

UNIFORM CONSUMER SALES PRACTICES ACT

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§ 1. [Purposes, Rules of Construction]

This Act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (3) to encourage the development of fair consumer sales practices;

(4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection; and

(5) to make uniform the law, including the administrative rules, with respect to the subject of this Act among those states which enact it.

COMMENT

This section provides general interpretative guidelines. As stated in § 1(4), Federal Trade Commission decisions, rules, and guides are germane to the interpretation of the Act.

§ 2. [Definitions]

As used in this Act:

(1) "consumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a service, or an intangible [except securities] to an individual for purposes that are primarily personal, family, or household, or that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation by a supplier with respect to any of these dispositions;

(2) "Enforcing Authority" means [appropriate official or officials];

(3) "final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired;

(4) "person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity;

(5) "supplier" means a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

COMMENT

[Subsec. (1)]. A consumer transaction typically involves a natural person who obtains or is solicited to obtain an item of goods, a service, or an intangible primarily for personal, family, or household purposes. Also included are certain analogous transactions in which a natural person obtains or is solicited to obtain a business opportunity in which he has not been previously engaged. In view of the extensive state regulation of securities transactions, their inclusion is left optional. On the assumption that land transactions frequently are, and should be, regulated by specialized legislation, they are excluded altogether.

[Subsec. (2)]. In order to obtain effective administration, the National Conference recommends centralizing all powers granted by the Uniform Consumer Sales Practices Act in a single official. In some states a single official, typically the Attorney General, already has been granted substantial power with respect to consumer sales practices. In these states, the Attorney General is the logical choice for designation as Enforcing Authority. Because the Enforcing Authority may frequently find it necessary to engage in litigation, the Attorney General also is a likely choice for Enforcing Authority in states which have not previously subjected consumer sales practices to extensive regulation. Moreover, if an enacting state creates a new agency to administer the Act, that state should carefully review each provision of the Act and provide a statutory framework which will ensure an effective working relationship between the new agency and the Attorney General.

[Subsec. (3)]. This definition pertains to one of the preconditions of class action damage liability in §§ 9(b)(1) and 11(d)(1). The Enforcing Authority is required to maintain a public file of these judgments and to make them available for public dissemination, § 5(a)(3), (5).

[Subsec. (4)]. This definition is derived from the Uniform Statutory Construction Act § 26(4) (1965).

[Subsec. (5)]. In addition to manufacturers, wholesalers, and dealers, debt collection agencies and advertising agencies fall within this definition. Section 14 should be consulted in order to ascertain the conduct by suppliers which is exempt from the Act.

§ 3. [Deceptive Consumer Sales Practices]

(a) A deceptive act or practice by a supplier in connection with a consumer transaction violates this Act whether it occurs before, during, or after the transaction.

(b) Without limiting the scope of subsection (a), the act or practice of a supplier in indicating any of the following is deceptive:

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

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

(3) that the subject of a consumer transaction is new, or unused, if it is not, or that the subject of a consumer transaction has been used to an extent that is materially different from the fact;

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

(5) that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

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

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

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

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

(10) that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations if the indication is false; or

(11) that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping

the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction.

COMMENT

[Subsec. (a)]. This subsection forbids deceptive advertising, deceptive statements made when goods are delivered, and deceptive statements made in connection with debt collection. A deceptive act or practice has the likelihood of inducing a state of mind in a consumer that is not in accord with the facts. It is immaterial whether this capacity to mislead arises from a verbal, written, or graphic misrepresentation or a nondisclosure by a supplier.

[Subsec. (b)]. The acts and practices listed in this subsection are treated as per se deceptive. They merely illustrate the acts and practices which violate § 3(a).

[Subsec. (b)(1)]. This subsection forbids such conduct as misrepresenting the durability or components of a product, or the efficacy of a service.

[Subsec. (b)(2)]. This subsection forbids such conduct as misrepresenting that a superseded style or model is the latest style or model of a product, or that a particular product, service, or intangible is the equivalent of another product, service, or intangible; for example, misrepresenting that a two-ply tire is the equivalent of a four-ply tire.

[Subsec. (b)(3)]. This subsection forbids such conduct as misrepresenting that returned goods which were used by the original purchaser are unused. However, it does not preclude the description of returned goods as either new or unused, if that is in fact the case.

[Subsec. (b)(4)]. This subsection forbids such conduct as spurious "fire" or "lost our lease" sales.

[Subsec. (b)(5)]. This subsection forbids such conduct as misrepresenting that different goods, services, or intangibles are those previously advertised or purchased.

[Subsec. (b)(6)]. This subsection forbids "bait advertising," a practice by which a supplier seeks to attract customers through advertising bargains which he does not intend to sell in more than nominal amounts. In order to induce acquisition of unadvertised items on which there is a greater mark-up, acquisition of the "bait" is discouraged through various artifices, including disparagement and exhaustion of an undisclosed miniscule stock. A supplier who is willing to sell all of the advertised items that he has in stock can avoid violating this subsection by disclosing that he has only "limited quantities" available. However, in the absence of such a willingness and disclosure, the existence of a violation should be determined on the basis of such objective factors as the representations made, and, in view of the expectable public demand, the reasonableness of the quantity of the advertised goods, services, or intangibles available.

[Subsec. (b)(7)]. This subsection forbids such conduct as misrepresenting that a television picture tube must be replaced or that a roof needs repair.

[Subsec. (b)(8)]. This subsection forbids such conduct as misrepresenting the amount of a price

reduction, a previous price, or the actual price that is paid by a consumer. However, general pricing claims or descriptions, such as "good prices," are not proscribed.

[Subsec. (b)(9)]. This subsection forbids such conduct as misrepresenting that a supplier is an authorized dealer, or that a supplier has received a favorable rating from an organization like Underwriters' Laboratories.

[Subsec. (b)(10)]. This subsection forbids misrepresentation of the rights, remedies, or obligations of either a supplier or a consumer. The prohibition includes such conduct as misrepresenting that a consumer is obligated to pay for unsolicited goods or services, that a warranty is unconditional, that a consumer is not entitled to the return of a downpayment, or that a supplier can garnish exempt wages.

[Subsec. (b)(11)]. This subsection forbids referral commission arrangements in which a consumer is to receive future commissions based upon events which occur after the time at which he enters into a related consumer transaction.

§ 4. [Unconscionable Consumer Sales Practices]

(a) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this Act whether it occurs before, during, or after the transaction.

(b) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(c) In determining whether an act or practice is unconscionable, the court shall consider circumstances such as the following of which the supplier knew or had reason to know:

(1) that he took advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors;

(2) that when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transaction by like consumers;

(3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction;

(4) that when the consumer transaction was entered into there was no reasonable probability of payment of the obligation in full by the consumer;

(5) that the transaction he induced the consumer to enter into was excessively one-sided in favor of the supplier; or

(6) that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment.

COMMENT

[Subsecs. (a) and (b)]. These subsections forbid unconscionable advertising techniques, unconscionable contract terms, and unconscionable debt collection practices. As under Uniform Commercial Code § 2-302 (1962 Official Text with Comments), unconscionability is a question of law for the court. Unconscionability typically involves conduct by which a supplier seeks to induce or to require a consumer to assume risks which materially exceed the benefits to him of a related consumer transaction.

[Subsec. (c)]. "Knowledge or reason to know" often will be established by a supplier's course of conduct. Although probative, this scienter is not invariably required in order to establish unconscionability under § 4(a).

[Subsec. (c)(1)]. This subsection includes such conduct as selling an English-language encyclopedia set for personal use to a Spanish-American bachelor laborer who does not read English, or using legal verbiage in a manner which can not be readily comprehended by a low-income consumer who both reads and speaks English.

[Subsec. (c)(2)]. This subsection includes such conduct as a home solicitation sale of a set of cookware to a housewife for \$375 in an area where a set of comparable quality is readily available to such a housewife for \$125 or less.

[Subsec. (c)(3)]. This subsection includes such conduct as the sale of two expensive vacuum cleaners to two poor families whom the salesman knows, or has reason to know, share the same apartment and the same rug.

[Subsec. (c)(4)]. This subsection includes such conduct as the sale of goods, services, or intangibles to a low-income consumer whom the salesman knows, or has reason to know, does not have sufficient income to make the stipulated payments.

[Subsec. (c)(5)]. This subsection includes such conduct as requiring a consumer to sign a one-sided adhesion contract which contains a penalty clause, an acceleration clause, a confession-of-judgment clause, a disclaimer of all warranties, and a clause permitting the supplier, but not the consumer, to cancel the contract at will. As indicated by this illustration, this subsection applies to contract terms which result in an excessively one-sided consumer transaction even though some or all of the contract terms are lawful in and of themselves. The exemption from the Act by subsection 14(a)(1) of acts or practices required or specifically permitted by or under federal or state law should accordingly be reconciled with this subsection by exempting only required or specifically permitted aggregations of contract terms and required or specifically permitted contract terms.

[Subsec. (c)(6)]. This subsection applies to misleading subjective expressions of opinion on which a supplier should reasonably expect a consumer to rely to his detriment. For example, a violation of this subsection would occur if a prospective purchaser asked a supplier what the useful life of a paint job was and the supplier, with reason to know that repainting would be necessary within two years, responded, "in my opinion the paint will wear like iron." Overt factual misstatements expressed in the form of opinion are dealt with by § 3's proscription of deceptive consumer sales practices. For example, a violation of § 3 would occur if a prospective purchaser asked a supplier what the useful life of a two-year paint job was and the supplier responded, "in my opinion repainting will not be necessary for five years."

§ 4A. [Jurisdiction and Service of Process]

[(a) The [_____] court of this State [may exercise] [has] jurisdiction over any supplier as to any act or practice in this State governed by this Act or as to any claim arising from a consumer transaction subject to this Act.]

[(b) In addition to any other method provided by [rule or] statute, personal jurisdiction over a supplier may be acquired in a civil action or proceeding instituted in the [_____] court by the service of process in the following manner. If a supplier engages in any act or practice in this State governed by this Act, or engages in a consumer transaction subject to this Act, he may designate an agent upon whom service of process may be made in this State. The agent must be a resident of or a corporation authorized to do business in this State. The designation must be in writing and filed with the [Secretary of State]. If no designation is made and filed, or if process cannot be served in this State upon the designated agent, whether or not the supplier is a resident of this State or is authorized to do business in this State, process may be served upon the [Secretary of State], but service upon him is not effective unless the plaintiff promptly mails a copy of the process and pleadings by registered or certified mail to the defendant at his last reasonably ascertainable address. An affidavit of compliance with this section must be filed with the clerk of the court on or before the return day of the process, if any, or within any future time the court allows.]

COMMENT

[Subsec. (a)]. This optional subsection grants the courts of an enacting state jurisdiction with respect to violations of the Act. It may be omitted in states where an express statutory grant of judicial jurisdiction is unnecessary.

[Subsec. (b)]. This optional subsection provides a method for obtaining personal jurisdiction over out-of-state suppliers who have violated the Act. It may be omitted in states with comparable "long-arm" statutes.

§ 5. [Duties of the Enforcing Authority]

(a) The Enforcing Authority shall:

(1) enforce this Act throughout the State;

(2) cooperate with state and local officials, officials of other states, and officials of the Federal government in the administration of comparable statutes;

(3) inform consumers and suppliers on a continuing basis of the provisions of this Act and of acts or practices that violate this Act, including mailing information concerning final judgments to persons who request it, for which he may charge a reasonable fee to cover the expense;

(4) receive and act on complaints;

(5) maintain a public file of (i) final judgments rendered under this Act that have been either reported officially or made available for public dissemination under Section 5(a)(3), (ii)

final consent judgments, and (iii), to the extent the Enforcing Authority considers appropriate, assurances of voluntary compliance; and

(6) report [annually on or before January 1] to the [Governor and Legislature] on the operations of his office and on the acts or practices occurring in this State that violate this Act.

(b) The Enforcing Authority's report shall include a statement of the investigatory and enforcement procedures and policies of his office, of the number of investigations and enforcement proceedings instituted and of their disposition, and of the other activities of his office and of other persons to carry out the purposes of this Act.

(c) In carrying out his duties, the Enforcing Authority may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure.

COMMENT

This section emphasizes that the Enforcing Authority's informational and educational duties are as important as his enforcement duties. The identity of persons investigated but not otherwise proceeded against must be kept confidential, § 5(c). However, § 5(c) does not preclude the confidential dissemination of information to other enforcement authorities, § 5(a)(2), or public disclosure of information in the file maintained under § 5(a)(5).

§ 6. [General Powers of the Enforcing Authority]

(a) The Enforcing Authority may conduct research, hold public hearings, make inquiries, and publish studies relating to consumer sales acts or practices.

(b) The Enforcing Authority shall adopt substantive rules that prohibit with specificity acts or practices that violate Section 3 and appropriate procedural rules.

COMMENT

[Subsec. (a)]. This subsection illustrates the consumer education techniques which may be employed by the Enforcing Authority.

[Subsec. (b)]. This subsection requires the Enforcing Authority to adopt specific substantive rules prohibiting deceptive consumer sales acts and practices. This substantive rule-making power must be exercised within the legislative standards provided by § 3. Adoption of appropriate procedural rules also is required.

§ 7. [Rule-making Requirements]

Alternative A

[The [State Administrative Procedure Act] applies to administrative action taken by the Enforcing

Authority under this Act.]

Alternative B

[(a) In addition to complying with other rule-making requirements imposed by this Act, the Enforcing Authority shall:

(1) adopt as a rule a description of the organization of his office, stating the general course and method of operation of his office and methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of the forms and instructions used by the Enforcing Authority or his office; and

(3) make available for public inspection all rules, written statements of policy, and interpretations formulated, adopted, or used by the Enforcing Authority in discharging his functions.

(b) A rule of the Enforcing Authority is invalid, and may not be invoked by the Enforcing Authority for any purpose, until it has been made available for public inspection under subsection (a). This provision does not apply to a person who has knowledge of a rule before engaging in an act or practice that violates this Act.]

COMMENT

Alternative A may be enacted in states that have administrative procedure acts. If a state does not have an administrative procedure act, Alternative B should be selected. The provisions in Alternative B and the accompanying optional §§ 7A-7E are derived from Uniform Consumer Credit Code §§ 6.403-408 (1969 Official Text with Comments).

§ 7A. [Rule-making Procedure]

[(a) Before adopting, amending, or repealing a rule, the Enforcing Authority shall give at least [30] days' notice of his intended action. The notice shall include a statement of the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views. The notice, for which the Enforcing Authority may charge a reasonable fee to cover the expense, shall be mailed to all persons who request it. It shall be published in [insert the appropriate medium of publication].

(b) The Enforcing Authority shall also offer all interested persons reasonable opportunity to submit data or recommendations orally or in writing. In the case of substantive rules, opportunity for oral hearing shall be granted if requested by 25 persons, a governmental subdivision or agency, or an association having at least 25 members. The Enforcing Authority shall consider all written and oral submissions respecting the proposed rule-making proceedings. Upon adoption of a rule, the Enforcing Authority, if requested to do so by an interested person not later than 30 days after adoption, shall issue a concise statement of the principal reasons for its

adoption including the reasons for overruling any considerations urged against its adoption.

(c) A rule is invalid unless it is adopted in substantial compliance with this section. A proceeding to contest a rule on the ground of noncompliance with the procedural requirements of this section must be begun within 2 years after the effective date of the rule.]

§ 7B. [Filing and Taking Effect of Rules]

[(a) The Enforcing Authority shall file in the office of the [Secretary of State] a certified copy of each rule adopted by him. The [Secretary of State] shall keep open to public inspection a permanent register of the rules.

(b) Each rule is effective [20] days after it is filed, unless a later date is specified in the rule.]

§ 7C. [Publication of Rules]

[(a) The [Secretary of State] shall compile, index, and publish all rules adopted by the Enforcing Authority.

(b) Upon request, the [Secretary of State] shall make the compilations required by subsection (a) available free of charge to [agencies and officials of this State] and to other persons at a reasonable fee to cover the expense.]

§ 7D. [Petition for Adoption of Rules]

[An interested person may petition the Enforcing Authority to adopt, amend, or repeal a rule. The Enforcing Authority shall prescribe by rule the form for such a petition and the procedure for its submission, consideration, and disposition. Within 30 days after submission, the Enforcing Authority shall either deny the petition in writing (stating his reasons for the denial) or initiate rule-making proceedings.]

§ 7E. [Declaratory Judgment on Validity or Applicability of Rules]

[The validity or applicability of a rule may be determined in an action for a declaratory judgment in the [appropriate] court, if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the rights or privileges of the plaintiff. The Enforcing Authority shall be made a party to the action. The court may render a declaratory judgment whether or not the plaintiff has previously requested the Enforcing Authority to determine the validity or applicability of the rule.]

§ 7F. [Validity of Rules]

[A rule of the Enforcing Authority may be invalidated only if it:

- (1) violates a constitutional or statutory provision;
- (2) exceeds the statutory authority of the Enforcing Authority; or

(3) is arbitrary, capricious, or otherwise clearly unreasonable in view of the whole record of the review proceeding.]

§ 8. [Investigatory Powers of the Enforcing Authority]

(a) If, by his own inquiries or as a result of complaints, the Enforcing Authority has reason to believe that a person has engaged in, is engaging in, or is about to engage in an act or practice that violates this Act, he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence.

(b) If matter that the Enforcing Authority subpoenas is located outside this State, the person subpoenaed may either make it available to the Enforcing Authority at a convenient location within the State or pay the reasonable and necessary expenses for the Enforcing Authority or his representative to examine the matter at the place where it is located. The Enforcing Authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar requests from officials of other states.

(c) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the Enforcing Authority may apply to the [_____] court for an order compelling compliance.

(d) [After consultation with the Attorney General,] the Enforcing Authority may request that an individual who refuses to comply with a subpoena on the ground that testimony or matter may incriminate him be ordered by the court to provide the testimony or matter. Except in a prosecution for [perjury] [false swearing], an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which he is entitled by law, may not be subjected to a criminal proceeding or to a civil penalty with respect to the transaction concerning which he is required to testify or produce relevant matter. This subsection does not apply to damages recoverable under Section 11(b) or to civil sanctions imposed under Section 9(a)(2).

COMMENT

If he has reason to believe that this Act has been, is, or is about to be violated, this section authorizes the Enforcing Authority to investigate whether legal proceedings should be instituted. If necessary, the Enforcing Authority may request a court order requiring compliance with his investigative directives. The identity of persons investigated but not otherwise proceeded against must be kept confidential under § 5(c). Investigative proceedings may be terminated by acceptance of a written assurance of voluntary compliance with the Act from a supplier, § 9(c). An assurance is not evidence of a prior violation of this Act, but subsequent failure to comply with the terms of a valid assurance is prima facie evidence of a violation of the Act, § 9(c). In the event that a state elects not to designate the Attorney General as Enforcing Authority, the optional reference to the Attorney General in subsection 8(d) should be enacted in order to insure that immunity from prosecution will not be granted without prior consultation with the Attorney General.

§ 9. [Remedies of the Enforcing Authority]

(a) The Enforcing Authority may bring an action:

(1) to obtain a declaratory judgment that an act or practice violates this Act; or

(2) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this Act;

(3) to recover actual damages, or obtain relief under subsection (b)(2), on behalf of consumers who complained to the Enforcing Authority before he instituted enforcement proceedings under this Act.

(b)(1) The Enforcing Authority may bring a class action on behalf of consumers for the actual damages caused by an act or practice specified as violating this Act in a rule adopted by the Enforcing Authority under Section 6(b) before the consumer transactions on which the action is based, or declared to violate Section 3 or 4 by final judgment of [insert the appropriate court or courts of general jurisdiction and appellate courts] of this State that was either reported officially or made available for public dissemination under Section 5(a)(3) by the Enforcing Authority [10] days before the consumer transactions on which the action is based, or, with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment that became final before the consumer transactions on which the action is based.

(2) On motion of the Enforcing Authority and without bond in an action under this subsection, the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, to reimburse consumers found to have been damaged, or to carry out a transaction in accordance with consumers' reasonable expectations, or to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a master or receiver against a supplier.

(3) If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under Section 9(b) is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(4) If an act or practice that violates this Act unjustly enriches a supplier and damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence [shall escheat to the State] [shall be allocated under the Uniform Disposition of Unclaimed Property Act].

(5) No action may be brought by the Enforcing Authority under this subsection more than 2 years after the occurrence of a violation of this Act, or more than one year after the last payment in a consumer transaction involved in a violation of this Act, whichever is later.

(c) The Enforcing Authority may terminate an investigation or an action other than a class action upon acceptance of a supplier's written assurance of voluntary compliance with this Act. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action. An assurance is not evidence of a prior violation of this Act. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this Act.

COMMENT

[Subsec. (a)]. In addition to declaratory and injunctive relief, this subsection empowers the Enforcing Authority to recover actual damages and other corrective relief on behalf of individual consumers who complain to his office prior to the institution of enforcement proceedings. With the exception of § 9(b)(2), proceedings by the Enforcing Authority to obtain relief for these individual consumers are not subject to the provisions of § 9(b).

[Subsec. (b)]. This subsection requires that a supplier have notice of potential class action damage liability through the occurrence of one or more preconditions. As soon as one or more of the preconditions has been satisfied, the Enforcing Authority may bring class actions for damages on behalf of individual consumers with respect to consumer transactions which took place after the occurrence of the precondition, § 9(b)(1). However, a supplier who can establish that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the violation limits his liability to the amount by which he was unjustly enriched, § 9(b)(3). With respect to consumer transactions in which a consumer becomes obligated to pay someone other than the supplier with whom he engaged in the transaction, the statute of limitations against that supplier nonetheless runs until one year following the last scheduled payment arising in the consumer transaction, § 9(b)(5).

[Subsec. (c)]. Except with respect to class actions which are dealt with in §§ 12 and 13 this subsection authorizes the Enforcing Authority to terminate investigative and enforcement proceedings upon acceptance of a written assurance of voluntary compliance with the Act from a supplier. Unless an assurance has been abrogated by the parties or a court, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this Act. Moreover, if the parties have agreed that an assurance shall be filed with a court as a consent judgment, a failure to comply with its terms by a supplier who has agreed to it provides notice of potential class action damage liability, §§ 9(b)(1), 11(d)(1). The Enforcing Authority may include assurances, and must include consent judgments, in the public file maintained under § 5(a)(5).

§ 10. [Coordination with Other Supervision]

(a) If the Enforcing Authority receives a complaint or other information relating to noncompliance with this Act by a supplier who is subject to other supervision in this State, the Enforcing Authority shall inform the official or agency having that supervision. The Enforcing Authority may request information about such suppliers from the official or agency.

(b) The Enforcing Authority and any other official or agency in this State having supervisory authority over a supplier shall consult and assist each other in maintaining compliance with this Act. Within the scope of their authority, they may jointly or separately make investigations, prosecute suits, and take other official action they consider appropriate.

COMMENT

This Section coordinates the Enforcing Authority's powers with other administrative supervision of suppliers. Similar provisions appear in Uniform Consumer Credit Code § 6.105(2) and (3) (1969 Official Text with Comments). Conduct that is required or specifically permitted by other regulatory authorities is exempted from the Act by subsection 14(a)(1).

§ 11. [Private Remedies]

(a) Whether he seeks or is entitled to damages or has an adequate remedy at law, a consumer may bring an action to:

(1) obtain a declaratory judgment that an act or practice violates this Act; or

(2) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this Act.

(b) Except in a class action, a consumer who suffers loss as a result of a violation of this Act may recover actual damages or [\$100], whichever is greater.

(c) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief, except damages, against an act or practice that violates this Act.

(d)(1) A consumer who suffers loss as a result of a violation of this Act may bring a class action for the actual damages caused by an act or practice (i) specified as violating this Act in a rule adopted by the Enforcing Authority under Section 6(b) before the consumer transactions on which the action is based, or (ii) declared to violate Section 3 or 4 by a final judgment of [insert the appropriate court or courts of general jurisdiction and appellate courts] of this State that was either reported officially or made available for public dissemination under Section 5(a)(3) by the Enforcing Authority [10] days before the consumer transaction on which the action is based, or (iii) with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(2) If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(3) If an act or practice that violates this Act unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence [shall escheat to the State] [shall be allocated under the Uniform Disposition of Unclaimed Property Act].

(e) Except for services performed by the Enforcing Authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(1) the consumer complaining of the act or practice that violates this Act has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this Act; and

(2) an action under this section has been terminated by a judgment or required by the court to be settled under Section 13(a).

(f) Except for consent judgments entered before testimony is taken, a final judgment in favor of the Enforcing Authority under Section 9 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(g) When a judgment under this section becomes final, the prevailing party shall mail a copy to the Enforcing Authority for inclusion in the public file maintained under Section 5(a)(5).

(h) An action under this section must be brought within 2 years after occurrence of a violation of this Act, within one year after the last payment in a consumer transaction involved in a violation of this Act, or within one year after the termination of proceedings by the Enforcing Authority with respect to a violation of this Act, whichever is later. However, when a supplier sues a consumer, he may assert as a counterclaim any claim under this Act arising out of the transaction on which suit is brought.

COMMENT

[Subsec. (a)]. This subsection permits a consumer to obtain appropriate declaratory and injunctive relief regardless whether he recovers or has standing to recover damages.

[Subsec. (b)]. In order to make an individual damage remedy meaningful, this subsection allows a consumer who has incurred actual damage to recover minimum damages of [\$100].

[Subsec. (c)]. This subsection authorizes a consumer to bring a class action for declaratory or injunctive relief regardless whether he recovers or has standing to recover damages.

[Subsec. (d)]. This subsection requires that a supplier have notice of potential class action damage liability through the occurrence of one or more preconditions. As soon as one or more of the preconditions has been satisfied, a consumer may bring a class action for damages on behalf of individual consumers with respect to consumer transactions which took place after the occurrence of the precondition, § 11(d)(1). However, a supplier who can show that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the violation limits his liability to the amount by which he was unjustly enriched, §§ 11(d)(2).

[Subsec. (e)]. This subsection authorizes the court to award a reasonable attorney's fee to certain prevailing parties in litigation under § 11. If a consumer has brought or maintained an action which he knew to be groundless, a reasonable attorney's fee can be awarded to a supplier. On the other hand, if a supplier either has been found to have violated the Act or has avoided this finding by invoking the forced settlement provisions of § 13, a reasonable attorney's fee can be awarded to a consumer.

[Subsec. (f)]. This subsection is comparable to 15 U.S.C. § 16(a) (1970), which makes final judgments in government antitrust proceedings admissible in subsequent actions by private parties. The subsection is not intended to forestall the application of principles of collateral estoppel which preclude a supplier from relitigating the facts established in an action by the Enforcing Authority.

[Subsec. (g)]. This subsection requires private litigants under the Act to assist the Enforcing Authority in providing notice of potential class action damage liability.

[Subsec. (h)]. With respect to consumer transactions in which a consumer becomes obligated to pay someone other than the supplier with whom he engaged in the transaction, the statute of limitations against that supplier nonetheless runs until one year following the last scheduled payment arising in the consumer transaction.

§ 12. [Class Actions]

(a) An action may be maintained as a class action under this Act only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class; and

(5) either:

(A) the prosecution of separate actions by or against individual members of the class would create a risk of:

(i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(B) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(C) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) The matters pertinent to the findings under subsection (a)(5)(C) include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(4) the difficulties likely to be encountered in the management of a class action.

(c) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be amended before the decision on the merits.

(d) In a class action maintained under subsection (a)(5)(C) the court may direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(1) the court will exclude him from the class, if he so requests by a specified date;

(2) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(3) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(e) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

(f) In the conduct of a class action the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members or to the Enforcing Authority of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or

(5) dealing with similar procedural matters.

(g) A class action shall not be dismissed or compromised without approval of the court. Notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(h) The judgment in an action maintained as a class action under subsection (a)(5)(A) or (B), whether or not favorable to the class, shall describe those whom the court finds to be members of the class. The judgment in a class action maintained under subsection (a)(5)(C), whether or not favorable to the class, shall specify or describe those to whom the notice provided in subsection (d) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

COMMENT

In order to facilitate its administration, this section is modeled closely on Federal Rule of Civil Procedure 23. The principal substantive deviation from the federal approach appears in § 12(d). Unlike its federal counterpart, § 12(d) allows a court discretion with respect to providing class members notice of an opportunity to exclude themselves from class actions based on the existence of common questions of law or fact. On the other hand, like the federal rule, § 12 permits actions against a class of defendants as well as actions on behalf of a plaintiff-class.

§ 13. [Special Provisions Relating to Class Actions]

(a)(1) A defendant in a class action may file a written offer of settlement. If it is not accepted within a reasonable time by a plaintiff class representative, the defendant may file an affidavit reciting the rejection. The court may determine that the offer has enough merit to present to the members of the class. If it so determines, it shall order a hearing to determine whether the offer should be approved. It shall give the best notice of the hearing that is practicable under the circumstances, including notice to each member who can be identified through reasonable effort. The notice shall specify the terms of the offer and a reasonable period within which members of the class who request it are entitled to be excluded from the class. The statute of limitations for those who are excluded pursuant to this subsection is tolled for the period the class action has been pending, plus an additional year.

(2) If a member who has previously lost an opportunity to be excluded from the class is excluded at his request in response to notice of the offer of settlement during the period specified under paragraph (1), he may not thereafter participate in a class action respecting the same consumer transaction, unless the court later disapproves the offer of settlement or approves a settlement materially different from that proposed in the original offer of settlement. After the expiration of the period specified under paragraph (1), a member of the class is not entitled to be excluded from it.

(3) If the court later approves the offer of settlement, including changes, if any, required by the court in the interest of a just settlement of the action, it shall enter a judgment, which is binding on all persons who are then members of the class. If the court disapproves the offer or approves a settlement materially different from that proposed in the original offer, notice shall be given to a person who was excluded from the action at his request in response to notice of the offer under paragraph (1) that he is entitled to rejoin the class, and, in the case of approval, participate in the settlement.

(b) On the commencement of a class action under Section 11, the class representative shall mail by certified mail with return receipt requested or personally serve a copy of the complaint on the Enforcing Authority. Within 30 days after the receipt of a copy of the complaint, but not thereafter, the Enforcing Authority may intervene in the class action.

COMMENT

This section permits a court in its discretion to require settlement of actions that have been brought on behalf of a plaintiff-class. In order to do so, the court must notify individual class members of an opportunity to exclude themselves from the settlement proceedings. As long as they have not had a prior opportunity to exclude themselves from a class action under § 12, persons who exclude themselves from a class action under § 13(a) thereafter can maintain either class or individual actions with respect to the same consumer transaction. However, with the two exceptions noted in § 13(a)(2) and (3), persons who have had a prior opportunity to exclude themselves under § 12 and later exclude themselves under § 13(a) thereafter can maintain only individual actions with respect to the same consumer transaction. If the court determines that a supplier has avoided a finding that he violated this Act by resort to § 13, the court may award a reasonable attorney's fee to the representative of the consumer class, § 11(e).

[Subsec. (b)]. This subsection allows the Enforcing Authority a limited time within which to intervene in private class actions. The period within which intervention must take place does not begin to run until the Enforcing Authority has received a copy of the complaint in a private class action.

§ 14. [Application]

(a) This Act does not apply to:

(1) an act or practice required or specifically permitted by or under Federal law, or by or under State law;

(2) a publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this Act;

(3) a claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction; or

(4) the credit terms of a transaction otherwise subject to this Act.

(b) A person alleged to have violated this Act has the burden of showing the applicability of this Section.

COMMENT

[Subsec. (a)(1)]. This subsection harmonizes the Act with other federal and state regulation. Section 10 also requires the Enforcing Authority to cooperate with other officials in an enacting state who have authority over suppliers.

[Subsec. (a)(2)]. This subsection exempts disseminators of information unless they commit a violation of this Act on behalf of others with actual knowledge that they are violating the Act or unless they commit a violation on their own behalf.

[Subsec. (a)(3)]. This subsection has primary application to product liability claims. To the extent that joinder is appropriate, it does not bar the joinder of a product liability claim with a related claim for violation of this Act, § 15.

[Subsec. (a)(4)]. This subsection exempts only the credit terms of a consumer transaction. For example, advertising and contractual provisions with respect to the finance charge in a consumer transaction would be exempt, but advertising and contractual provisions with respect to the nature or quality of the subject of a consumer transaction would not be exempt.

[Subsec. (b)]. This subsection allocates to a supplier the burden of establishing that his conduct is exempt from the Act.

§ 15. [Effect on Other Remedies]

The remedies of this Act are in addition to remedies otherwise available for the same conduct under state or local law, except that a class action relating to a transaction governed by this Act may be brought only as prescribed by this Act.

COMMENT

With the exception of class action provisions, this section makes clear that the Act does not preempt state and local remedies that are not explicitly repealed by § 18.

§ 16. [Short Title]

This Act may be cited as the Uniform Consumer Sales Practices Act.

§ 17. [Severability]

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 18. [Specific Repealer and Amendments]

(a) The following acts and parts of acts are repealed:

(1)

(2)

(3)

(b) The following acts and parts of acts are amended:

(1)

(2)

(3)

§ 19. [Time of Taking Effect]

This Act shall take effect on [].