptance of an unsolicited credit card. This conclusion is drawn from the definition of an accepted credit card. This includes, in pertinent part, the instance when a cardholder "has signed or has used, or authorized another to use," the card.⁸ Thus, under both state and federal law, a cardholder could be held liable for the personal or authorized use of an unsolicited credit card. He could also be held liable for the unauthorized use of an "unsolicited" but "accepted" credit card, if the issuer complies with the appropriate provisions set out in each statute.⁹ The federal act, however, limits liability for unauthorized use to \$50.¹⁰ Since it would be inconsistent with federal law to apply the Massachusetts ceiling of \$100, the federal limitation would control.¹¹

The strength of the federal provisions is found in the criminal liability section of the Truth in Lending Act.¹² The sanctions imposed by this section are presumably sufficient to discourage the credit industry from mailing unrequested credit cards. In Massachusetts, six bills providing similar prohibitions against the mailing of unsolicited credit cards and similar liability for violation were initiated in the

⁶ Federal Consumer Credit Protection Act, 15 U.S.C. §§1601 et seq. (1968) [hereinafter cited as FCCPA].

⁷ Pub. L. No. 91-508, §502, adding FCCPA §132. (Pub. L. No. 91-508, §§501-503, amends the FCCPA) [hereinafter citation will be to the relevant FCCPA section].

⁸ FCCPA §103(1).

⁹ G.L., c. 255, §12E(2); FCCPA §133(a).

¹⁰ FCCPA §133(a).

¹¹ Id. §111(a) provides that "[t]his title does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title or regulations thereunder, and then only to the extent of the inconsistency."

¹² Id. §112.

1970 legislative session.¹³ Although the approach in each of these bills would provide more protection than the present statutory scheme in Massachusetts, such proposals contain a fundamental weakness. They require state enforcement agencies to police the consumer market for violations, and hence are effective only to the extent that these agencies are successful in finding and prosecuting violators. Moreover, this type of legislation does not deal directly with the problem. Despite the severity of the penalties or the efficiency of the enforcement, the target of an unsolicited mailing may become liable for charges by simply using the card. For many consumers, especially those unaccustomed to the luxury of credit, this is the danger which accompanies unsolicited credit cards. It is all too easy to use a credit card without reflecting on the consequences. It is this concern which should be reflected in legislation.

A bill sponsored by Representative Scalli for Attorney General Quinn in the 1970 legislative session would have surmounted the problems discussed above.¹⁴ The Quinn proposal, by eliminating liability for debts resulting from the use of an unsolicited credit card, would effectively stem the flow of unrequested cards. As a result, the enforcement agencies would not have to police the consumer market, and consumers would be released from the burden of dealing with unsolicited cards and the financial difficulties so often incurred. In short, the bill proposed by the attorney general would have been a most appropriate response to the problems generated by the unsolicited credit card.

The relationship between the new Section 12E and federal law is sure to cause some confusion. As noted above, the Massachusetts section requires disclosure of credit terms pursuant to Chapter 140(c) of the General Laws before a card may be considered accepted. The new federal law makes no such requirement, but presumably would provide the cardholder with the remedy for disclosure violation found elsewhere in the act.¹⁵ Whether a cardholder who did not receive Truth-in-Lending disclosures could claim he had no liability for charges under the Massachusetts section and also claim money damages under the federal law is a perplexing question. Unlike the issue of liability for the unauthorized use of an accepted credit card, the Massachusetts remedy for failure to disclose credit terms is not inconsistent with the federal remedy. It is therefore entirely possible that a cardholder could utilize both remedies.¹⁶

Massachusetts has received an exemption from the general provisions

¹³ House Bills 50, 90, 375, 1397, 2843 and 3999.

¹⁴ House Bill 2846.

¹⁵ FCCPA §130 provides for damages of "twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000. . . ."

¹⁶ See note 11 *supra*.

of the federal act,¹⁷ but it has not received an exemption from the provisions of the new sections dealing with credit cards. Would a cardholder seeking damages for disclosure violations have to bring his cause of action under the federal act? The new federal credit card provisions are a part of the Truth in Lending Act. It would therefore seem that the remedy for violation of the federal provisions would be entirely federal in nature. Moreover, since the Massachusetts Truth in Lending Act does not deal with credit cards, it would seem unlikely that the cardholder could allege a state cause of action.

§9.9. Unfair or deceptive debt collection. Acts of 1970, c. 883, §1, amends Chapter 93 of the General Laws by adding Section 49. The new Section 49 generally prohibits unfair, deceptive or unreasonable debt collection techniques employed against a debtor who has incurred a debt primarily for personal, family or household purposes. Certain specific practices are declared to be of the kind prohibited. Failure to comply with the provisions of this section constitutes an unfair or deceptive act or practice under Chapter 93A of the General Laws.¹ The authority to enforce the provisions is primarily vested in the attorney general. The commissioner of banks, however, will also exercise significant informal influence over retail creditors who violate this section through his authority under Chapter 255D of the General Laws.

Acts of 1970, c. 883, §2, further amends Chapter 93 of the General Laws by substituting a new Section 28. This new section instructs any person or collection agency doing business for which a bond is required (by Section 24 of Chapter 93) to give a complete account to the person or organization from whom an indebtedness was taken for collection,

¹⁷ Pursuant to FCCPA §123 and Supp. II to Regulation Z §226.12.

§9.9. 1 G.L., c. 93, §49, states that "such collection or attempt to collect shall be deemed unfair, deceptive or unreasonable if:

"(a) The creditor communicates, threatens to communicate or implies the fact of such debt or alleged debt to a person other than the person who might reasonably be expected to be liable therefor, except with the written permission of the alleged debtor. The provisions of this paragraph shall not prohibit a creditor from notifying a debtor of the fact that the creditor may report a debt or alleged debt to a credit bureau or engage an agent or an attorney for the purpose of collecting the debt or alleged debt. For the purposes of this paragraph, the use of language on envelopes indicating that the communication relates to the collection of a debt shall be deemed a communication of such debt or alleged debt.

"(b) The creditor communicates directly with the alleged debtor after notification from an attorney representing such debtor that all further communications relative to the debt should be addressed to him.

"(c) The creditor communicates with the alleged debtor in such a manner as to harass or embarrass the alleged debtor, including, but not limited to communication at an unreasonable hour, with unreasonable frequency, by threats of violence, by use of offensive language, or by threats of any action which the creditor in the usual course of business does not in fact take.

"(d) The creditor communicates with alleged debtors through the use of forms or instruments that simulate the form and appearance of judicial process."

For an extensive analysis of G.L., c. 93A, see 1969 Ann. Surv. Mass. Law c. 8.

and to turn over the proceeds of such collection within 30 days upon written demand. Additionally, new Section 28 requires the person or collection agency to return any claims within 30 days after written request and after payment of any amounts that may be owing to the person or collection agency. Failure to comply with the provisions of new Section 28 or with the provisions of any accompanying regulations also constitutes an unfair or deceptive practice under Chapter 93A. In addition to the penalties found in Chapter 93A, the violators of these provisions may also be fined by the commissioner of banks.² In enforcing this section the commissioner of banks has broad powers to regulate the activities of credit collection agencies.³ The Federal Trade Commission likewise exercises considerable regulative power over these agencies, and also regulates the debt collection practices of unlicensed retail merchants.⁴ In Massachusetts these unlicensed individuals are regulated by the attorney general.⁵ To the extent to which the commissioner of banks regulates debt collection in the Commonwealth, either formally⁶ or informally,⁷ it may be worthwhile to compare his regulations with those of the FTC.

In substance, these regulations are very similar. Each set of regulations requires disclosure. The FTC requires disclosure of purpose on all literature sent to a debtor.⁸ Massachusetts requires the collection agency in communicating with debtors to use the exact name in which the banking commissioner granted the license to operate. Massachusetts also prohibits the use of the collection agency's name on the return address, requiring instead the agency's business address and telephone number. The central theme in both sets of regulations is the prohibition of unfair or deceptive practices.⁹ Massachusetts prohibits communications which are at an unreasonable hour or which are calculated to harass the debtor.¹⁰ Both the Massachusetts and the FTC regulations prohibit conduct which implies that the collection agency is a branch of or in any way connected with an agency of government.¹¹ Additionally, the Massachusetts regulations include a prohibition against representing or implying that an agency is an attorney.¹² The FTC regulations prohibit the use of organizational titles or trade

² G.L., c. 93, §28, provides for a fine of not more than \$500 or imprisonment for not more than three months, or both.

³ *Id.* §§24-28.

⁴ 16 C.F.R. pt. 237, §§237.0-237.6 [hereinafter cited as FTC Regs.].

⁵ G.L., c. 93, §49(d).

⁶ *Id.* §§24-28.

⁷ As a result of the authority created by G.L., c. 255D, §31.

⁸ FTC Regs. §237.2(b).

⁹ See Mass. Banking Reg. No. 18. See also FTC Regs. §237.1, which states: "An industry member shall not use any deceptive representation or deceptive means to collect or attempt to collect debts or to obtain information concerning debtors."

¹⁰ Mass. Banking Reg. No. 16.

¹¹ *Id.* No. 5; FTC Regs. §237.3.

¹² Mass. Banking Reg. No. 5.

status which imply that an organization is a credit bureau or a collection agency when in fact it is not.¹³ The FTC regulations also prohibit misrepresentation of the service which is rendered by a collection agency or a credit bureau.¹⁴

The regulations generally do not compare further, although the Massachusetts regulations contain certain additional provisions.¹⁵ From this brief comparison it is apparent that each agency would provide rather similar protection if the respective regulations were enforced with equal vigor.

The new Section 49 of G.L., c. 93, ostensibly extends the regulation of collection agencies, previously achieved through regulations issued by the commissioner of banks, to creditors doing their own collecting where not subject to the commissioner's regulations. The list of specific practices in this statute is not nearly so long as that in the commissioner's regulations, but the list is not exclusive. Thus, those added practices in the commissioner's regulations fall within the general prohibition of the new section.

This new statute applies to creditors and their "assignees," which may well mean that it encompasses any third party collecting a debt for the creditor, including collection agencies. This is important because collection agencies subject to the commissioner's regulations and enforcement are not subject to consumer remedies, while consumers under the new statute have remedies under Chapter 93A. Further, the general prohibition does not restrict consumers to the list of practices in either the statutes or the commissioner's regulations. A consumer is free to allege, and a court to hold, that other practices are unfair, unreasonable or deceptive. At the same time, each practice listed by regulation or statute must be tested in fact against the general prohibition of unfair, unreasonable or deceptive practices.

A particularly troublesome practice which is prohibited by the commissioner's regulations is communication with a third party concerning the debt. The creditors or their collectors are free to reach a debtor at work or at home by telephone, but may not disclose to his employer or family why they are calling. If, however, by agreement, the debtor permits the collector to contact, for example, his wife or elder son, the communication can hardly be prohibited as unfair, deceptive or unreasonable. A blanket "waiver" clause in a credit agreement, however, would be unenforceable as an unfair and deceptive practice. The allowed written permission must refer to a specific debt and be voluntary on the part of the debtor. Third parties with whom there may be no communication include strangers as well as persons known to the debtor. Thus, even envelopes must not evince a debt.

A single communication at a particular time of day would not be

¹³ FTC Regs. §§237.4-237.5.

¹⁴ *Id.* §237.6.

¹⁵ Mass. Banking Reg. Nos. 6, 7, 10, 11 and 17.

unreasonable, unless the debtor protested that it interfered with his normal activity. A debtor is as much entitled to relaxation after normal working hours as is a collector. Still, if the debtor works at irregular or unusual hours, communication at times when he would be available would not in itself be unfair or unreasonable. In short, creditors must adjust their collection practices to the particular debtor and the particular debt.

Without pursuing further the specific practices addressed by the statute, it is safe to say that many customary collection techniques are now effectively proscribed. Collectors may resort primarily to written or oral requests and to appeals to a sense of moral and legal obligation. If a prohibited practice is not confined to a single debtor, the aggrieved debtor may employ the class action remedy of Chapter 93A to the considerable financial loss of the offending collector.

During the 1970 SURVEY year, another section was added to the provisions regulating credit bureaus.¹⁶ This new section creates liability in the form of damages for gross negligence in furnishing to a credit grantor erroneous credit information or information prohibited under G.L., c. 93, §46. Since Section 46A requires both proof of gross negligence and proof of damages, it is of little practical use to the consumer. However, since violation of this section would result in an unfair or deceptive practice under Chapter 93A, the attorney general may take appropriate action, despite the problems raised by the heavy burden of proof.

APPENDIX

REGULATIONS ADOPTED MARCH 9, 1971, PURSUANT TO THE PROVISIONS OF CHAPTER 885 OF THE ACTS OF 1970

Pursuant to the Chapter of 885, Acts of 1970, and, in accordance with the provisions of General Laws, Chapter 30A, hearings were held by the Consumers' Council on February 25, 1971, due notice having been given to all interested persons, in accordance with the requirements of General Laws, Chapter 30A.

All interested parties wishing to do so, having filed written comments and having been permitted to testify at the hearing and all comments having been considered, the Consumers' Council adopts the following regulations for implementation of the Unit Pricing Act, adopted under Chapter 885, Acts of 1970 and further finds that the packaged commodities to be regulated, in accordance with Chapter 885, Acts of 1970, are as set forth in paragraph 5 of the following regulations.

¹⁶ Acts of 1970, c. 794, amending G.L., c. 93, by adding §46A.

1. *Definitions.*

(a) "Packaged Commodity" means any food, drug, device or cosmetic and any other article, product, or commodity of any kind or class which is customarily necessary or used for personal, family or household use and offered for sale at retail and which is listed in paragraph 5, hereunder;

(b) "Unit Price" means the price per measure.

2. *Exemptions.*

Sellers at retail need not comply with the provisions of these regulations as to the following packaged commodities:

(a) Medicine sold by prescription only;

(b) Beverages subject to or complying with packaging or labeling requirements imposed under the Federal Alcohol Administration Act.

(c) Such packaged commodities which are required to be marked individually with the cost per unit of weight under the provisions of General Laws, Chapter 94, Section 181.

(d) Such packaged commodities which are sold in units of even pounds, pints, quarts, or gallons, and which have a retail price plainly marked thereon; but only the particular packaged commodity sold in such units shall be exempt.

(e) Packaged commodities sold by any retail establishment operated by a person as his sole place of business shall be exempt from these regulations.

3. *Means of Disclosure.*

All retail establishments subject to these regulations shall disclose the price per measure to consumers in the following manner:

(a) Attachment of an orange stamp, tag or label on the item itself, or directly under the item on the shelf on which the item is displayed, and conspicuously visible to the consumer, such orange stamp, tag or label carrying the following data and no other:

(i) The words "Unit Price", as a heading.

(ii) The designation of the price per measure, shall be expressed in terms of dollars or cents, as applicable, carried to three digits. If the price is over \$1.00, it may be expressed to the nearest full cent, provided that said price is rounded off from .005 and over to the next higher cent; and if .004 or less down to the next lower cent, but, that if it is expressed in cents, it be carried to three digits. Example: "25.3 cents per pound; \$1.67 per quart."

(iii) The description of the packaged commodity by item and size of the unit being sold may also be included thereon at the option of the retail establishment.

(iv) In such items as paper products, which are manufactured in numbers of folds showing in addition to such other information as may be required hereunder the applicable "ply" count or thickness customarily designated as "ply", by such packaged commodities.

(b) If the packaged commodity is not conspicuously visible to the consumer, a list of the price per measure conspicuously placed near the point of purchase, or a sign or list of price per measure posted at or near the point of display, or by stamping or affixing the price per measure on the packaged commodity itself, provided that the date, color code and size requirements of paragraph 3(a) and (c) are met.

(c) The size of the print of the legend required under the provisions of paragraph 3(a) and 3(b) and in any other place within the retail establishment, where the price of commodities regulated hereunder is displayed, the price per measure shall be displayed in type no smaller than that used for the price of the item, but, in no event shall such price per measure appear in a size less than 7/16" in height; PROVIDED, that, if any retail establishment is unable to meet the minimum size requirements, set forth herein, such retail establishment may apply to the Consumers' Council for permission to use a size and type no less than pica size for such periods of time as Consumers' Council may deem to be reasonable.

(d) When the display space used for the packaged commodity is inadequate to set forth separate price legends as required hereunder, and where price designations are not customarily used for the commodities, the retailer may set forth such legends as are required hereunder on display cards or other material used for the display of prices for such commodities. The display of unit price shall appear on an orange background, be conspicuously visible, and the size of type used for the legend shall be no less than the size of the type used for the price of such packaged commodity.

4. *Price Per Measure.*

The price per measure required to be disclosed under these regulations shall be:

(a) Price per pound for commodities whose net quantity is customarily expressed in units of pounds or ounces or both.

(b) Price per pint, quart or gallon for commodities, whose net quantity is customarily expressed in units of pints, quarts, gallons or fluid ounces, or a combination thereof; provided, that the same unit of measure is used for the same commodity in all sizes sold in such retail establishment.

(c) Price per 50 feet or per 50 square feet, as appropriate, for commodities and items whose net quantity is customarily expressed in units of feet, inches, square feet or square yards, or whose net quantities are expressed in units of area or length.

(d) Price per 100 units of commodities, whose net quantity is expressed by a numerical count.

5. *Packaged Commodities Regulated.*

(a) The following commodities shall be labeled in accordance with these regulations no later than May 24, 1971. Thereafter, such commodities may not be sold in retail stores subject to these regulations unless the conditions of these regulations shall have been met.

Detergents	Oleomargarine
Household cleansers, waxes, deodorizers	Coffee, instant and ground
Cereals	Cocoa
Instant breakfast foods	Tea
Butter	Jellies, jams and sandwich spreads

(b) The following commodities shall be labeled in accordance with these regulations no later than July 19, 1971. Thereafter, such commodities may not be sold in retail stores subject to these regulations, unless the conditions of these regulations shall have been met.

Fruits, vegetables, and juices — canned, jarred, boxed	Aluminum and plastic wraps
Pet foods	Spaghetti, noodles and pasta products
Baby foods	Ketchups — mustards — sauces
Shortenings	Snack foods, such as potato chips, pretzels, etc.
Flour	Soups — canned and dry mixes
Baking mixes and supplies	
Canned fish and meats	
Sanitary paper products, such as napkins, paper towels, tissues, etc.	

(c) The following commodities shall be labeled in accordance with these regulations no later than Sept. 20, 1971. Thereafter, such commodities may not be sold in retail stores subject to these regulations, unless the conditions of these regulations shall have been met.

Frozen fruits, vegetables, and juices	Cookies and crackers
Bread and pastry products	Salad Dressings
Bottled beverages — carbonated and non-carbonated	Toothpaste
Flavored syrups and powdered drink mixes	Deodorants
	Shampoos
	Shaving Cream

Retail sales of food made from bulk, if the quantity is weighed, measured or counted at the time of such sale by the retailer such as

Cold cuts	Fish products and meat
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6. *Extension of Time for Compliance.*

(a) Any retail establishment which is unable to comply with these regulations within the time set forth herein, may apply to the Consumers' Council for permission to extend such time for compliance for a period not to exceed thirty days. Such retail establishment shall set forth, in as much detail as possible, the reasons for its inability to comply. The Consumers' Council may extend such period from time to time, upon such terms and conditions as it may deem reasonable.

(b) Exemption from compliance with the requirements of any of the provisions of paragraph 3 may be granted for cause by the Consumers' Council, upon the filing of a statement, setting forth the reason for inability to comply with any of the requirements of paragraph 3. Such exemption shall be granted by the Consumers' Council for such period of time as it may deem reasonable.

7. *Responsibility for Compliance.*

In the event of a violation of these regulations, the manager, or person in charge of such retail establishment and the person employing such manager or person in charge, where applicable, shall be deemed to be responsible for compliance by such retail establishment with the requirements of these regulations.